

Irish Times Ltd. v. Ireland

[1998] 1 I.R. 359, [1998] 2 I.L.R.M. 161 (2 April 1998)

[1998] 1 I.R. 359, [1997] 2 I.L.R.M. 541, [\[1997\] IEHC 30](#) (18 February 1997) reversed

THE SUPREME COURT

Hamilton C.J.

O'Flaherty J.

Denham J.

Barrington J.

Keane J.

Judicial Review No. 1997/43JR

S.C. Appeal Nos. 68 & 77, 92 & 197, 93 & 195, 91 & 196 of 1997

**The Irish Times Limited,
Examiner Publications (Cork) Limited,
Independent Newspapers Ireland Limited,
News Group Newspapers Limited,
and
Radio Telefís Éireann**

Applicants

AND

Ireland,

The Attorney General,

and

His Honour Judge Anthony G. Murphy,

Circuit Court Judge of the Cork Circuit, County Cork

Respondents

The Director of Public Prosecutions

and

Howard Charles Millar,

James Noel,

Roman Smolen,

and

Theresa Bernadette da Silva Roy

Notice Parties

Judgments delivered on 2nd April 1998

Hamilton C.J.

1. By orders of the High Court (Geoghegan J.) made on the 7th February, 1997, the Irish Times Limited, the Independent Newspapers (Ireland) and the News Group Newspapers Limited and the Examiner Publications (Cork) Limited (hereinafter referred to as the applicants) were granted leave to apply for an order of *certiorari* of an order made by His Honour Judge Anthony G. Murphy, the third respondent herein, on the 6th February, 1997, in proceedings entitled *The Director of Public Prosecutions v. Howard Charles Millar*, *The Director of Public Prosecutions v. James Noel*, *The Director of Public Prosecutions v. Roman Smolen*, and *The Director of Public Prosecutions v. Theresa Bernadette da Silva Roy* whereby the said applicants were enjoined from publishing and, directed not to publish, in their newspaper reports of the trial of the said criminal proceedings. The grounds upon which such leave was sought and granted were set forth in the statement of grounds filed on behalf of the said applicants.

2. The said orders made by the third respondent provided that there should be no contemporaneous media reports of the said proceedings save of:-

1. the fact that the trial is proceeding in open court;
2. the names and addresses of the accused parties;
3. the nature of the crimes alleged in the indictment; and
4. where the trial is taking place;

and that the reports should not refer to the fact that the accused were in custody or the fact that the captain of the vessel had pleaded guilty to the charge.

3. An order in similar terms to those granted on the 7th February, 1997, was granted in favour of Radio Telefís Éireann by the High Court (Kelly J.) on the 10th February, 1997, as this applicant was also affected by the said order made by the respondent.

4. The aforesaid orders directed that the notice parties in the title hereof be served with notice of the proceedings and statements of opposition were filed on behalf of the first two notice parties.

5. The circumstances which led to the making of the aforesaid applications, are set forth in detail in the judgment about to be delivered by O'Flaherty J., which I have read and there is no need for me in the course of this judgment to set forth such facts.

6. As the issues raised in the statements of grounds and statements of opposition were, in fact, common to each applicant, the applications were heard contemporaneously by the learned trial judge (Morris J.) and he delivered a composite judgment reported at [1998] 1 I.R. 359. As he stated, in the course of the said judgment, the issues which arose in the hearing before him concerned at p.366:-

"firstly the powers, if any, which a trial judge has to either prohibit or limit the reporting of a criminal trial which is proceeding before him and secondly, if he does have such powers, the manner in which they should be exercised."

7. Article 34.1 of the Constitution provides that:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

8. As stated by Walsh J. in the course of his judgment in *In re R. Ltd.* [1989] I.R. 126 at p.135:-

"It is already well established in our constitutional jurisprudence that a phrase such as 'save in such special and limited cases as may be prescribed by law' which appears in Article 34, s. 1 of the Constitution is to be construed as a law enacted, or re-enacted, or applied by a law enacted by the Oireachtas subsequent to the coming into force of the Constitution."

9. It was submitted to the High Court on behalf of the applicants herein that the order made by the learned Circuit Court Judge contravened the provisions of this Article of the Constitution.

10. It was submitted in the High Court and in this Court that the order prohibiting contemporaneous media reports of the proceedings before him other than the report of the facts set forth in the said order had the effect of rendering the conduct of the

trial, the subject of the order, other than in public and thereby contravened the provisions of Article 34.1 of the Constitution.

11. This submission was accepted by the learned High Court Judge who stated that at p.367:-

"I do not accept that a trial being held subject to the limitations on publication imposed by the learned trial judge in this case is being held 'in public'."

12. He then referred to a passage from the speech of Diplock L.J. in *Att. Gen. v. Leveller Magazine* [1979] A.C. 440, where he stated at p.449:-

"As a general rule the English system of administering justice does require that it be done in public: *Scott v. Scott* [1913] A.C. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to the wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

and agreed with this statement of law as being appropriate to this jurisdiction.

13. This right of contemporaneous publication by the media to a wider public of fair and accurate reports of proceedings that have taken place in court is impliedly recognised by the Oireachtas in s. 18 (i) of the Defamation Act, 1961, which provides that:-

"A fair and accurate report published in any newspaper or broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station within the State or in Northern Ireland of proceedings publicly heard before any court established by law and exercising judicial authority within the State or in Northern Ireland shall, if published or broadcast contemporaneously with such proceedings, be privileged."

14. In the course of his judgment in *Cullen v. Toibín* [1984] I.L.R.M. 577, O'Higgins C.J. stated at p.582:-

"... the freedom of the press and of communication which is guaranteed by the Constitution ... cannot be lightly curtailed."

15. Having held that the restriction placed by the Circuit Court Judge upon contemporaneous publication of proceedings by the media of court proceedings constituted an infringement of Article 34 of the Constitution, the learned High Court Judge then posed the following question at pp.367 and 368:-

"If, therefore, restriction upon contemporaneous publication of proceedings by the media of court proceedings constitutes an infringement of Article 34 in that the proceedings are not being held 'in public', are there any circumstances in which such a restriction can be imposed?"

16. In considering this question he stated that:-

"It is, in my view, clear beyond doubt that in reaching his decision in the present case the learned trial judge had in the forefront of his mind the accused's right to a fair trial in due course of law as was his right under Article 38.1 of the Constitution ..."

17. Article 38.1 of the Constitution provides that:-

"No person shall be tried on any criminal charge save in due course of law."

18. The learned High Court Judge was correct in his view that the learned Circuit Judge had in the forefront of his mind, at the time of making his order, the accused's right to a fair trial in due course of law.

19. The learned Circuit Judge had stated on the 6th February, 1997, in the course of delivering judgment on an application by the applicants herein to lift the order made by him prohibiting media reporting of the trial of *Director of Public Prosecutions v. Millar, Noel, Smolen, da Silva and Richards*:-

"Well, obviously in general the interests of the media must be secondary to the interests of justice and of the accused people. The accused people in the trial are not Irish citizens, one is from very far away indeed. They are all in custody and there is no question of their being other than in custody until those proceedings are terminated. If they are found to be guilty of the crimes

with which they are charged they will have been in custody, in jail, for a considerable time and that is an oppression, albeit a necessary oppression, whatever way one looks at it. It is an oppression for which they have no remedy against those who incarcerated them. Their interest must be served first, the interests of justice, of which that interest forms part, must be served next and the public interest served thereafter."

20. The learned Circuit Court Judge then went on to say that:-

"Now the ban on publication of this case was not to hold the trial *in camera*. The doors of the court are open, seats are available, the trial is held in public. The question is whether the media can inform the public of the day to day *minutia* of the trial. I considered the risk to the accused people and the risk to the trial having regard to what happened and having regard to what was happening. I could see it was going to happen again, that this trial will be aborted and they will be back in custody for a considerable period.

