

**The King Commission live: an examination of the legal and
ethical considerations involved in broadcasts of judicial
proceedings**

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DECLARATION

I, the undersigned, hereby declare that the work contained in this assignment is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

SUMMARY

The controversy around the broadcasting of court proceedings has reigned in the United States since the 1950s, reaching a peak with the trial of O.J. Simpson, widely interpreted as an example of the destructive effect of a "media circus" on the administration of justice. In many other U.S. courtrooms, however, television and radio journalists do their work unobtrusively, professionally and to the benefit of their viewers and listeners. The King Commission of Inquiry into allegations of match-fixing in cricket gave South Africa its first experience of television and radio coverage of judicial proceedings, and lay the basis for a more liberal approach to electronic coverage of courts. The Constitution protects freedom of expression, including the freedom to receive and impart information. This has been interpreted by the High Court as conferring on radio journalists the freedom to record and broadcast the King Commission's proceedings. It is argued in this study that the High Court's reasoning could be applied with equal force to television, and to coverage of the courts. It is suggested a trial period of electronic coverage of courts, under clear guidelines for journalists and legal practitioners, may provide greater clarity on the desirability of allowing electronic coverage of courts on a permanent basis.

OPSOMMING

Die netelige vraagstuk rondom die uitsaai van hofverrigtinge het alreeds in the vyftigerjare van die vorige eeu in die Verenigde State ontstaan. Die vervolging van O.J. Simpson was 'n hoogtepunt in die debat. Dié saak word gereeld voorgehou as 'n voorbeeld van die nadelige effek wat 'n "mediasirkus" op die regsproses kan uitoefen. Maar in baie ander Amerikaanse howe doen radio- en televisiejoernaliste hulle werk sonder steurnis, professioneel, en ten voordeel van hul luisteraars and kykers. The Kingkommissie van Ondersoek na beweringe van oneerlikheid in krieket was Suid-Afrika se eerste ervaring van elektroniese dekking van 'n regterlike proses, and kan moontlik die basis vorm vir 'n meer liberale benadering tot elektroniese dekking van howe. Die Grondwet waarborg vryheid van uitdrukking, insluitende die vryheid om inligting uit te stuur en te ontvang. Die Hooggeregshof het onlangs beslis hierdie vryheid beteken radiojoernaliste mag die verrigtinge van die Kingkommissie opneem en uitsaai. In hierdie studie word geargumenteer dat die Hooggeregshof se beslissing ook van toepassing kan wees op televisie, en op hofverrigtinge. Daar word voor die hand gedoen dat Suid-Afrikaanse howe vir 'n proeftydperk elektroniese dekking van hofverrigtinge toelaat, met streng reëls vir joernaliste en regspraktisyns. So 'n proefneming kan dalk groter duidelikheid verskaf oor die voor- en nadele van televisie- en radiodekking van howe op 'n permanente basis.

Without the unwavering love, support and patience of my wife Anne, not to mention her practical help, suggestions and comments, this assignment would not have seen the light of day.

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1. INTRODUCTION

When Hansie Cronjé and other South African cricket players admitted before the King Commission to crooked dealings with bookmakers, it shook the sporting world. No wonder that dozens of journalists from around the world descended on the Centre of the Book in Cape Town, the venue of the commission's sittings, to hear and record the players' stories. But the commission was also significant from another point of view: it was the first time in South Africa that live television and radio coverage of a formal legal process such as a judicial commission of inquiry was permitted. (The Truth and Reconciliation Commission, which also allowed live broadcasts, was not a judicial commission, but an investigative structure *sui generis*.)

In allowing television cameras and radio recording equipment into the sittings of the commission South Africa was discarding a long tradition of sacrosanct commissions and courts, inherited from the British legal. But the television and radio journalists who crowded their equipment into the commission room were merely following in the footsteps of their American colleagues, who have been covering court proceedings live for decades. That is not to say that American journalists won the right to broadcast court proceedings without a fight. It took years of advocacy and litigation before cameras became an accepted part of the media coverage of most courts, and even today the matter is not finally settled. In South Africa, the process has just begun.

There are very good reasons why South African courtrooms should be kept clear of television cameras and microphones – and there are very good reasons why television and radio should be permitted to broadcast the proceedings of courts. This is a relatively new matter on the legal-political agenda in South Africa, and this country have much to learn from other countries that have debated this question at length, chiefly the United States. Many of the arguments waged

over the years in the United States for and against cameras in courtrooms are also applicable here. In examining the question of electronic coverage of South African courts, it is therefore not necessary to re-invent the wheel. The research and experience are already there.

This study is an attempt to summarise that research and experience, and bring it to bear on the situation in South Africa. The study looks at the experience of cameras in courtrooms in other countries and examines one specific case, the trial of O.J. Simpson, which graphically illustrates some of the problems that may arise with televised court proceedings. It then turns to the South African situation: the legal background, the King Commission, how it came about that cameras and microphones were permitted there and how live broadcast coverage affected the proceedings. Lastly, it offers some thoughts and suggestions for the future of electronic coverage of courts here.

2. HISTORY AND EXPERIENCE IN OTHER COUNTRIES

2.1. The United States of America

The controversy about cameras and microphones in courtrooms is almost as old as the history of broadcasting. Broadcasters in the United States have been fighting an uphill battle since the 1930s, in the case of radio, and the 1950s, in the case of television, for the right to use the tools of their trade inside courtrooms as print journalists did their notepads and pens. The main opponent was the influential American Bar Association (ABA), and the principal obstacle the ABA's Canon 35, expressing the legal fraternity's opposition to the use of microphones and cameras, still or television, in courtrooms (Bliss, 1991).

Canon 35 was adopted in 1937 because of the "circus atmosphere" surrounding the trial of Bruno Hauptmann, the accused in the Lindbergh kidnap case, and amended in 1952 to include a prohibition against broadcasting court proceedings (Bliss, 1991: 419 - 420). Canon 35 states in part:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom ... and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted." (Bliss, 1991: 420).

Canon 35, however, was not universally observed for long. On December 6, 1955, KWTX-TV became the first television station to provide live coverage of a trial, in Waco, Texas (Bliss, 1991: 420). The next state to allow microphones and cameras into courts was Colorado, where the judges were given a discretion to allow coverage provided all parties in the dispute gave their consent (Bliss, 1991: 420).

In 1965, however, the move towards allowing television and radio into courts received a severe setback when the US Supreme Court ruled, in *Estes v Texas*, that there was no constitutional right to televise court proceedings. The court overturned the trial court conviction of Billie Sol Estes for fraud, on the basis that the disruption caused by the broadcast of the proceedings had deprived the defendant of his right to due process and a fair trial (Mason, 1999).

Notwithstanding *Estes* and the continued opposition of the ABA, more states began allowing broadcast coverage. In some states, coverage was allowed on an experimental basis, and rules aimed at minimising the disruptive effect of cameras started to develop. "Here and there,

gingerly, courts entered the electronic age." (Bliss, 1991: 421). In 1980, in *Richmond Newspapers v Virginia*, the Supreme Court recognised for the first time that the media had a constitutional right of access to criminal trials. "People in society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing," said Chief Justice Warren Burger, stating the court's majority opinion (quoted in Mason, 1999). The following year, in *Chandler v Florida*, the court ruled that the presence of a camera in court did not inherently deprive a criminal defendant of a fair trial. That decision effectively overruled *Estes*, and opened the way for states to adopt their own policies regarding electronic coverage of courts.

Although the *Chandler* ruling applied only to state courts - cameras are expressly banned from federal criminal trials in the federal rules of criminal procedure (Mauro, 1998) - it was nevertheless a watershed. Bliss (1991: 421) says:

"The decision was a signal victory for broadcasters because it was unanimous and, as NBC's veteran law correspondent Carl Stern pointed out at the time, because it 'dealt with the toughest situation - the presence of cameras in a criminal trial, before a jury, over the objection of the defendants'. By the next year 37 states were permitting some form of broadcast coverage."