Why did I take this view? I had reliable information that it started on a sinister footing on Tuesday last. It was reported on radio that day a jury was to be sworn to try this case. That of course was inaccurate. No jury panel had been summoned for that day. It was also reported that some of the jury panel having heard this dropped what they were doing and ran for this courthouse. This was not a very accurate report.

Today we have another report in the Evening Echo presented to me at 2.30, it now being 5 o'clock and this application having started at 4.20, saying that the Echo was in court today fighting an order banning the newspaper from reporting the case. The Irish Times also made a report on the matter today.

The public must be informed that the trial is proceeding but I believe that there is in existence a judicial discretion, if the judge is satisfied that interference is possible, that he may interfere with the immediate interests of the media. This is not a ban on reporting. This is not a ban on the public. This is a delay which cannot conceivably adversely affect the public interest and for the reasons stated I think it was quite justified."

21. The learned High Court Judge was of the view that the provisions of Article 34.1 had to be considered in the light of the Constitution as a whole and in particular with

regard to the provisions of Article 38.1 and Article 40.6.1 of the Constitution and held that the learned Circuit Court Judge had balanced the right of the accused persons to a fair trial against the media's and the citizens' "right to freedom of expression".

22. He stated that at p.370:-

"The learned trial judge in balancing these two rights clearly found that the accused's right to a fair trial was paramount and ranked higher in the hierarchy of rights than the right of the media to contemporaneous reporting. In this conclusion, he was undoubtedly correct (see the judgment of Denham J. in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465)."

23. In the course of her judgment in that case Denham J. had stated at p.474:-

"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.

A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However on the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute.

If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted."

24. These statements apply with equal force to the media's right to publish and the public's right to know and be informed.

25. It is important, however, to emphasise that Denham J., in this passage from her judgment, refers to a "real risk" of an accused person not receiving a fair trial.

26. In this regard, Finlay C.J. in the course of his judgment in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, stated at p.507:-

"With regard to the general principles of law I would only add to the principles which I have already outlined, the obvious fact to be implied from the decision of this Court in *D. v. The Director of Public Prosecutions*, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and

inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

27. The learned High Court Judge having cited this passage from the judgment of Finlay C.J. stated at p.374:-

"It follows, therefore, in my view that before a judge presiding over a trial imposes a ban on reporting, he must be satisfied of two things -

(a) that there is a 'real risk of an unfair trial' if contemporaneous reporting is permitted, and

(b) that the damage which such improper reporting would cause could not be remedied by the trial judge either by appropriate direction to the jury or otherwise."

28. Applying these tests, he concluded that the learned Circuit Court Judge was justified in concluding that a real risk existed and held that he was empowered to make the order that he did, that in doing so he applied the correct criteria and the law, that there was material upon which he was justified in reaching the conclusions that he did, that nothing in his approach to the case removed from him his jurisdiction and that the order he made was valid.

Appeal

29. The applicants have appealed against the judgment and order of the learned High Court Judge and the respondents have appealed against such portion thereof as found that the trial before the learned Circuit Court Judge was not a trial being held in public within the meaning of Article 34.1 of the Constitution by reason of the order made prohibiting the contemporaneous reporting of the details thereof.

30. Two fundamental issues arise for consideration in this appeal:-

1. Whether the trial held before the learned Circuit Court Judge was a trial being held in public within the meaning of Article 34.1 of the Constitution by reason of the order made prohibiting the contemporaneous reporting of the details thereof?

2. Whether, in the particular circumstances of this case, it was open to the learned Circuit Court Judge to prohibit the contemporaneous reporting of the trial by the applicants herein on the grounds that there was a real risk of an unfair trial if such reporting were permitted?

31. These issues are of fundamental importance as they relate to a fundamental principle of the administration of justice in a democratic state, namely, the administration of justice in public.

32. Maintenance of, and respect for, the rule of law is an essential ingredient in the working of a democratic state.

33. While the organs of government are subject to the rule of law and the Constitution, it rests primarily on the judicial arm of government to uphold the Constitution and the law and to administer justice in public on behalf of all the inhabitants of the State.

34. In so doing, the judicial arm of government must fulfil and be seen to fulfil, its obligation in this regard.

35. This obligation is best fulfilled by the administration of justice in public. Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done but be seen to be done. Only in this way, can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained.

36. This obligation to administer justice in public pre-dated the enactment of the Constitution and was well-recognised at common law.

37. As stated by Walsh J. in the course of his judgment in *In re R. Ltd.* [1989] I.R. 126, at pp.134 and 135:-

"Prior to the enactment of the Constitution the question of whether or not particular matters should be held in public was a matter for the discretion of the judges subject of course always to particular statutory provisions which dealt with the subject. However it was always quite clear that the judges had no discretion to prevent the public from attending hearings unless they were satisfied that either total privacy for the whole or part of any case was absolutely necessary to enable justice to be done. The primary object of the

courts is to see that justice is done and it was only when the presence of the public or public knowledge of the proceedings would defeat that object that the judges had any discretion to hear cases other than in public. It had to be shown that a public hearing was likely to lead to a denial of justice before the discretion could be exercised to hear a case or part of a case other than in public."

38. This common law principle was in effect copper-fastened by the provisions of Article 34.1 of the Constitution which however limited to some extent the discretion previously enjoyed by judges.

39. Article 34.1 provides that:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

40. The obligation contained therein providing for the administration of justice in public is not discharged by conducting a trial to which the public, including the media, are admitted but in respect of which there is in force an order prohibiting the media from contemporaneous reporting of the proceedings.

41. The effect of such an order in this case was to deprive the wider public, who did not have access to the court in which the proceedings were being conducted, of knowledge of the proceedings. Knowledge of the proceedings was limited to those inhabitants of the State who were able to be present in the courtroom in which the trial was being conducted.

42. As justice is required to be administered in public on behalf of all the inhabitants of the State, such inhabitants are entitled to be informed of the proceedings in the court and to be given a fair and accurate account of such proceedings and the media are entitled to give such an account to the wider public.

43. The public nature of the administration of justice and the right of the wider public to be informed by the media of what is taking place are matters of the greatest importance.

44. Such a right is not however an absolute one.

45. In the first instance it can be limited, as provided in Article 34.1 itself, in such special and limited cases as may be prescribed by law.

46. O'Flaherty J., in the judgment which he is about to deliver, instances a number of such cases which have been prescribed by law and there is no need for me, in the course of this judgment, to repeat them.

47. It was submitted on behalf of the applicants that in the absence of "an express statutory provision" as that phrase was used by Walsh J. in *In re R. Ltd.* [1989] I.R. 126, no general discretion lies in the court to order a trial otherwise than in public and that as there was no statutory enactment relevant to the instant case, there was no discretion or jurisdiction vested in the learned Circuit Court Judge to make an order that it be tried otherwise than in public.

48. The effect of such submission, if valid, would be to remove from a trial judge the jurisdiction and discretion which he enjoyed at common law to prohibit reports of proceedings when he considered such reporting would frustrate or render impractical the administration of justice and to vest in the Oireachtas solely the jurisdiction of deciding what aspects of the administration of justice would be conducted in private.

49. A literal interpretation of Article 34.1 of the Constitution, if construed alone, would appear to support the submission made on behalf of the applicants but Article 34.1 must be construed in the light of the other provisions of the Constitution and in particular Article 38.1 which provides that:-

"No person shall be tried on any criminal charge save in due course of law."

50. In her judgment in *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465, Denham J. stated at p.473 that:-

"The applicant's constitutional rights must be protected. Under the Constitution, Article 38, s.1:-

'No person shall be tried on any criminal charge save in due course of law.'

The unenumerated rights of Article 40, s.3 incorporate a right to fairness of procedures. Fair procedures incorporate the requirement of trial by jury unprejudiced by pre-trial publicity. The applicant is entitled to a jury capable of concluding a fair determination of facts on the facts as presented at the trial.

The applicant's right to a fair trial is one of the most fundamental constitutional rights accorded to persons. On a hierarchy of constitutional rights it is a superior right."

51. While the public nature of the administration of justice and the constitutional right of the wider public to be informed of what is taking place in courts established by the Constitution are matters of public importance these rights must in certain circumstances be subordinated to the interests of justice and the rights of an accused person which are guaranteed by the Constitution.

52. I am satisfied that the exercise of the rights conferred by Article 34.1 can be limited, not only by Acts of the Oireachtas, but also by the courts where it is necessary in order to protect an accused person's constitutional right to a fair trial.

53. The right of an accused person to receive a fair trial is entrenched in our legal system and confirmed by the provisions of the Constitution and is a right superior to any rights arising from the provisions of Article 34.1 of the Constitution.

54. As I stated in the course of my judgment in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, at p.493:-

"Having regard to the fundamental role of juries in our criminal justice system, it is fundamental that for an accused to have a fair trial, not only that the trial should be conducted in accordance with fair procedures, but the jury should reach its verdict in a criminal case by reference only to the evidence lawfully admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions gathered from the media or some other outside sources because fair procedures incorporate the requirement of trial by a jury unprejudiced by pre-trial publicity and capable of concluding a fair determination of facts on the evidence as presented at the trial."

55. While in that case I was dealing with the question of pre-trial publicity, my remarks apply equally to publicity during a trial.

56. *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 and *Z. v. Director of Public Prosecutions* referred to in the course of this judgment dealt with applications to prohibit the holding of trials because of alleged prejudice arising from pre-trial publicity but many of the statements contained in the judgments of these cases are relevant to the issues under consideration in this appeal.

57. It is the function and role of a trial judge in the conduct of criminal proceedings to ensure that the trial of an accused person is conducted in accordance with fair procedures and to ensure, so far as practicable, that the jury should reach its verdict by reference only to evidence lawfully admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions gathered from the media or any other outside sources.

58. He is further under an obligation to hold the trial in public and not to interfere or in any way restrict the right of the media to publish a fair and accurate report of the proceedings publicly heard before the court unless such publication is prohibited by law or would interfere with or prejudice an accused person's right to a fair trial.

59. An accused person's right to a fair trial includes the right to have the jury reach its verdict by reference only to evidence lawfully admitted at the trial.

60. It is hard to envisage any circumstances (other than where a "trial within a trial" is held for the purpose of determining whether particular evidence is admissible or where persons are jointly indicted but tried separately) in which fair and accurate reporting in or by the media of such evidence could in any way interfere with or in any way prejudice this right or compromise the proper administration of justice. Neither of the said exceptional circumstances arise on the facts of this case.

61. The learned Circuit Court Judge was undoubtedly concerned and apprehensive, for the reasons stated by him, that the contemporaneous reporting of the trial might lead to a situation which would oblige him to abort the trial and to order the continued detention of the accused pending the re-trial and was anxious to ensure that such a situation would not arise.

62. The learned Circuit Court Judge, however, was not entitled on the evidence before him to assume that the reporting of the proceedings in the course of the trial would be other than fair and accurate or that such reporting would in any way prejudice the administration of justice or the accused person's right to a fair trial and lead to an abortion of the trial.

63. Neither was he entitled to assume at that stage that even if the reporting proved to be inaccurate or unfair and that if such inaccuracy or unfairness came to the attention of the jury, the situation thereby created could not be avoided by appropriate rulings and directions to the jury.

64. The learned High Court Judge (Morris J.) had properly concluded that at p.374:-

"... before a judge presiding over a trial imposes a ban on reporting he must be satisfied of two things:-

(a) that there is a real risk of an unfair trial, if contemporaneous reporting is permitted, and

(b) that the damage which such improper reporting would cause could not be remedied by the trial judge either by appropriate directions to the jury or otherwise."

65. I would agree that this is the correct test but am satisfied that there was no evidence before the learned Circuit Court Judge which would justify him in holding that there was a real risk of an unfair trial if contemporaneous reporting of the trial was permitted. He was not entitled to assume that such reporting would be other than fair and accurate.

66. Should it transpire that the subsequent reporting of the proceedings was not fair and accurate and that such unfairness and inaccuracy was such as to interfere with the integrity of the trial process then the trial judge has adequate powers under the contempt of court procedure to deal with the matter so far as the media was concerned and by giving appropriate directions to the jury.

67. Consequently, I am satisfied that the learned Circuit Court Judge had, in the circumstances of this case, no jurisdiction to make the order sought to be quashed and that he erred in law in so doing.

68. I would allow the appeal.

69. Before concluding, I would, however, like to state that there have been in the recent past many trials which have been aborted because the trial judge considered that the integrity of the trial process had been interfered with by reason of the manner in which the trial was being reported in the media and that there was a real risk of an unfair trial.

70. The risk to a fair trial would arise if such reporting came to the attention of the jury and facts and opinions contained therein were likely to influence the jury in the consideration of their verdict.

71. A trial judge is entitled to discharge a jury in such circumstances only if he is satisfied that the situation thereby created, *viz.* the risk of an unfair trial, cannot be avoided by appropriate rulings and directions.

72. Save in exceptional circumstances, a trial judge should have confidence in the ability of the jury to understand and comply with such directions, to disregard any inadmissible evidence and to give a true verdict in accordance with the evidence. It is only when this is not possible that the extreme step shall be taken of discharging the jury.

O'Flaherty J.

73. On the 4th February, 1997, five accused appeared at the Cork Circuit Criminal Court before the third respondent charged on two counts of importing and possessing, with intent to supply, the illegal drug cocaine. A quantity of cocaine to the value of over £40 million was found on board a converted trawler, the *Sea Mist*, by customs and garda officers in Cork Harbour on the 29th September, 1996. The captain of the vessel, Gordon Richards, pleaded guilty to the count of possession with intent to supply and was put back for sentence until the trial of the other four accused (named as notice parties in the title hereof) was finished.

74. Their trial commenced on the 6th February, 1997, and the hearing continued for 15 days thereafter and concluded on the 27th February, 1997. Three of the accused were acquitted by direction of the trial judge. Roman Smolen was acquitted by the jury.

75. On Tuesday the 4th February, 1997, the third respondent had made an order forbidding the media from reporting the evidence that would be given in the course of the trial. Representatives of various newspapers as well as Radio Telefís Éireann (the applicants here) applied to the third respondent on the 6th February, 1997, seeking clarification of and, indeed, the lifting of the blanket ban that had been imposed by him. But the third respondent ruled that the ban on the publication of the evidence must remain until after the conclusion of the trial. The media were only to report:-

- (a) the fact that the trial was proceeding;
- (b) the names and addresses of the accused parties;

- (c) the nature of the crimes alleged in the indictments;
- (d) the place where the trial was proceeding;
- (e) the fact that the captain of the vessel (Mr. Gordon Richards) had pleaded guilty to a charge of possession and had been put back for sentence.

76. He further provided that no press report should mention the fact that the accused were being held in custody.

77. However, the learned trial judge went on to say that the case was not being held *in camera*. He said:-

"Now the ban on publication of this case was not to hold the trial *in camera*. The doors of the court are open, seats are available. The trial is held in public. The question is whether the media can inform the public of the day to day *minutiae* of the trial."

78. It seems that the judge took the extreme course he did because of some mis-reporting that took place on a radio station in relation to another drugs case sometime previously and which led to the discharge of the jury. Further, he was influenced by some false alarm that had been given in relation to this case to the effect that a jury was being sworn on the Tuesday (the 4th February) when such was not the case.

79. We have not been furnished with any details as to what led the learned judge to discharge the jury on the previous occasion but what is known is that applications are being made too frequently on very tentative grounds to have juries discharged both in criminal and civil cases where some inaccuracy or, it may be, a certain bias in a publication is perceived.