In 1982, a year after *Chandler*, the ABA softened its stance on broadcasting and adopted a revised version of Canon 35 giving judges a discretion to allow coverage subject to certain conditions. The revised Canon 3A (7), stated:

"A judge may authorise broadcasting, televising, recording, and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the rights of parties to a fair trial subject to express conditions which allow such coverage in a manner that

will be unobtrusive, will not distract trial participants, and will not interfere with the administration of justice." (Bliss, 1991: 421)

The canon was ultimately removed from the ABA's Code of Judicial Conduct in 1989, when it was recognised that electronic media coverage of legal proceedings was an administrative rather than a judicial ethical issue, and should as such be left to administrative rules in every jurisdiction (Johnson and Krafka, 1994: 3).

At the close of the 20th century, 48 states (all but Mississippi and South Dakota, as well as the District of Columbia) allowed some form of electronic coverage (Alexander, 1999: 19). States that allow cameras into their courtrooms have adopted guidelines governing the conduct of camera operators as well as the circumstances in which cameras may be barred. Guidelines typically require the media to give judges advance notice of an intention to cover a trial; restrict the number of cameras to one or at the most two; allow the court to determine the location and field of view of the camera or cameras; prohibit auxiliary lighting; and enjoins media organisations to bear the cost of installing equipment and, if necessary, to work out their own pooling arrangement without burdening the court. In most states, the guidelines also require camera operators to observe the dignity and decorum of the court by, among other things, wearing "proper business attire"! (For examples of state guidelines on camera in courts, see Appendices A to C).

Federal courts are a different matter. As mentioned earlier, cameras had been banned from federal criminal courts since the adoption in 1946 of Rule 53 of the Federal Rules of Criminal Procedure. In 1972, the Judicial Conference incorporated Canon 3A (7) of the ABA into its own rules of conduct and subsequently issued a separate policy statement giving judges a discretion

to allow cameras into courts only for ceremonial proceedings, such as naturalisation proceedings (Alexander, 1999: 19).

In 1990, after extensive lobbying by media groups, the Judicial Conference allowed a three-year experiment with cameras in selected civil courts. The experiment, conducted by the Federal Judicial Center and discussed in greater length later, found wide support among participating judges in favour of allowing cameras in courtrooms. The Judicial Conference, however, did not accept the recommendation that judges in all federal courts should be given a discretion to allow cameras, only going as far as to allow the 13 appellate courts to decide for themselves whether to allow camera or not. To date, only two have approved coverage (Alexander, 1999: 19).

Congress is currently considering the so-called "Sunshine in the Courtroom" provision of the proposed Judicial Reform Act, which would allow coverage of all federal court proceedings at the discretion of the presiding judge. It remains a hotly-contested matter, as evidenced by hearings to date before the Senate Judiciary Committee (Ringel, 2000).

An important step towards improved court coverage was taken in 1991 with the establishment of Court Television Network (Court TV for short). Court TV is owned by Time Warner and Cablevision, and the founding director was a trained lawyer, *American Lawyer* magazine publisher Steve Brill. By 1997, Court TV had reached more than 30 million viewers - nearly one-third of television households (Alexander, 1999: 22). Court TV specialises in gavel-to-gavel coverage, and provides expert analysis and commentary of cases it covers.

Alexander (1999: 23) concludes: "Thus, with all but two states now allowing camera coverage, the introduction of cameras into some federal courts and the advent of Court TV, cameras are now becoming a fixture in courtrooms."

2.2. Canada

The media's access to courts in Canada is much more circumscribed than in the United States, and the question of allowing cameras in courts has become a matter for litigation and debate much more recently (Linton, 1993). Although only one province, Ontario, explicitly bans cameras from courts, electronic coverage of trials does not occur regularly anywhere in Canada. However, there has been some experience with coverage of other legal proceedings such as Royal Commissions of Inquiry (Linton, 1993).

In a review of public and media access to courts, the Law Reform Commission of Canada (1987) has recommended that electronic media coverage of criminal trial appeals be allowed, that reporters be permitted to make audio recordings of criminal trials as a substitute for, or in addition to, handwritten notes, and that a "national experiment" be undertaken to investigate the effect of television coverage of criminal trials. The experiment has not yet been conducted (Linton, 1993).

The introduction of the Canadian Charter of Rights and Freedoms, which includes a provision on freedom of expression and the media, has opened the way for litigation over this issue. The Canadian Broadcasting Corporation used this provision in defence of a television journalist charged with filming in the corridor of a court building in contravention of the Canadian Judicature Act. The trial court rejected the argument that the act was an infringement of the Charter of Rights and Freedoms, and ruled that, even if it were, it would be reasonable in terms of the limitations clause. On appeal, the higher court ruled that the relevant section of the Judicature Act was an infringement of the Charter, but that it was a reasonable limitation (Linton, 1993). (This case was cited in argument before the Cape High Court in an application to

allow broadcasting of the King Commission's proceedings, and will be discussed in more detail later.)

2.3. Australia

The issue of permitting electronic coverage of court proceedings is not high on the socio-political agenda in Australia. According to Linton (1993), there have been a few instances in which portions of court proceedings had been recorded and later broadcast on television or, in one instance, for use in a commercial film. The proceedings of the High Court of Australia in Canberra are broadcast via closed-circuit television on a permanent basis for the benefit of news media representatives.

As in South Africa, the law concerning broadcasting of legal proceedings grows out of a court's "inherent power to control and regulate its own proceedings" (Linton, 1993). The issue was investigated by the New South Wales Law Reform Commission, which concluded, unsurprisingly, that the media supported television and radio access to courts, while the legal profession and judiciary opposed it. After considerable public debate in the media following the release of the commission's report in 1989, the matter was put on the back burner, where it has remained (Linton 1993).

2.4. The United Kingdom

Cameras and audio recording equipment has been banned from British courts since 1925 in terms of the Criminal Justice Act. A brief experiment in televising Scottish courts by the BBC in 1994 met with mixed reaction and was discontinued (Mason, 1999).

The matter was brought to the fore again in 2000 when the BBC and other broadcasters applied to broadcast the Lockerbie trial. Although staged in the Netherlands, the Lockerbie trial was conducted by Scottish judges in terms of Scottish law. Before the start of proceedings, the court gave the go-ahead for a closed-circuit television relay of proceedings to relatives of the victims in New York, Washington, London and Dumfries. The broadcasters involved in the application wanted the right to use the footage taken by the closed-circuit television cameras (BBC News Online, 2000), citing their freedom of expression in terms of the European Convention of Human Rights. The application was refused on the grounds that the Convention could not determine the procedural arrangements of a court.

2.5. The Simpson Trial

Throughout the US, trials are recorded and broadcast quietly and with a minimum of fuss (as well as a minimum of viewers – otherwise the networks would broadcast them all day!). Yet the one trial that sticks in the mind as an example of the baleful influence of television on the judicial process is the trial of O.J. Simpson. As such, it merits a section of its own in any discussion of the history of televised court proceedings.

On October 3, 1995, a staggering 150 million US television viewers watched the verdict in *California v Simpson*, televised live on all three major networks as well as three cable networks. (Alexander, 1999: 3) The dramatic broadcast followed 16 months of unprecedented news coverage since celebrity O.J. Simpson was charged with the murders of his ex-wife, Nicole, and her friend Ron Goldman. More than 1000 reporters worked on daily coverage, and more than 2000 hours of gavel-to-gavel live broadcast aired on Court TV, the cable network specialising in court coverage. The Simpson trial had become the latest - and greatest - "Trial of the Century".