80. Trial judges have tended on occasion to adopt an undue tenderness towards juries in this regard. If there is an inaccuracy as regards pending or current proceedings, or a slant is put on any case that is thought not to be fair to one party or another, then in most cases this can be put right by the trial judge giving an appropriate direction to the jury either in advance of, or in the course of, the case, as required.

81. In *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476, the case dealt with the impact of very adverse publicity in relation to an accused in advance of a trial, the Chief Justice, then President of the High Court, having reviewed the relevant

authorities made the following observation in regard to juries in criminal cases which is apposite to the problem thrown up by this appeal, at p.496:-

"It is the duty and obligation of juries to act with complete impartiality, complete detachment and without letting matters of sympathy, prejudice, sentiment or emotion take any part and it is the obligation and duty of the trial judge to so instruct them. To have regard to factors other than the evidence, properly admitted and given at the trial, would be to disregard their oath and the clear directions given to them by the trial judge. After eighteen years practice as a member of the Bar of Ireland and over nineteen years service as a judge, I share in the confidence that our judicial system has in juries to act with responsibility in accordance with the terms of their oath, to follow the directions given by the trial judge and a true verdict give in accordance with the evidence."

82. It is no doubt because of this trend which has developed and gathered pace in recent times whereby juries are discharged too precipitately, when the justice of the case could be better met by the trial judge giving appropriate directions, which lead the trial judge in this case to guard with, as I come to hold, excessive zeal the integrity of the forthcoming trial. He was conscious that the accused had been in custody for up to five months; if there was an abortive trial they would have to stay in custody for an extra length of time. All of the accused were non-nationals. In the result, as already related, the four accused who stood trial were acquitted.

The applicants challenged the trial judge's order. They asked that it be quashed on *certiorari*. The High Court (Morris J.) by its judgment and order of the 18th February, 1997, refused to quash the order.

83. The applicants appealed to this Court. The appeal could not be reached having regard to the state of the Court's list and, in any event, the trial was in the course of hearing, two thirds of the way through as it happened. So nothing in this appeal can affect what has transpired. But we can give some guidance for the future which may be of help to trial judges, journalists, as well as the public in general because the issues raised are of outstanding constitutional importance, *viz.* the right of accused persons to fair trials and the freedom of the press to report court proceedings allied to which is the public's right to know what goes on in the courts of law, as well as the

rights of the parties, on occasion certainly, to require that proceedings in which they are involved are eligible for publication.

84. While Morris J. did not agree with the trial judge's assessment that proceedings with such a ban as this constituted a trial in public, nonetheless, he concluded that the trial judge was entitled to come to the conclusion that a total ban on contemporaneous reporting was necessary to protect the accused from risk. He went on to say at [1998] 1 I.R. 359 at p.373:-

"I make no judgment on whether I would have come to the same conclusion. I am not required to do so. I do find that on the evidence before him the trial judge was justified in reaching the conclusion which he did."

85. I interpose to point out that the only "evidence before him" was the matter of the mis-reporting in regard to the previous trial; the false alarm about the summoning of the jury panel and some suggestion that the *Evening Echo* (owned by the Examiner Group) had reported, in an early edition of the 6th February, 1997, which had appeared about 2.30 p.m., that it was in court fighting an order banning the newspaper from reporting the case when, in fact, the judge did not take up the hearing of this matter until after 4.00 p.m. on that date. However, it is right to say that counsel had indicated to the judge in the forenoon that they would be moving the application later in the day so that while it might not have been strictly accurate to say that one is "fighting" any order in court until the hearing has started, nonetheless, the report was not in substance misleading.

86. Morris J. concluded that before a judge presiding over a trial imposes a ban on reporting he must be satisfied of two things:-

(a) that there is a "real risk of an unfair trial" if contemporaneous reporting is permitted, and

(b) that the damage which [any] improper reporting would cause could not be remedied by the trial judge either by appropriate directions to the jury or otherwise.

87. While I would uphold that as the correct test, which test of its nature means it should only operate in very limited circumstances, I do not consider that the learned trial judge ever came to apply such a test in the circumstances of this trial.

88. Article 34.1 of the Constitution provides:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

89. The ambit and effect of this provision have been analysed in the context of purely civil proceedings by Walsh J. *In re R. Ltd.* [1989] I.R. 126, where he said at p.134:-

"The issue before this Court touches a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. Article 34 of the Constitution provides that justice shall be administered in courts established by law and shall be administered in public save in such special and limited cases as may be prescribed by law. The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all the inhabitants of the State.

Prior to the enactment of the Constitution the question of whether or not particular matters should be heard in public was a matter for the discretion of the judges subject of course always to particular statutory provisions which dealt with the subject. However it was always quite clear that the judges had no discretion to prevent the public from attending hearings unless they were satisfied that either total privacy for the whole or part of any case was absolutely necessary to enable justice to be done. The primary object of the courts is to see that justice is done and it was only when the presence of the public or public knowledge of the proceedings would defeat that object that the judges had any discretion to hear cases other than in public. It had to be shown that a public hearing was likely to lead to a denial of justice before the

discretion could be exercised to hear a case or part of a case other than in public."

90. Later in his judgment, he said at p.135:-

"It is already well established in our constitutional jurisprudence that a phrase such as 'save in such special and limited cases as may be prescribed by law' which appears in Article 34, s. 1 of the Constitution is to be construed as a law enacted, or re-enacted, or applied by a law enacted by the Oireachtas subsequent to the coming into force of the Constitution."

91. In *Beamish & Crawford Ltd. v. Crowley* [1969] I.R. 142, the case was an appeal on a point of procedure: what was the appropriate venue for the holding of a trial where the possibility of adverse publicity for the plaintiff's goods was put forward as one of the factors that should be considered in deciding the venue, Ó Dálaigh C.J. (speaking for the Court) concluded, at p.146:-

"One need not waste sympathy on the manufacturer whose goods are not of merchantable quality; but the manufacturer whose goods are shown to be of merchantable quality does deserve sympathy. But publicity, deserved or otherwise, is inseparable from the administration of justice in public; this is a principle which, as the Constitution declares, may not be departed from except in such special and limited cases as may be prescribed by law: Article 34, section 1. I cannot accept that the fact that the trial will, for one of the parties, attract more undesirable publicity in one venue than in another is a matter proper to be taken into account in determining the venue; ..."

92. In the context of a criminal trial, however, Article 38.1, which provides: "No person shall be tried on any criminal charge save in due course of law" must have paramountcy over the requirement that a trial is held in public. See, for example, *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465, per Denham J. "...on the hierarchy of constitutional rights there is no doubt but that the applicant's right to fair procedures is superior to the community's right to prosecute"; at p.474, and, *a fortiori*, to have the trial held in public.

93. I agree with the learned High Court Judge that in general if the press are prohibited from reporting contemporaneously the course of proceedings, and the evidence given, the trial loses the character of being a trial held in public. As noted in

the account of counsels' submissions in the old case of *R. v. Clement* (1821) 4 B & ALD 218, at p.225:-

"The public good is to be considered; and it is for the public benefit that a faithful account should be published of a transaction of which they might otherwise receive only a garbled account from the mouths of individuals. Such a publication has the effect of increasing, as it were, the size of a Court of Justice. It brings to the knowledge of others, not personally present, the facts as they really exist."

94. Only an Act of the Oireachtas (with a qualification which I note in a moment) can provide for *in camera* hearings, whether the exclusion of the public be absolute, limited or in the discretion of the judge. Examples are as follows: s. 2 of the Criminal Law (Incest Proceedings) Act, 1995 (exclusion of the public from proceedings for an offence under the Punishment of Incest Act, 1908, other than the verdict or decision and any sentence); s. 6 of the Criminal Law (Rape) Act, 1981, as amended by s. 11 of the Criminal Law (Rape) (Amendment) Act, 1990 (exclusion of the public from the trial of certain sexual offences other than the verdict or decision and any sentence) and s. 20 (3) of the Criminal Justice Act, 1951 (discretion to exclude the public from criminal proceedings for offences which are, in the opinion of the court, of an indecent or obscene nature).

95. While these enactments authorise the exclusion of members of the public, the entitlement of *bona fide* representatives of the press to attend such trials is preserved. Where a trial involves offences of a sexual nature, while the press may *attend*, legislation requires that when they *report*, they must do so in a way that safeguards the anonymity of the parties. A recent example is to be found in s. 3 of the Criminal Law (Incest Proceedings) Act, 1995, which prohibits the publication of any matter which is likely to lead members of the public to identify either the accused or the alleged victim once an individual has been charged under the Punishment of Incest Act, 1908. Two further examples are to be found in s. 7 of the Criminal Law (Rape) Act, 1981, as amended by s. 17 (2) of the Criminal Law (Rape) (Amendment) Act, 1990, which precludes members of the press from publishing material likely to identify a complainant in the trial of a sexual assault offence, and s. 8 of the same Act which interdicts the publication of material likely to identify a person being tried for a rape offence.

96. Aside from such statutory provisions, however, it has been recognised for a long time that it may be necessary to postpone publication of evidence on occasion. Again, it is necessary to emphasise that postponement rather than total prohibition will most always be but poor consolation for the press; the whole point of the speed with which news is reported nowadays is that it will often only be relevant for the public if it is reported *immediately*. However, in the case of a "trial within a trial", this will most commonly occur when there is a question whether a confession should be admitted in evidence, as well as other areas where it will be necessary to bring down the curtain, temporarily, in relation to the admissibility of evidence the court is justified in making an order postponing the publication of such evidence until after the trial or, sooner, if the evidence is deemed admissible at trial. Further, where persons are jointly indicted but where separate trials are ordered, on occasion, it may be prudent to prohibit evidence that would be incriminatory of a second accused awaiting trial. I would, however, give a wide discretion to the trial judge as to how to deal with this and, indeed, the facts of the foundation case on this matter: *R. v. Clement* (1821) 4 B & ALD 218, would not nowadays be sufficient to justify such an order. (That was a case where it was felt that witnesses in subsequent trials might "trim" their evidence to suit their particular ends once they had read other evidence in the newspapers; the prohibition on publication had nothing to do with any possible prejudicial effect on a subsequent jury).

97. It will be clear, however, that the order made by the third respondent here went much further than has ever been allowed in the past (*cf. R. v. Horsham J.J., Ex p. Farquharson* [1982] Q.B. 762). If valid here, it is an order that could be made, in theory at least, in every type of case: criminal and civil. It must be that the exercise of such a jurisdiction is inconsistent with the Constitution.

98. In the first instance, the members of the public are entitled to know what goes on in courts of law. Take this very case. It must have been a matter of extreme bewilderment to the public to learn that they could not hear contemporaneously about the prosecution that was brought arising on this massive seizure of drugs; it was said in this Court, in passing, that this may have been the biggest seizure of cocaine anywhere in Europe to date. Yet, the public was destined never to learn anything about the course of the trial of those who pleaded not guilty because the

media declined, for whatever reason, to publish any details of the evidence afterwards.

99. Next, there is the right of the accused to have their cases reported in the press; it has been known in the past for witnesses to come forward to offer evidence favourable to an accused, who might not otherwise have done so, once they have read or heard about the case on radio or television. Especially is this true ever since the enactment of s. 17 of the Criminal Procedure Act, 1967, which prohibits the publication of the proceedings at the preliminary examination of indictable offences in the District Court. Or, an accused about whom adverse rumours had circulated in advance of a hearing might properly wish it to be shown how he came to be vindicated at trial.

100. Finally, there is the freedom of the press argument. I would hold that freedom of the press is guaranteed under Article 40.6.1 and that the protection in the constitutional provision is not confined to mere expressions of convictions and opinions. Carroll J. so held in *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597. In that case the plaintiff had sought to prevent the publication of the memoirs of a deceased member of the British Secret Services. The learned judge said that the defendants had a constitutional right under Article 40.6.1 to publish information which does not involve any breach of copyright provided that the public interest in this jurisdiction is not affected by the publication and there was not a breach of confidentiality in a private or commercial setting. I would endorse and apply her reading of the Constitution to the circumstances of this case.

101. While freedom of the press is constitutionally guaranteed, there is a sense in which freedom of the press might be categorised as such freedom as remains after the Constitution itself and the law have had their say: the publication of blasphemous, seditious or indecent matter is prohibited by the Constitution itself and is to be punishable by law and, in addition, there are the laws of contempt and defamation. As against that, the legislature has recognised in s. 18 of the Defamation Act, 1961, that a fair and accurate report published in any newspaper or broadcast of proceedings publicly heard before any court established by law and exercising judicial authority within the State or in Northern Ireland shall, if published or broadcast contemporaneously with such proceedings, be privileged.

102. So the press has the right to report and, indeed, comment on proceedings in courts of law. As was observed by Atkin L.J. in the course of his speech in *Ambard v. Attorney General for Trinidad and Tobago* [1936] A.C. 322 at p.335:-

"... no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

103. The passage was adopted by this Court in *In re Hibernia National Review* [1976] I.R. 388.

Indeed, as long ago as 1901, O'Brien L.C.J. spoke to similar effect when he said:-

"In his private personal character a Judge receives no more protection from the law than any other member of the community at large; and, even in his judicial character, he should always welcome fair, decent, candid, and I would add, vigorous criticism of his judicial conduct; ..." *R. v. McHugh* [1901] 2 I.R. 569, at p.579

104. And returning to recent times, in *Cullen v. Toibín* [1984] I.L.R.M. 577, O'Higgins C.J. said at p.582:-

"... the freedom of the press and of communication which is guaranteed by the Constitution ... cannot be lightly curtailed."

105. The press are entitled to report, and the public to know, that the administration of justice is being conducted fairly and properly. This is not to satisfy any idle curiosity of the public. The public have both a right and a responsibility to be kept informed of what happens in our courts. Since the proper administration of justice is of concern to everyone in the State, the press has a solemn duty to assure the public by fair, truthful and contemporaneous reporting of court proceedings whether or not justice is being administered in such a manner as to command the respect and the

informed support of the public. As it was put by Fitzgerald J., in an Irish case of the last century, one of the many securities for the due administration of justice is "the great security of publicity": *R. v. Gray* (1865) 10 Cox C.C. 184 at p.193.

106. In my judgment the blanket ban imposed by the trial judge went too far. It was not justified. It was an order to prevent what was only a possibility of harm though made, I have no doubt, from the best of motives. The risk that there will be some distortion in the reporting of cases from time to time must be run. The administration of justice must be neither hidden nor silenced to eliminate such a possibility. The light must always be allowed shine on the administration of justice; that is the best guarantee for the survival of the fundamental freedoms of the people of any country.

107. I would allow the appeal.

Denham J.

108. I have had the opportunity of reading the judgments of the Chief Justice and O'Flaherty J. in which the facts and constitutional provisions relevant to the appeal have been set out fully and it is unnecessary for me to repeat them. The issues in the case are:

- (a) whether the trial before the learned Circuit Court Judge was held in public within the meaning of Article 34.1 of the Constitution, and
- (b) whether in the circumstances of the case it was open to the learned Circuit Court Judge to prohibit the contemporaneous reporting of the trial?

(a) In Public

109. The learned Circuit Court Judge ordered that the hearing be held with the doors of the court open, seats available, yet with a ban on contemporaneous media reporting, except for:-

- (i) the fact that the trial was proceeding in open court,
- (ii) the names and addresses of the accused parties,
- (iii) the nature of the crimes alleged in the indictment,
- (iv) where the trial was taking place,
- (v) but not referring to the fact that the accused were in custody, and
- (vi) the fact that the captain of the vessel had pleaded guilty to the charge.

110. The precise words of the learned Circuit Court Judge were:-

" ... the doors of the court are open, seats are available, ..."

111. There is a certain resonance with part of the judgment of Walsh J. in *In re R. Ltd.* [1989] I.R. 126 at p.134, where he stated:-

"The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done."