The Simpson trial is these days chiefly remembered as a "media circus": even in South Africa, where a lawyer recently referred to it in argument against allowing electronic coverage of the proceedings of the King Commission of Inquiry into allegations of match-fixing in cricket (Appendix E: 16). The presence of television cameras in the Simpson courtroom, the argument goes, destroyed the dignity and decorum of the court, caused proceedings to degenerate into a farce, hindered the administration of justice and destroyed public confidence in the legal system. This view ignores the fact that television formed only a relatively small part of the media covering the trial, and that other factors - including the conduct of lawyers and the judge - had also played a role. There is a strong argument to be made that the Simpson trial degenerated into a circus despite, not because of, the presence of television cameras in the courtroom.

Most people are familiar with the circumstances of the case. In June 1994, Simpson, an immensely popular former football star and media personality, was arrested for the murders of his ex-wife Nicole and her friend, Ron Goldman. The arrest followed a nationally televised "highway chase" during which police followed Simpson's off-road vehicle for several hours on a Los Angeles highway before the star gave himself up. Live broadcasts of the "chase" cost television networks an estimated \$7 million in lost advertising revenue (Alexander, 1999: 3). After a trial of nine months under the glare of unprecedented media coverage, Simpson was

acquitted. That was not yet the end. A civil trial followed, in which the families of Goldman and Nicole Simpson won major damages awards from Simpson. (Television cameras were barred from the civil trial - but that did not deter one cable channel, which, in the absence of courtroom footage, offered nightly "recreations" of the day's testimony! [Alexander, 1999: 9]). The performance of the media during the trial remained the subject of intense scrutiny and debate. Three years after the verdict, wrote Linda Deutch (1998), who covered the trial for the Associated Press, America was "still in the throes of post-O.J. Simpson traumatic stress disorder".

The use of television and still cameras was a major issue in proceedings even before the trial proper started. In a pre-trial hearing in November 1994, Judge Lance Ito, who was to preside over the trial, allowed himself to be convinced by representatives of the news media to allow television coverage. The coverage would be subject to the standard guidelines of the state of California, one of 47 states that allow television into courtrooms subject to certain rules. These guidelines determine the number of cameras in court, the conduct of camera operators, and what the camera may focus. (For typical examples of state broadcasting guidelines, see Appendices A to C.)

During the trial, Judge Ito clashed several times with media representatives who failed to adhere to the guidelines. Once, he threatened to ban all cameras after a cameraman panned across the courtroom and inadvertently showed a brief glimpse of an alternate juror. On another occasion, the judge actually did order all cameras from the courtroom, and later fined the offending party \$1000, after a cameraman zoomed in to show Simpson writing a note on a legal pad. Two reporters - one from Court TV and one from USA Today - were thrown out of the courtroom for whispering too loudly and thus disrupting proceedings. Sometimes the incidents

seemed petty: Judge Ito once reprimanded and threatened to throw out a reporter for chewing gum "in a distracting manner" (Alexander, 1999).

But the worst excesses of the Simpson trial were committed by lawyers and journalists outside of court, and not all of them involved television. Before the trial had started, Judge Ito threatened to set aside his own decision to allow television coverage because one station had broadcast erroneous reports based on "leaked" information obtained from legal sources. Several times, the judge threatened to "pull the plug" on television coverage unless lawyers stopped what he described as "pandering" to the cameras (Alexander, 1999).

According to Alexander (1999), a notable example of the impact of media coverage on the judicial process in the Simpson case involved "cheque book journalism" practised both by television and print journalists. The most pervasive form of this practice was payment to potential witnesses to tell their stories before testifying in court. Several witnesses were never called because their evidence was considered tainted; this could have influenced the eventual verdict.

"In spite of ... the fact that most of the problems in this area were caused by 'tabloid' journalists," says Alexander (1999: 7), "many courtroom participants failed to make any distinctions and remain wary of all journalists due to possible interference with due process."

How much of the Simpson farce was the fault of the media, specifically television and radio? Since the Simpson case is frequently cited as an argument against allowing electronic coverage of courts – even in South Africa – this is more than just an academic question.

"(W)ith thousands of journalists and media personnel spending so much time covering the case out in Camp O.J.," says Alexander (1999: 8), "the general impression of the coverage of the case was of a media circus. Of course, the trial included more than 100 witnesses and nearly a thousand pieces of evidence and cost the taxpayers of Los Angeles about nine million dollars. But the media added to the circus atmosphere: at the least, some members of the media harassed the principals in the case, interfered with witnesses, disclosed information prematurely or in the worst cases published incorrect speculation."

Most of the instances of media excess mentioned by Alexander occurred not inside the courtroom but outside, and could therefore not be cited as evidence against allowing cameras in courtrooms. Also, the offending behaviour in many cases could not have happened without the collusion of lawyers and law enforcement officials, and for this the media could not be blamed alone.

Fred Graham, managing editor of Court TV, says lawyers and judges who blamed the O.J. Simpson circus on cameras in the courtroom have got it backwards:

"There's a story about a rooster who crowed at dawn each day and came to believe he made the sun come up. The rooster had it backward, of course, and that's what happened to the judges who concluded that because a television camera was present in Judge Ito's unruly courtroom, it caused the disarray of the Simpson trial. A more logical conclusion would have been that Judge Ito lost control of his courtroom, and the camera permitted the world to see the ugly spectacle that resulted." (Graham, 1998.)

Alexander acknowledges this when he says (1999: 8): "In all fairness, much of the blame for the chaotic atmosphere surrounding Simpson surely lay with the members of the legal profession

themselves. Several of the lawyers involved were rightfully accused of trying the case in the media with their frequent press conferences, press releases and interviews with reporters. Even Judge Ito was criticised for participating in a five-part TV interview prior to the trial, as well as granting requests to other judges, writers, and celebrity reporters to sit in on portions of the case and to visit with him in his chambers."

Scott Libin of the Poynter Institute for Media Studies, asks the question pertinently: "Think about it: In the absence of TV's evil eye, would Judge Lance Ito have presided with the dignity and decisiveness of Solomon? Would Johnny Cochran (a key member of Simpson's defence team) have exhibited the meek manners of Mr Rogers? And, maybe most important: With no camera inside, would the lawyers have cleaned up their act outside the courtroom, where they used the media to try their cases free from the pesky and restrictive rules of evidence?" (Libin, 1995.)

These kinds of problems would have occurred with or without cameras in the courtrooms. Nevertheless, says Alexander (1999: 8) some members of the news media have to accept at least partial responsibility for submitting – knowingly or unknowingly – “to manipulation by lawyers for both the prosecution and the defence in order to be first with a story”.

Andrew Tyndall (1998), publisher of the Tyndall Report, a weekly analysis of network broadcast news, argues that courtroom cameras fuelled the media's fascination with the Simpson trial, which ranked as one of the most-covered stories of the decade (second only to the Persian war in terms of airtime on network news broadcasts):

"Why was the Simpson trial such a big story? Part of the explanation lies in the nature of trial coverage. A long trial has logistical and narrative advantages for a news operation: All the action takes place in one room so news gathering is inexpensive; it has a beginning, a middle

and an end so the commitment of resources is not open-ended; it has a limited cast of characters so explanations are not too convoluted; it has winners and losers decided by a jury.”

Although the “cult of celebrity” was a major factor in drawing attention to Simpson's case and it was unlikely that the Simpson scenario would ever be repeated, there were other factors that played a part in the intense media interest. These factors, Tyndall argues, hold some general truths about the nature of network coverage of the judiciary.