112. However, those words should not be given a literal meaning so as to restrict the interpretation of "in public" to exclude the press or press reporting. The whole timbre of Walsh J.'s judgment is that justice be administered in public on behalf of all the inhabitants of the State. In analysing the principles which subsequently became part of the Constitution in Article 34 he pointed out that it was only when justice would be defeated by the presence of the public or public knowledge that a case would be heard otherwise than in public. He endorsed case law determining that publicity is inseparable from the administration of justice. Further, he was not considering a conflict of constitutional rights such as arises in this case. Consequently, his judgment does not support the decision of the learned Circuit Court Judge.

113. It is a fundamental right in a democratic State for the people to have access to the courts to hear and see justice being done, save in a few limited exceptions. This right helps sustain democracy. Ireland is a democratic State (Article 5), all powers of government derive from the people (Article 6) and are exercisable only by or on the authority of the organs of state established by the Constitution (Article 7). The judicial branch of government, judicial power, is administered in courts established by law by judges appointed in the manner provided for in the Constitution (Article 34). The right to public court hearings is stated in Article 34.1 as:-

"Justice ... save in such special and limited cases as may be prescribed by law, shall be administered in public."

114. The term "in public" is not defined in the Constitution. "Public" is defined in the Concise Oxford Dictionary, 8th Ed.:-

"... of or concerning the people as a whole; ... open to or shared by all the people; ... done or existing openly ..."

115. Considering the roots of the word "public", its connection to the people, together with its current meaning, these factors clearly indicate that a hearing "in public" signifies a hearing before the people. We are not living in ancient times or in a city state. We live in a modern democracy in the age of information technology. It is entirely impractical for all people to attend all courts. Nor is that required. What is required is that information of the hearings in court are in the public domain. In a modern democracy this information is brought into the public domain by many routes, but in reality most people learn of matters before the courts from the press. Thus any curtailment of the press must be viewed as a curtailment of the access of the people to the administration of justice and should be analysed accordingly.

(b) *Right to prohibit contemporaneous reporting*

116. There is no general discretion in or statutes pursuant to Article 34.1 of the Constitution which empowered the learned Circuit Court Judge to order the hearing otherwise than in public. Applying the decisions of Walsh J. in *In re R. Ltd.* [1989] I.R. 126 at p.135 and Finlay C.J. in *Irish Press Plc v. Ingersoll Publications Ltd.* [1993] I.L.R.M. 747 at p.751, there is no law, that is statute, pursuant to Article 34.1, permitting the learned Circuit Court Judge to limit access to the court.

117. However, that does not dispose of the matter. While there is no discretion in Article 34.1 to order a trial otherwise than in public Article 34.1 does not exist in a vacuum. There are competing constitutional rights, rights relating to other persons and in addition the court has duties under the Constitution. The court has a duty and jurisdiction to protect constitutional rights and to make such orders as are necessary to that end. There were several rights for consideration at the trial before the Circuit Court. The accused had a right to trial in due course of law (Article 38.1) and to a trial with fair procedures (Article 40.3). The trial judge had a duty to uphold the Constitution and the law and to defend the rights of the accused. Balanced against that was the community's right to access to the court, to information of the hearing, to the administration of justice in public (Article 34.1). That right is clearly circumscribed by the terms of Article 34.1. However, also in the balance was the freedom of expression of the community, a freedom of expression central to

democratic government, to enable democracy to function. There was also the freedom of expression of the press. Thus consideration should have been given to Article 40.6.1 (i), which may include the publication of information: *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* 1986] I.R. 597. The right to communicate (Article 40.3) was also a part of the panoply of rights in the bundle of rights for consideration.

118. None of the rights in consideration are absolute. Where there are competing rights the court should give a mutually harmonious application. If that is not possible the hierarchy of rights should be considered both as between the conflicting rights and the general welfare of society: *People v. Shaw* [1982] I.R. 1 at p.56.

119. The accuseds' right to a fair trial is superior to the other rights in the balance: *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465; *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476. However, categorising the rights and placing them in the appropriate hierarchy does not dispose of this matter.

Test

120. The test to be applied is whether there is a real risk that the accused would not receive a fair trial if the trial was held in public.

121. Further, the test requires a second step. If it were determined on evidence that there was a real risk of a trial being unfair if it were held in public then the trial judge should consider whether the real risk can be avoided by appropriate rulings and directions. This two-part process was not applied or applied appropriately.

122. In addition, when the issue is a ban such as in this case the test should be applied after hearing evidence and submissions from the parties and any relevant representatives. This was not done, a further breach of constitutional procedures. The evidence in this case on which the learned trial judge decided to ban contemporaneous reporting falls far short of evidence establishing a real risk.

Error

123. While the learned Circuit Court Judge had the jurisdiction to make such an order in principle, he erred in law, in the test and its application, and in the process. He fell into unconstitutionality and breached the requirements of natural justice. He

exceeded his jurisdiction and thus rendered the decision liable for judicial review:
State (Holland) v. Kennedy [1977] I.R. 193 at p.201.

Conclusion

124. The fundamental constitutional principle that justice be administered in public means that the jurisdiction to make an order limiting contemporaneous press reporting of a trial arises only in exceptional circumstances where after applying the appropriate test and process the trial judge determines that there is a real and unavoidable risk of an unfair trial. If there is a real and unavoidable risk that the accuseds would not receive a fair trial then there would be no question of the accuseds' right to a fair trial being balanced detrimentally against the other rights in consideration.

125. On the two matters in issue I am satisfied that (a) the trial before the learned Circuit Court Judge was not held in public within the meaning of Article 34.1, and (b) while it is open to the learned Circuit Court Judge in principle to prohibit contemporaneous reporting, such an order would be the rare exception, require a heavy onus of proof and in this case the learned Circuit Court Judge did not apply the correct law, test, or process. In light of this error judicial review in the form of a declaration lies against the decision and I would allow the appeal.

Barrington J.

126. This case raises interesting points on the relationship between Article 34, Article 38 and Article 40.6 of the Constitution. One of the applicants' principal submissions rested on Article 34. Article 34.1 of the Constitution reads as follows:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law shall be administered in public."

127. It is true that the order made by the learned trial judge in the present case was not an order directing that the trial be held *in camera*. It was merely an order prohibiting contemporaneous reporting of the trial. The doors of the court remained open and any member of the public (including representatives of the press and the

radio) was free to enter and to watch the proceedings. It is a fine point as to whether, under these circumstances, the proceedings were, or were not, being conducted in public.

128. As Keane J. points out in his judgment, which I have had the pleasure of reading in advance, nowadays very few citizens have the time to attend court. The press is in effect the eyes and the ears of the public. It is an important protection to accused persons that their case be heard in public. It is also important to the citizens in general that anything eccentric, unusual, or apparently unfair which happens in the courts should be drawn to their attention. It is also important to all engaged in the administration of justice that justice should not only be done but should be seen to be done.

129. A ban on contemporaneous reporting of a case may carry with it the danger that the case may never be reported at all. Moreover the privilege conferred on newspapers by s. 18 of the Defamation Act, 1961 applies only to fair and accurate reports of legal proceedings published "contemporaneously" with such proceedings.

130. I would have no difficulty therefore in holding that the order made by the learned trial judge so emasculated the right to a hearing in public as to constitute a denial of that right unless it could be justified by some other provision of Article 34 or by some other provision of the Constitution.

131. As counsel for the third and fourth applicants has pointed out the exception "save in such special and limited cases as may be prescribed by law" contained in Article 34.1 refers only to laws enacted since the coming into operation of the Constitution. There is no act of the Oireachtas passed since the coming into operation of the Constitution justifying the kind of order made by the learned trial judge and therefore this order must be held to be void unless it can be justified under some other provision of the Constitution.

Article 38

132. Article 38.1 provides that:-

"No person shall be tried on any criminal charge save in due course of law."