"First, the saturation levels of coverage of Simpson on the network nightly news reflected a fascination with the Simpson trial throughout the media, in everything from supermarket tabloids to gavel-to-gavel cable coverage to Jay Leon's 'Tonight Show' monologue. Courtroom cameras, the use of which was a major innovation of the past decade, made this possible. Nevertheless, over the past 10 years, trials in camera-free courtrooms have also been heavily covered - so the importance of cameras attracting the attention of the networks can be exaggerated.

"Second, the sheer length of the Simpson trial accounted for its huge totals. The responsibility for that lies with Judge Lance Ito, who lost control of his courtroom. The Simpson trial represented the American public's primary exposure to actual courtroom procedure. Marred as it was by incompetence, showboating and dawdling, the trial may have seriously damaged popular respect for the judicial system as a whole.

"Third, a perusal of the top 10 trials of the last decade puts the Simpson trial in its context ... The Simpson defence, which stressed the racism, incompetence and corruption of the Los Angeles Police department, would have been impossible without the events that preceded it: the beating of Rodney King, the acquittal of the officers involved, the inability of the police to control the ensuing riots in South Central LA, the retrial of the LAPD officers and the trial in the Reginald

Denny beating. Together, those stories depicted a police department that neither protected nor served the public and a court system that reached verdicts based on sociology rather than justice. Altogether, the overarching judicial story in the United States in the past 10 years might be called LA Law: a crisis of confidence in the criminal justice system."

The Simpson trial brought the argument about cameras in courts to a head in the US. It also distilled the arguments for and against allowing electronic coverage of court proceedings. Some of these would not apply in South Africa because they are peculiar to the jury system; many, though, are pertinent.

2. THE ARGUMENTS

3.1. Arguments against permitting electronic coverage of courts

3.1.1. Sound bites and sensationalism

Many arguments in favour of cameras and courtrooms assume that television and radio broadcast trials gavel-to-gavel, without abridging the proceedings. But in reality, audiences are seldom able to watch or listen to broadcasts all the time, even if trials are covered gavel-to-gavel. The majority of the public tend to see and hear edited highlights - sound bites - on news bulletins. This, opponents of electronic coverage of courts argue, potentially misrepresents the true nature of judicial proceedings and the justice system.

Judge William Howard of the South Carolina Appellate Bench comments:

"People often form judgments based upon incomplete or inaccurate information. If viewers see only a selected part of a proceeding, such as a particularly entertaining portion of a witness' testimony or a lawyer's final argument, and if it is transformed into importance by repeated emphasis, the reality is distorted. When it is visualised, rather than verbally summarised, it becomes an unalterable vision of truth. Predictably, if the verdict does not mirror this view of reality, the conclusion is that the system does not work." (Howard, 1996.)

According to Mason (1999), it was precisely this fear that led the United States Judicial Conference to end a three-year experiment of cameras in federal courts in 1994, despite the Federal Judicial Center's finding that no trial during the three-year experiment had been adversely affected (Johnson and Krafka, 1994). The trial, and problems with the findings, are discussed at greater length later.

By using sound bites and selecting only sensational trials for coverage, the broadcast media – especially television – fall short of fulfilling the educational potential of allowing cameras and microphones into courts, opponents argue. Coverage could also affect the functioning of the judicial system by inducing lawyers and judges to "play to the gallery", like politicians. Another US judge, Andrew Siracuse, says:

"Television has had a disastrous effect on our political campaigns, on the conduct of our legislatures, and on the consideration of appointees like Supreme Court judges. Sound bites, glib half-truths and startling if poorly-founded accusations have taken the place of debate and discourse. The business of the nation is shaped by what makes a good 30-second spot on the six-o'clock news. For all their lip service to the public good and the integrity of the news

gathering function, our television networks have only one goal: to make money." (Siracuse, 1997.)

The notion that television could help build public confidence in the judicial system, or educate the public about important issues, is illusory, Siracuse argues:

"TV stations do not broadcast trials because the owner wants the public to be informed. The cameras are there because the courtroom provides cheap programming. Does anyone imagine the O.J. Simpson trial was broadcast because it raised important social issues? ... (M)ost television stations are not likely to give up their valuable air time for anything but a sensational, highly-publicised, circus of a trial. Even if we resist the temptation to become media stars, television's selective view of the judicial system gives the public a very partial, misleading picture of the courts." (Siracuse, 1997.)

Judge Judith Kaye, a former journalist and now chief justice of the state of New York, believes selective coverage does more harm than good.

"There is natural drama in courtroom battles, especially those that deal with life's darker or more bizarre twists. But there is more to the work of the courts than just sensational events ... very little of the forest of institutional competence is seen in the popularly reported accounts of the courts. The emphasis on sensational cases is one reason for this. Without question, focus on the exceptional skews perceptions of what courts do and how they do it." (Kaye, 1998.)

While this is an argument that could be brought against any media coverage, the following is peculiar to television and, to a lesser extent, to radio, because of the brevity of the medium:

"Perhaps if the selective coverage gave more of the court's reasoning, it would be less troubling. Less snappy, I know, but more accurate, more useful. Too often coverage focuses solely on the result and the personalities involved ... Coverage driven by sound bites presents several dangers. It rarely provides the public with sufficient information for an informed judgment about the outcome in an individual case, let alone the functioning of the legal system as a whole. And in extreme cases, by fomenting outrage at unpopular but legally sound decisions, it chips away at that cornerstone of our democratic system, the independence of the judiciary." (Kaye, 1998.)

Tyndall (1998) argues that television coverage of the courts emphasises individual trials over the judiciary as an institution of government.

The Tyndall report tracked the content of network news from September 1987 to August 1997, tabulating the number of minutes devoted to news stories on the weekday nightly news broadcasts of ABC, CBS and NBC. From that database, three lists were calculated: the top 10 trials, the top 10 judicial stories that did not involve court proceedings, and the 10 most heavily covered news stories. Courtroom dramas, says Tyndall, were "the only stories from the judicial realm to break into the ranks of the most heavily covered stories". Apart from trials, the legal institution most often covered was the Supreme Court - "usually by covering the nomination and confirmation of judges".

The Simpson trial, says Tyndall, ranked among the top 10 most covered stories of the decade, bested in airtime only by the Persian War. Sustained television coverage of the trial contributed to its magnitude as a news story, says Tyndall: "It achieved its notoriety by a sustained, day-in, day-out drumbeat of coverage." (Tyndall, 1998.)

Graham (1998) acknowledges that selective coverage could be a problem:

"Critics of cameras in courts complain that the television medium too often does not present trials in an instructive way. They point out that much TV news coverage is long on cover footage and sound bites and short on explanations and analysis. They say the educational promise of gavel-to-gavel coverage is not fulfilled when broadcasters concentrate on celebrity trials and murder cases."

Those complaints have some justification, Graham concedes: "Television news - especially the local variety - often focuses (along with print journalism) on the sensational. But if cameras are not allowed inside the courtroom, that raises prospects that TV news will either not cover the story at all, or may short-change it. With cameras in court, legal stories will at least be covered generously on TV - and, hopefully, covered well ... Television has its shortcomings and its challenges regarding coverage of legal proceedings - but it can only fulfil the promise of cameras in courts if cameras are admitted there."

Access to courts, says Graham, burden the electronic media with a responsibility to report fairly: "It is apparent that the public will be best served when two things happen: When the nation's judges exercise the courage and public spirit to admit cameras to trials - and when broadcasters present the trials in a manner that responsibly informs viewers."

3.1.2. Dignity and decorum

According to some commentators, the belief that television cameras would undermine the dignity of the courts and foster disrespect for the judicial system lies at the heart of the much of the legal fraternity's objections to televised court proceedings.

Tony Mauro (1998), legal editor for USA Today, ascribes the reluctance to allow cameras into federal courts in the US to former Chief Justice Warren Burger's "lifelong quest for a sort of powdered-wig level of dignity and civility in the federal courts".