133. Article 34 may have given to the Oireachtas power to provide that justice is to be administered otherwise than in public in such "special and limited cases as may be prescribed by law". Article 38 however, which is concerned with the actual trial of offences, is largely the concern of the judiciary who have the duty of seeing that trials are conducted in due course of law.

134. Article 38.5 provides that subject to the exceptions contained in the said Article, no person is to be tried on any criminal charge without a jury.

136. A fundamental duty of a trial judge is to ensure that the trial before him is conducted in due course of law. Different generations of lawyers may have different insights into what is required by "due course" or "due process" of law. But the general incidents of a jury trial in a criminal case were well known to the framers of the Constitution. Had they intended to change these incidents one would have expected them to say so.

137. Among these incidents is the duty of a trial judge in a criminal case to ensure that prejudicial matter of no probative value is not admitted in evidence before the jury. Thus if a question is raised as to whether an alleged confession was or was not made by the accused voluntarily the judge will investigate the voluntariness of the confession in the absence of the jury before deciding whether or not to admit it in evidence. This is because a jury of laymen could hardly be expected to exclude from their minds damaging evidence such as an alleged confession of guilt even though the alleged confession might be of no probative value in law. There would be little point however in the judge conducting his inquiry in the absence of the jury if the press were free to report everything which happened in the absence of the jury and if the members of the jury could read all about it in their newspapers.

138. The common sense of the matter is so obvious that the press have traditionally co-operated with the courts in not reporting evidence heard in the absence of the jury in a criminal trial. However as Denham J. said in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 at p.474:-

"The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right."

139. If therefore the press were to put in jeopardy the right of an accused person to a fair trial I have no doubt that the courts would have all powers necessary to defend and vindicate the constitutional rights of the accused. (See *the State (Quinn) v. Ryan* [1965] I.R. 70). I have no doubt therefore that a trial judge would, in a proper case have a right to prohibit the contemporaneous reporting of part, or even in an extreme case, of all of the evidence in a criminal trial.

Article 40.6

140. Article 5 of the Constitution states that Ireland is, *inter alia*, a "democratic State". In moving from the discussion of Article 34 and Article 38 of the Constitution to Article 40.6 we are moving from an area primarily concerned with the practical implications of the rule of law to one primarily concerned with the public activities of the citizen in a democratic society. The importance of this case derives from the fact that it lies at the interface between these two principles of constitutional government.

141. Article 40.6.1 (i) provides as follows:-

"6.1 The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

- i. The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."

142. The right to freedom of expression is one of the personal rights of the citizen which the State is bound to defend and vindicate, as far as practicable, in

accordance with the provisions of Article 40.3 of the Constitution. It is of course surrounded by many reservations and safeguards. But it is a positive right which the State is pledged to defend and the function of the court is to preserve the balance between the guarantee and the reservations in such a way as to give to the right guaranteed life and reality. The position is totally different from the position in a common law country where the citizen is entitled to say anything he wishes as long as it is not illegal.

143. The Irish Constitution was drafted before the Second World War and the European Convention on Human Rights after it. Yet if one compares Article 40.6.1 (i) of the Irish Constitution with art. 10 of the European Convention on Human Rights (which deals with freedom of expression) one finds significant similarities as well as important differences. Article 10 reads as follows:-

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

144. It appears to me also that it is important to look at the context in which the right of the citizens to express freely their convictions and opinions is placed in the Constitution. Article 40.6.1 deals with three rights, the right of the citizens to express freely their convictions and opinions, the right of the citizens to assemble peaceably and without arms and the right of the citizens to form associations and unions. All of these relate to the public activities of the citizens and to the practical workings of a democratic society. They are part of the dynamics of political change. They are at

once both vitally important to the success of a democracy and potentially a source of political instability. That is why the Constitution and the European Convention both assert and circumscribe them. That is also why it is so important to get the balance right in interpreting them.

145. Article 40.6.1 (i) is unique in conferring liberties and rights upon the "organs of public opinion". "Organs" are not capable of having rights so this reference must be taken to mean a reference to those persons whether natural or artificial (such as the applicants in the present action) who control the organs of public opinion. These rights must include the right to report the news as well as the right to comment on it. A constitutional right which protected the right to comment on the news but not the right to report it would appear to me to be a nonsense. It therefore appears to me that the right of the citizens "to express freely their convictions and opinions" guaranteed by Article 40 of the Constitution is a right to communicate facts as well as a right to comment on them. It appears to me also that when the European Convention on Human Rights states that the right to freedom of expression is to include "freedom ... to receive and impart information" it is merely making explicit something which is already implicit in Article 40.6.1 of our Constitution.

146. This interpretation appears consistent with the judgment of O'Higgins C.J. in *Cullen v. Toibín* [1984] I.L.R.M. 577, when, lifting an injunction on the publication of an article by a witness at a trial which purported to contain a description of how the accused had carried out the murder of which he had been convicted, while the accused's appeal was still pending before the Court of Criminal Appeal, he said at p.582:-

"There is ... the matter of the freedom of the press ... guaranteed by the Constitution and which cannot be lightly curtailed."

147. Likewise it is consistent with the decision of this Court in *Heaney v. Ireland* [1997] 1 I.L.R.M. 117, to the effect that the right to silence is a correlative right to the right to freedom of expression. Likewise it is consistent with the judgment of Carroll J. in *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597.

148. The judgment of Costello J. in *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373, is cited as authority for the contrary proposition that Article 40.6

guarantees only the right to express ones convictions and opinions and not the right to communicate facts. But as Costello J. himself recognised, Article 40.6 had nothing to do with the question at issue in that case. That case involved a commercial courier which attempted to set up in opposition to the postal monopoly formerly operated by the Minister for Posts and Telegraphs. The case was really an economic and commercial dispute which turned not on freedom of expression but on the means of private communication.

149. Costello J. accepted that a "a right to communicate" was one of the unspecified rights of the citizen protected by Article 40.3 of the Constitution, and he reiterated this view in *Kearney v. Minister for Justice* [1986] I.R. 116 at p.118. I would be prepared to accept that such a right exists as one of the unspecified rights of the citizen but, if such a right exists, it must include not only the right to communicate facts but also the right to communicate convictions opinions and even feelings. The question then arises of what is the relationship between this right and the right of freedom of expression guaranteed by Article 40.6 of the Constitution.

150. In some respects the two rights may overlap and may be complimentary. But the right of freedom of expression is primarily concerned with the public statements of the citizen. When the Constitution guarantees the citizen liberty for the exercise of this right it is guaranteeing to him that he will not be punished by the criminal law or placed under any unconstitutional restriction for freely stating in public his convictions and opinions, be they right or wrong. *A fortiori* it guarantees him, but again subject to the same constitutional restrictions, the right to state the facts on which these convictions and opinions are based. The Constitution guarantees to the organs of public opinion liberty for the criticism of government policy. But it would be absurd to suggest that the press enjoys constitutional protection under Article 40.6.1 (i) when criticising government policy but not when reporting the facts on which its criticism is based.

151. The sister rights guaranteed by Article 40.6.1 are the right of the citizens "to assemble peaceably and without arms" and the right of the citizens "to form associations and unions" but it would be absurd to suggest that the right of the citizens "to assemble peaceably and without arms" guaranteed the right of the citizens to assemble but not their right actually to hold a meeting or that the right of the citizens "to form associations and unions" guaranteed the right of the citizens to

"form" associations but not their right to manage or run them for any particular purpose. Likewise it seems to me absurd to suggest that the constitutional right of the citizens to express freely their convictions and opinions does not also protect, subject to constitutional exceptions, their right to state facts. In this context it is important to remember that we are construing, not a revenue statute, but a constitution.