This view coloured the position of the US Supreme Court to this day, says Mauro, to the point that even judges who worked in televised state courts and supported the idea turn against it when they are elevated to federal benches. The current Chief Justice, William Renquist, expressed a similar sort of sentiment when he said soon after his accession that he feared the court would lose "mystique and moral authority" if its proceedings were televised. "I hope," he said, "we don't get to the time where the members of our court are trying to get on the 6 o' clock news every night." (Mauro, 1998).

"With some judges," says Graham (1998), "the real motivation for barring cameras from big cases may be 'Itophobia' - fear of appearing as inept as (O.J. Simpson trial) Judge (Lance) Ito, with the multitudes watching. Others genuinely believe that the misbehaviour of lawyers in the Simpson case was stimulated by the cameras, not by Judge Ito's lack of control, and that high-profile cases encourage lawyers to showboat ... There is also a subtle sentiment among some judges that allowing themselves to be seen on television is injudicious or unseemly, even if it doesn't harm the trial. The unspoken corollary of this mindset is that those judges who do permit cameras are, perhaps, show-offs."

Libin (1995) says the same arguments that are now being made against cameras in courts were also used twenty-five years ago by those opposed to televising of Congress. As they proved groundless in the case of Congress, so they will prove groundless in the case of courts:

"The argument I hear most against cameras in court is that they somehow cheapen the proceedings and promote posturing by lawyers. These are very familiar claims. In the late 1970s, people who opposed cameras in Congress argued that there would be lawyers in front of the lens there, too, and you couldn't trust them not to bog down the deliberative process with their posturing. Since the birth of C-Span, there certainly has been some political manipulation of the cameras in the House and the Senate chambers by whichever party was in charge at the time. Still, most people now seem to think gavel-to-gavel coverage of Congress at least ought to be available, even if few people watch it that way often. And keep in mind that banning cameras from Congress or from the courts doesn't ban coverage; it just reduces that coverage to the subjective reports of correspondents. I haven't heard anybody argue that we should widely curtail in-person access to legislative or judicial proceedings - just that we should restrict what you can see and hear if you can't be there yourself."

Howard (1996) notes that journalists who do not observe appropriate behaviour in courts could contribute to a decline in respect for the judicial system:

"I swear there is a secret mandate that photographers wear jeans and a T-shirt. Many courtroom camera rules contain dress codes. Failure to comply seems like a small infraction. But if you consider the infraction in the light of overall concern that cameras may contribute to a decline in respect for the judicial system, the infraction seems larger."

Siracuse (1997) believes a breakdown in the observance of courtroom dignity and decorum would eventually lead to a breakdown of justice; and that this dignity is incompatible with mass media exposure:

"Many of us sit in older buildings, dating from the time when the county courthouse was the most visible symbol of a community's pride and its faith in its own institutions. Quite a few of those courthouses were designed to look like Greek or Roman temples, and with good reason: what goes on in our courtrooms is a mix of drama, ritual, factual inquiry and forensic combat, held in an atmosphere of impartiality and sober pursuit of the truth. How can that atmosphere survive when the world is watching? George Gerbner, former dean of the prestigious Annenberg School of Communications, notes that 'when you change the audience, you change the proceedings'. The effects may be subtle, and they may not be noticed for years, but by then it may be too late."

3.1.3. Cameras and microphones affect participants and pervert the trial process

This, if true, is the most serious of the objections to electronic coverage of trials. A number of studies show that cameras have no material effect on witnesses, lawyers and other participants in trials. Opponents of cameras in court, however, argue that those studies are methodologically flawed, and point to other studies showing that cameras do have an adverse effect on participants.

A study by the New York State Defenders Association concluded that cameras should be banned from courts because of the adverse effect on the trial process: "Our judicial system does

not need the unnecessary and extraneous interference that cameras and sensational media coverage bring to court proceedings." (NYSDA, 1997).

The report was based on a survey of 351 judges participating in a two-and-a-half-year experiment allowing cameras into courts. Before that, the state of New York did not allow cameras or audio equipment in courtrooms. The major findings of the NYSDA study were the following:

- Only 25% of judges agreed that television coverage served as a deterrent against injustice.
- 37% of judges said television coverage tended to cause judges to make rulings they may not have made otherwise.
- 40% of judges said witnesses were distracted by the presence of television cameras.
- 45% of judges agreed that television coverage posed a potential threat to judicial independence.
- 52% of judges did not agree that television coverage enhanced public understanding of the judicial system.
- 59% of the judges did not agree that television coverage had a positive effect on the criminal justice system, with only 25% of judges believing it did.
- 80% of the judges believed television coverage was more likely to serve as a source of entertainment than education for the viewing public.
- 80% of judges were concerned about the commercial exploitation of judicial proceedings by the television industry, while 87% agreed that television coverage transformed sensational criminal trials into mass-marketed commercial products.

The NYSDA study shares the methodological shortcomings of its Federal Judicial Center counterpart (discussed later), most important of which is the fact that it measured perceived, as

opposed to actual, effects of cameras on trial participants. But the NYSDA report also cites a number of public surveys supporting its contention that cameras should not be allowed into courts. The most extensive, a poll among New York voters by the Marist Institute, reported the following findings:

- 62% of respondents believed cameras got in the way of a fair trial.
- 52% thought cameras had a negative effect on the justice system.
- 43% said they would be less willing to serve on a jury if the trial would be televised.
- 54% would be less willing to testify as a witness to a crime if cameras were present.
- 68% would not want the trial to be televised if they were a victim.
- 69% would not want the trial televised if they were a defendant.
- 70% would not want their trial televised if they were involved in a civil case.

Lassiter (1996) lists several ways in which television cameras could have a prejudicial impact on participants in a trial. It could intimidate potential witnesses, who may decide not to testify because of the glare of publicity; witnesses' testimony may be affected by what they see during televised proceedings before they take the stand; and witnesses may embellish their testimony to appeal to the media. Lassiter also draws attention to what he calls "the comprehensive and instantaneous feedback loop" affecting all participants in a trial:

"By virtue of re-broadcast and nightly analysis, the combination of television media in and out of the courtroom provides a feedback loop, which permits the judge, lawyers, witnesses, and jurors at trial to become aware of the public reaction to what goes on at trial - also virtually instantaneously."

This loop, Lassiter argues, has a prejudicial, if subtle, effect on trials.

If it is indeed true that broadcast coverage negatively affects to justice process - and, as will be shown later, the weight of experience in the United States appears to show that it is not - that is a serious objection. Graham (1998) says the debate around televised trials, especially the O.J. Simpson trial, had forced into the open an unresolved issue about the role of the courts.

"That issue is, how much importance should the judicial system give to doing justice in public? Is the sole function of the courts to dispense justice between competing parties, so that any proposed measures to inform the public should be rejected if they might conceivably affect a trial? Or is opening the courts to the public a value in itself, which should be accommodated unless there is some showing that the quality of justice would be diminished?"

It may be, says Wardle (2000), that the interests of the media and the courts are incompatible: "The primary concern of the judge and the court must be with matters of law, rights, due process and the fair administration of justice, whereas the primary concern of the media is with probing and displaying the social interests or entertainment value involved in the dispute." These competing interests have to be weighed when consideration is given to electronic coverage of court proceedings.

3.2 Arguments in favour of permitting electronic coverage of courts

3.2.1. It is good for the courts

Perhaps the strongest argument in favour of television cameras in courtrooms is that it opens up the justice system to public scrutiny. It is widely accepted in democratic countries that justice

must not only be done, but that it must also be seen to be done; and television cameras, the argument goes, enable the public to see the justice system in action.

Public scrutiny of courts reduces the likelihood of judicial impropriety and prevents miscarriages of justice. In *Richmond Newspapers v Virginia*, the US Supreme Court noted that public access to courts is "an indispensable attribute of an Anglo-American trial" because it "gives the assurance that the proceedings were conducted fairly to all concerned, and it discourage(s) perjury, the misconduct of participants, and decisions based on secret bias or partiality" (quoted in Wardle, 2000).

Before the advent of modern communications, the public had to be physically present to observe trials. In modern times, it is impossible for the majority of people to attend court proceedings regularly. Television and radio mean that they could have access to trials and other legal proceedings without being physically present. Lucy Dalglish, former president of the Society of Professional Journalists, says (1996):

"The late Supreme Court Justice Felix Frankfurter once said he longed for the day the media covered the Supreme Court as thoroughly as it did the World Series. Frankfurter understood why the Constitution guarantees every defendant a fair, public trial. 'The public's confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system,' he said. There is no better way for the media to portray the courts than to show by television what happens in a courtroom ... The only realistic way for the public to observe the courts in modern-day America is to allow electronic media coverage. Gone are the days when citizens would travel an entire day to the county seat to watch an important public event like the Scopes Monkey trial."

In papers filed in a court application to televise a trial in New York state in 1996, attorneys for Court TV argued:

"By stationing silent, unobtrusive cameras inside courtrooms, Court TV seeks to vindicate the ancient public right to hear, see and communicate observations concerning judicial proceedings. It does this by treating its viewers as though they themselves were in the courtroom. Because space and time constraints prevent the vast majority of citizens from physically attending court proceedings, Court TV acts as a surrogate, actually showing citizens how the judiciary operates." (Abrams et al, 1996.)

Frances Zemans, former executive vice-president of the American Judicature Society, argues that the accounts of court reporters, however competent, could never provide a true picture of the justice system. Live television coverage would do better at presenting an unmoderated picture of the courts.

"As we near the end of this century, we cannot limit ourselves to 18th Century technology ... It is not sufficient, we submit, to rely on those members of the media who take up most of the seats in the courthouse. However excellent and valuable their reporting and analysis may be, and often is, it is filtered information ... I should also note, perhaps with some regret, that public respect for the media these days is about the same as it is for many of our public institutions. This is sadly a time of little trust. Thus, the general public do not believe that the media version of an event is the way they would see it themselves. Like it or not, America sees the world through the lens of a camera, and there is nothing like seeing it for yourself." (Zemans, 1996)

The premise here is that television does not distort or select, but simply presents proceedings warts and all. Brill says: "The camera takes away traditional reporters' monopoly on the

information about what actually happened in the trial." (quoted in Mason, 1999). If televised court proceedings turn into a spectacle, as the trial of O.J. Simpson did, this is not the fault of the cameras. Television is merely the messenger: "When you lose the reporters and commentators, the camera is the ultimate original source," says Cynthia Glozier (1996), supervising producer for Court TV. "Sometimes, as in the Simpson case, the unadorned truth about our system is frightening. But isn't the truth what journalism is supposed to be about?"

3.2.2. It is good for the people

Cameras in courtrooms not only enable people to scrutinise the judicial system, but they also inform people about the workings of the courts. According to the American Judicature Society (1994), "live or recorded coverage of actual court proceedings is vital to citizen awareness and an understanding of the justice system". By putting cameras in courtrooms, millions of people would be able to better understand their legal system. Indeed, notes Mason (1999), tapes of actual trials are often used as teaching tools for law students, and Court TV donates video tapes to schools and universities as part of its "Cable in the Classroom" programme.

John Langbein, professor at the Yale Law School, observes: "Cameras are a godsend because the public has been educated to think that criminal trials are what they saw on Perry Mason, and it is not true. What's showing is the way the system really works." (Abrams et al, 1996).

Court TV aids the education process by supplementing coverage with an anchorperson - himself an experienced attorney - and with guest commentators, usually attorneys, judges or legal academics who are experts in the field covered by the televised trial. These experts are

instructed not to opine on whether a party is right or wrong, but simply to explain to viewers what is happening in court and to place the proceedings in context (Abrams et al, 1996).

Graham (1998) describes television as "an unparalleled way to inform the public about vital issues of governance and everyday life". Present-day Americans, says Graham, are "often isolated and poorly informed about their government and their neighbours. Much of what they know they get from television".

3.2.3. Experience and research show the advantages outweigh the disadvantages

One of the main arguments against allowing cameras in courts is that it may affect participants in the trial. But the experience in 48 states in the United States where some form of television coverage is allowed suggests otherwise, says Wardle (2000): "None of these states has been so dissatisfied with the experience to repeal the rules allowing cameras in the courtroom; rather, the courts and commentators report generally very positive experiences."

Four states - Virginia, California, Nevada and New Jersey - have conducted their own research into the effect of cameras in the courts. They were unanimous in concluding that the presence of cameras in courts had little impact on the trial or participants (Mason, 1999).

Two other scientific studies could be cited in support of cameras in courts. The first and most comprehensive, by the United States Federal Judicial Center (FJC) - the equivalent of our Law Commission - concluded that trial broadcasts had little or no effect on the administration of justice (Johnson and Krafka, 1994). The second, conducted on behalf of the International Criminal Tribunal for the former Yugoslavia by Dr Paul Mason of the Centre for Media and

Justice at the Southampton Institute, concluded that cameras could actually contribute to the proper administration of justice (Southampton Institute, 2000).

The Southampton Institute's study is the most recent. The institute's report, issued on May 16 2000, examined the use of cameras at the war crimes trials of the International Criminal Tribunal - headed, incidentally, by South African Constitutional Court Justice Richard Goldstone, a proponent of televised court proceedings - and concluded that footage made available to the media contributed to a better understanding of the proceedings (Southampton Institute, 2000). The report also concluded that the ICTY's policy of allowing cameras in courtrooms could be adopted with benefit by other international judicial proceedings, including the Lockerbie trial.

The report was based on interviews with judges, counsels for the prosecution and the defence, and administrative staff at the ICTY. The research focused on the use of in-house audio-visual equipment in courtrooms of the ICTY and its impact on participants in the proceedings and the administration of justice. At the ICTY, each courtroom is equipped with six remote-controlled and silent cameras that record the proceedings both for archiving and media purposes. Only recordings of public hearings are made available to the media. Following strict instructions ensuring a full, balanced, fair and accurate account of the public hearings, the audio-visual staff select pictures from the six cameras on a full and live basis. This footage is fed to the media with a short delay (30 minutes) in a technical room installed in the lobby of the Tribunal. This footage is made available to the media on a free-of-charge basis.

The main conclusions were:

- There was a general consensus that court participants are not affected by cameras in court. This was true in both self-assessment and in evaluation of the impact of cameras upon other court participants.
- Respondents unanimously agreed that cameras in Tribunal courtrooms perform three primary functions: to promote the Tribunal's workings; to provide a full and accurate court record; and to enable trials to be archived. Respondents considered the in-house television coverage of Tribunal proceedings to have the necessary sobriety and neutrality.
- The vast majority of respondents suggested cameras have a positive effect, or no effect, on the administration of justice. Cameras can inform the international community of the workings of the Tribunal whilst ensuring a transparent and fair system of justice is in operation.
- It was suggested by many that the audio-visual policy of the Tribunal could be successfully adopted by other international judicial proceedings, including the Lockerbie trial. There was uncertainty concerning televising domestic court proceedings.

Mason commented on his findings: "The findings suggest that court participants' behaviour is not significantly affected by the presence of cameras in court. Moreover, the use of cameras in legal proceedings, provided that they are operated under strict guidelines, has a positive effect on the administration of justice, and helps international justice to be seen to be done."

(Southampton Institute, 2000).