152. The freedom of expression guaranteed by Article 40.6.1 of the Constitution includes criticism of government policy. *A fortiori* it includes criticism of other aspects of State activity including the working of the courts. Apart from particular statutes designed to protect privacy or the weaker members of the community there are only two kinds of restrictions on publicity or criticism concerning the courts. Both exist to protect the administration of justice. The first kind of restriction is on publicity which tends to deny to an accused person a fair trial and the other is on the kind of irresponsible and malicious criticism which damages the administration of justice by bringing the courts into contempt.

Conclusion

153. There is no doubt that the learned trial judge in the present case was concerned about the fact that the accused were all foreigners and that, in the event of the trial being aborted because of irresponsible publicity, the accused would probably be denied bail and remanded in custody while awaiting a new trial.

154. The learned trial judge put the matter as follows in his *ex tempore* judgment delivered at Cork Circuit Criminal Court on the 6th February, 1997:-

"I consider the risk to the accused people and the risk to the trial having regard to what happened and having regard to what was happening. I could see it was going to happen again, and that this trial will be aborted and that they will be back in custody for a considerable period.

Why did I take this view? I had reliable information that it started on a sinister footing on Tuesday last. It was reported on radio that all that day a jury was to be sworn to try this case. That of course was inaccurate. No jury panel was summoned for that day. It was also reported that some of the jury panel

having heard this dropped what they were doing and ran for this Courthouse. That was not a very accurate report.

Today we have another report in the Evening Echo presented to me at 2.30 p.m., it now being 5 o'clock, and this application having started at 4.30 p.m., saying that the Echo was in court today fighting an order barring the newspaper from reporting the case. The Irish Times also made a report on the matter today."

155. The learned trial judge's concern that there should not be a mistrial does him credit. But at the same time he appears to have been unduly apprehensive. An inaccurate report on local radio about the jury being sworn coupled with the statement in a local newspaper that it was in court fighting a case when the case had merely been listed for hearing on that particular day hardly constitutes a major threat to the administration of justice. The learned trial judge clearly took the view that the most important issue was the right of the accused to a fair trial. But he does not appear to have assessed correctly the requirement of Article 34 of the Constitution that justice "shall be administered in public". He does not appear to have at all considered the fact that the applicants had a constitutional right to report the court proceedings. For that reason he made no attempt to see if the applicants' constitutional right to report the proceedings could be reconciled with the accused's right to a fair trial.

156. Apart from the foregoing it is not clear to what extent if any the individual applicants were responsible for the mistakes of which the learned trial judge complained. In this respect the decision of the learned trial judge savours of Brutus' famous fallacy concerning Julius Caesar:-

"Therefore, think him as a serpent's egg
Which, hatch'd, would, as his kind, grow mischievous
And kill him in the shell".

(Julius Caesar II, I, 32).

157. I would allow the appeal and reverse the order of the learned High Court Judge.

Keane J.

158. Article 34.1 of the Constitution provides:-

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

159. It was submitted in the High Court, and again in this Court, that a trial to which the public were admitted, but the detailed contemporaneous reporting of which in the media was prohibited, was held "in public" within the meaning of this Article. That submission was rejected by the High Court Judge: I have no doubt whatever that he was correct in so holding. It was a logical consequence of that submission, which counsel for the respondents did not shrink from advancing, that Article 34.1 could not be invoked to invalidate the enactment by the Oireachtas of a law prohibiting all contemporaneous reporting by the media, print or electronic, of any trial, civil or criminal. Protection for what was accepted to be their right to report such proceedings contemporaneously was to be found, it was urged, in those provisions of the Constitution which, expressly or by implication, guarantee freedom of speech.

160. I am satisfied that such a construction of Article 34.1 could not possibly be upheld. It is immaterial whether one takes the decisive factor in this context to be the presumed intention of the framers of the Constitution in 1937 or the manner in which it should most appropriately be construed in today's conditions. I do not believe that at any stage in the history of this State over the past 75 years a trial to which the public were admitted, but which the media were prohibited from reporting at the time it was being held, would have been regarded as a trial held "in public" within the ordinary meaning of those words.

161. The reasons for this are obvious but will bear restating. As Walsh J. pointed out in *In re R. Ltd.* [1989] I.R. 126, the actual presence of the public is not necessary, but the doors of the courts must be open to satisfy the requirement that justice be administered in public. However, the very fact that physical and other constraints prevent more than a minuscule section of the entire population from being present in court while justice is being administered makes it all the more imperative that the media should have the widest possible freedom to report what happens in court

which is consistent with the proper administration of justice. It is manifest that the right of the public to know what is happening in our courts, a right which is clearly recognised and guaranteed by Article 34, would be eroded almost to vanishing point if the public had to depend on the account that might be transmitted to them by such people as happened to gain admission to the court room for the trial in question. In modern conditions, the media are the eyes and ears of the public and the ordinary citizen is almost entirely dependent on them for his knowledge of what goes on in court.

162. Justice must be administered in public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy.

163. Article 34 envisages that in what it describes as "special and limited cases" which must be prescribed by law, justice may be administered otherwise than in public. Specific instances in which that power has been availed of are set out by O'Flaherty J. in his judgment. It could never be exercised so as to deprive the media completely of the power to publish contemporaneous reports of court proceedings, since that would render the guarantee of the public administration of justice virtually meaningless.

164. Since, as it seems to me, the freedom of the press to report on court proceedings is clearly guaranteed, subject to those limited qualifications, by Article 34.1 it is unnecessary to reach any conclusion as to whether it also derives support from Article 40.6.1 which guarantees liberty for the exercise of

"The right of the citizens to express freely their convictions and opinions."

165. It was held by Costello J., as he then was, in *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373, that the protection afforded by that Article is confined to the expression of convictions and opinions and that the citizens' right to communicate is one of the personal unspecified rights of the citizen protected by Article 40.3.1. I

would reserve for a case in which it arose the question as to whether that view of the law is to be preferred to that of Carroll J. in *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597.

166. The right of the public to be informed as to proceedings in court is not, however, an absolute right: its exercise may, on occasions, have to yield to other constitutional requirements, specifically Article 38.1, which provides that:-

"No person shall be tried on any criminal charge save in due course of law."

167. The limitations imposed by this Article on the contemporaneous reporting of court proceedings are not, in general prescribed by any Act of the Oireachtas. Article 50 of the Constitution, which preserved the existing body of statute and common law in existence at the date of the enactment of the Constitution to the extent that it was consistent with its provisions, carried forward into our law and machinery of contempt of court, which in turn had been carried over by the Constitution of the Irish Free State. That law has always recognised the inherent jurisdiction of the courts established under the Constitution to take such steps as are necessary to ensure that the proper administration of justice is not compromised by the manner in which court proceedings are reported. This will on occasions involve the postponement of the publication of reports of court proceedings, rather than their total suppression. The media have properly recognised that, where a "trial within a trial" takes place in the absence of a jury to determine whether particular evidence is admissible, reporting of the proceedings must, in fairness to the accused, be deferred until the entire trial has concluded. A similar restraint may be required in the case of persons jointly indicted but separately tried. The jurisdiction of the courts to ensure that in instances such as these the integrity of the trial process is preserved by means of the contempt of court procedure is not in doubt: see *Keegan v. de Burca* [1973] I.R. 223; *The State (Director of Public Prosecutions) v. Walsh* [1981] I.R. 412.

168. In the present case, however, the learned Circuit Court Judge prohibited the detailed contemporaneous reporting of the trial solely because of the possibility that the reporting might be inaccurate and, it would seem, because he feared that this could lead to the discharge of the jury. I have no doubt that those misgivings, although doubtless seriously entertained by the learned Circuit Court Judge, could not possibly justify so extreme a step as the banning of detailed, and, it must be

assumed, accurate, contemporaneous reporting of the trial. For the reasons I have given, this was not a trial held "in public", although no part of it came within the cases envisaged by Article 34.1, and prescribed by legislation, in which a trial otherwise than in public can be held. Nor was the invocation of so drastic a measure justified by any established and overriding necessity to preserve the integrity of the trial process so as to ensure that it was held in due course of law in accordance with Article 38.

169. I would also allow the appeal.