The second study, by the Federal Judicial Center (Johnson and Krafka, 1994), is perhaps the most frequently cited in arguments favouring televised court proceedings. This 56-page report, released in 1994, is an evaluation of the 1991-1993 pilot program allowing electronic media coverage of federal civil proceedings in six district and two appellate courts. The pilot

programme was conducted in terms of a set of guidelines to govern the conduct of the media (See Appendix D). The guidelines required reasonable advance notice of a request to cover a case; a prohibition on the filming or photographing of jurors; allowed only one television camera and one still camera in trial courts and two television and one still camera in appellate courts; and required the media to establish pooling arrangements. In addition, judges were given a discretion to refuse, terminate or limit media coverage if they deemed it to be in the interest of justice.

The report provides information concerning applications for coverage and proceedings actually covered, as well as a content analysis of news broadcasts incorporating such coverage. It summarises results from surveys of judges and attorneys in the pilot courts; interviews with judges, court staff administrators, and media representatives; and state studies of the effects of electronic media presence on witnesses and jurors.

The main findings were:

- Overall, attitudes of judges towards electronic media coverage of civil proceedings were initially neutral and later more favourable after experience under the pilot programme.
- Judges and attorneys who had experience with electronic media coverage under the programme generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.
- Judges, media representatives and court staff found the guidelines governing the programme to be generally workable.
- Overall, judges and court staff reported that members of the media were very co-operative and complied with the programme guidelines and any other restrictions imposed.

- Most television evening news footage submitted for content analysis employed courtroom footage to illustrate a reporter's narration rather than to tell the story through the words and actions of participants (and) provided basic verbal information to the viewer about the nature and facts of the cases covered.
- Most participants believed electronic media presence had minimal or no detrimental effect on jurors or witnesses.

Although the most comprehensive study of its kind to date, the FJC evaluation had several shortcomings, acknowledged in the report itself (Johnson and Krafka, 1994: 8). First, it did not measure the actual, as opposed to perceived, effects of electronic media on witnesses, counsel and judges. The only way to measure the actual effects would be to study and compare the behaviour of witnesses, counsel and judges in two different groups of cases: those covered by the electronic media, and those not covered. Second, it did not directly measure the attitudes of witnesses and parties in cases because most of them had little or no courtroom experience, and could therefore not, as attorneys and judges could, make reliable judgments about the effect of the media on themselves. "A witness who has never been in a courtroom," the report says, "might be nervous for many reasons but might attribute that state - inappropriately - to the presence of cameras." Finally, because the pilot programme was limited to civil trials, the impact of electronic coverage on criminal proceedings was not evaluated. Opinions on the issue of electronic coverage of criminal proceedings were, however, obtained through questionnaires and interviews.

Another concern, also acknowledged in the report, was that the pilot programme was conducted in courts that had volunteered to take part; the analysis therefore focused on judges who may be expected to be on average more favourable towards electronic media coverage than a randomly-selected sample of judges would have been.

Nevertheless, the report recommended that federal courts should be authorised to provide camera access to civil trials subject to the guidelines used in the pilot programme: "The converging results from each of our inquiries suggest that members of the electronic media generally complied with programme guidelines and that their presence did not disrupt court proceedings, affect participants in the proceedings, or interfere with the administration of justice." (Johnson and Krafka, 1994, p43.)

3.2.4. The law

In most constitutional democracies, the public, including journalists, have a right to attend court proceedings in the absence of compelling reasons to deny them access. The US Supreme Court decisions in *Richmond Newspapers v Virginia* and *Chandler v Florida*, mentioned earlier, established the constitutional right of journalists to attend court proceedings. In the latter case, the court also held that the presence of television cameras in a courtroom did not inherently violate the defendant's right to a fair trial, and that there was no empirical evidence that television coverage of a trial had an adverse psychological effect on participants in the case. Two other cases in the 1980s confirmed and strengthened those rulings. In *Globe Newspaper Co v Superior Court*, the Supreme Court held that a law prohibiting access to trials involving sexual offences against minors was unconstitutional, and that the government had to show compelling reasons to exclude the public and the media from any trial. In *People v Spring* the court confirmed that the television cameras by themselves could not deprive a defendant of his due process rights (Mason, 1999).

In January 2000, a judge in New York - one of the last states to hold out against camera access to trials - ruled that the state law banning cameras from courts was unconstitutional. The case in question was the well-publicised trial of four police officers accused of murdering Amadou Diallo, an unemployed immigrant from West Africa. Judge Joseph Teresi stated that the "quest for justice in any case must be accomplished under the eyes of the public" and held that television coverage would "further the interests of justice, enhance public understanding of the judicial system and maintain a high level of confidence in the judiciary" (Lee, 2000).

The South African Constitution, like its counterpart in the United States, also guarantees freedom of expression, including the freedom to receive and impart information, as well as open court proceedings. Until very recently, the South African courts had not had the opportunity to consider whether this means cameras and microphones should be allowed into courts. Two landmark decisions the second half of 2000, however, show that the High Court is leaning in the direction of more openness to the electronic media. The legal position in South Africa will be discussed in more detail in a later chapter. Suffice to say at this stage that South African courts, including the Constitutional Court, are directed to look to other jurisdictions for guidance on issues of constitutional law where a local precedent does not exist. That means that the opinions of the US Supreme Court are likely to weigh heavily if an application is brought for television cameras to be allowed into a local court.

4. ELECTRONIC MEDIA AND THE SOUTH AFRICAN COURTS

The European Court of Human Rights has described freedom of expression as "one of the essential foundations of a democratic society and ... one of the basic conditions for its progress and the development of man" (*Handyside v United Kingdom* (1976) 1 EHRR 737). This dictum

is recognised in the South African Constitution, which includes freedom of expression as one of the fundamental rights enshrined in Chapter 2, the Bill of Rights. Although the Constitution does not prescribe a hierarchy of rights, the importance of freedom of expression as part of the bedrock of democracy has been explicitly recognised by the Constitutional Court. *In South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), Justice Kate O'Regan expressed this principle as follows:

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

The Constitution recognises the importance of freedom of expression by including it among the fundamental rights enshrined in Chapter 2, the Bill of Rights. Section 16 states:

"(10) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research."

The constitution protects not only free speech, but freedom of expression. Expression is a wider concept than speech and includes, according to De Waal (1998: 235), activities such as "displaying posters, painting and sculpting, dancing and the publication of photographs". The

"press and other media" are singled out for special emphasis, recognising the fundamental importance of a free press in a democratic society. Furthermore, freedom of expression includes the right to "receive or impart information or ideas". It seems self-evident that the Constitution protects the right of journalists - and anybody else, for that matter - to observe court proceedings and report on them in any medium. This belief finds further support in the emphasis on openness and transparency in the pre-amble to Constitution, as well as the specific guarantees of open courts in sections 34 and 35.

The importance of open courts was, of course, recognised in South African law long before 1996, when the Constitution came into effect. Even when the apartheid government was doing everything in its power to stifle dissident voices in the media, the general principle that courts should be open to the public - and the media - was never in doubt.

"It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done," said Lord Hewart in 1924 (quoted in Stuart, 1990: 184); a point not lost on the South African courts: "It is a principle of justice as administered in this country that trials must take place in open court ... If that principle is violated, then ... the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court," said Mr Justice Broome in the 1960 terrorism trial of Mac Maharaj, who was later - in a more enlightened era - to become minister of transport (quoted in Stuart, 1990: 184).

The "open court" principle was recognised in the various statutes governing the courts, such as the Supreme Court Act 59 of 1959, the Criminal Procedure Act 51 of 1977, and the Magistrate's Courts Act 32 of 1944 (Stuart, 1990: 184). All three these statutes are still in effect.

The Supreme Court Act provides in Section 16: "Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as such court may in special cases otherwise direct, be carried on in open court." Likewise, the Magistrate's Court Act stipulates in Section 5: "Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court..."; and the Criminal Procedure Act holds in Section 152: "Except where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court..." The Commissions Act contains a similar provision, as do various other statutes dealing with quasi-judicial bodies.

How members of the public - and that includes the media - are entitled to exercise their right of access to the courts was explained by Mr Justice Eksteen in the matter of *Magqabi v Mafundityala* (quoted in Stuart, 1990: 184 - 185): "This principle envisages that members of the general public are freely entitled to enter a court of law and to see the administration of justice for themselves. As long as they do not wilfully disturb the proceedings of the court, and act reasonably, they are entitled to come into court and leave it whenever they please. If in so entering or leaving a court a person causes a disturbance or interrupts the proceedings the magistrate can control the situation through his powers in respect of contempt of court. On the other hand to issue a general order to the effect that nobody is to enter or leave the court at all while it is in session is an unwarranted derogation from the principle of justice being done in an open court, and to suggest that anyone who dares to enter the precincts of a court of law places himself under a whip, which he must learn to respect, does not seem to me to be consonant with the enlightened and civilised precepts which should always obtain in our courts in this country."

The courts have also long recognised another important principle: that the media act as interlocutors for the public, the vast majority of whom are unable to attend court and see justice done regularly. In 1913, Mr Justice Bristowe put it thus: "It is no doubt of the highest importance that the proceedings of the courts of justice should be accessible to the public, not only by virtue of their right to be present in court while the proceedings are taking place, but also of their *right to read fair and proper reports of such proceedings in the newspapers.*" (*Transvaal Chronicle and Another v Roberts*, 1915 TPD 188 192, quoted in Stuart, 1990: 186. Own italics.) Even earlier, Mr Justice Mason had stated: "The general rule that everyone is entitled to publish a fair account of judicial proceedings in open court has now been fully established, and that seems to me to embrace *the right to give all such information as may be necessary to enable the public to comprehend the course and result of those proceedings.*" (*Kingswell v Robinson* 1913 WLD 129, quoted in Stuart, 1990: 188. Own italics, again.)

The principle of open courts, and the right to report the proceedings of courts, appear to be firmly established in law. Yet, as every court reporter knows, judges and magistrates take a dim view of any audio-visual equipment in their courtrooms. In terms of directives issued by the judges-president of the various divisions of the High Court, not even the reporter's friend, the humble tape recorder, is allowed into courtrooms - let alone still or television cameras. Such directives, says Stuart (1990: 199), are issued under the "inherent jurisdiction which the Supreme Court has to regulate the conduct of the courts and to preserve the dignity of the courts". Breach of such a directive would constitute contempt of court.

The South African courts generally, therefore, rain off-limits to television cameras and radio equipment. Only in two instances have this ban been slightly relaxed: the Constitutional Court and the Supreme Court of Appeals, both of which allow television cameras into the courtroom

while the judges are taking their seats before hearing a case or delivering a judgment (Goldstone, 2000: 21).

It may seem surprising that the South African media, so often courageous in the face of draconian free speech encroachments in the pre-Constitutional era, so meekly accepted the rules regarding audio-visual equipment in courts. But it has to be remembered that there existed no avenue to challenge those rules. Judges were kings in their courtrooms; their word was, quite literally, law. If the judge did not want cameras in court, then that was the law and there was no recourse.

The enactment of the Constitution has changed all that. Now, the Constitution is king; and the question the courts will no doubt have to answer in the not-too-distant future is whether the Constitution, and specifically the freedom-of-speech provision in Section 16 and the open court provisions in Sections 34 and 35, permits a blanket ban on the audio-visual recording and broadcasting of court proceedings. That question was posed, and answered in the negative with regard to a commission of inquiry, before the Cape High Court in June 2000. Even before that, television cameras and audio recording equipment for radio were for the first time in South Africa allowed to record and broadcast, live, if they wished, the proceedings of a judicial commission of inquiry.

5..THE KING COMMISSION

The commission in question, which has come to be known as the King Commission, was appointed on 8 May 2000 by President Thabo Mbeki in terms of the Commissions Act 8 of 1947 to investigate, and report on, allegations that South African cricket players, including the

national captain Hansie Cronjé , had been involved in dishonest dealings with bookmakers - "match-fixing", for short. It was presided over by Mr Justice Edwin King, the recently-retired Judge President of the Western Cape.

The King Commission's sittings, which started on 7 June, were without doubt one of the biggest news stories of the decade. On the day following the first sitting, the Johannesburg *Star* carried five full pages of reports, including full statements from several players; according to its executive editor, David Hazelhurst (2000, pers. com.), the newspaper experienced an increase of almost 10 000 - or 6% - over its normal circulation that day. The increased circulation was maintained throughout the first phase of the hearings, and reached a peak on June 21, the day after Cronjé himself had testified and admitted accepting money from Indian bookmakers in return for predictions, information and, on occasion, playing below his best. *The Star*, and several other newspapers, carried a verbatim account of Cronjé 's statement to the commission.

It stands to reason that television and radio stations would also want to cash in on the story, and do so in the way they do best: by televising images and broadcasting sound recordings of the actual testimony of the players. Thirteen television cameras and a forest of microphones were trained on Judge King when he made his opening remarks on the morning of June 7; two satellite trucks stood ready outside to relay visuals and sound to the world. Aside from the local television stations - the SABC and e-tv - representatives of several foreign news organisations were present, including Reuters Television, the BBC, Associated Press Television, the Australian Broadcasting Corporation and Sky News. The secretary of the commission, John Bacon, said he had accredited 80 media representatives before the start of the sitting; several arrived and demanded accreditation on the first day (Bacon, 2000, pers. com.).

A commission of inquiry, even if conducted by a judge, is not a court of law. It is not subject to the same rules of evidence and tenets of natural justice as a court, because it is not a quasi-judicial tribunal but a fact-finding body (*Bell v Van Rensburg* NO 1971 3 SA 693 (C); quoted in Stuart, 1990: 117). However, the Commissions Act 8 of 1947 gives the chairman of a commission wide powers to regulate the proceedings of the commission, and in terms of the public access provision that power is very similar to the power granted a judge of the High Court, or a magistrate in a lower court, to exclude the media or sections of the media.

Section 4 of the Commissions Act 8 of 1947 gives the chairman of a commission the discretion to exclude any member of the public or class of people - including journalists - from proceedings of the commission. The section reads in full:

"Sittings to be public. All the evidence and addresses heard by a commission shall be heard in public, provided that the chairman of the commission may in his discretion exclude from the place where such evidence is to be given, or such address is to be delivered, any persons or class of persons whose presence at the hearing of such evidence or address is in his opinion not necessary or desirable."

It was this provision that Judge King relied upon when he made, during his opening statement, the following perfunctory ruling among a list of directions relating to the procedure of his inquiry (Appendix E: 5-6): "(N)o TV cameras or still cameras (are) to be used whilst the commission is in sitting and no recording devices are to be used. This is all in the interest of the smooth operation of this commission. Those are my directions at this stage, and they are open to amendment if I can be persuaded that it will not be deleterious to the sitting of the commission, that one or the other of those particular injunctions should be altered or watered down."

The ruling was immediately challenged by Advocate Gilbert Marcus SC on behalf of Midi Television (Pty) Ltd, proprietor of e-tv, and Paul Martin Cainer, news director of Live Africa News Network, a radio news agency. Their arguments are worth examining at length, because they echo many of the arguments waged over the years by proponents of cameras in courtrooms in other countries, especially the United States.

Marcus opened his campaign by submitting an affidavit by the proprietors of e-tv, in which the television station set out its rationale for wanting to broadcast the commission's proceedings. According to the affidavit, the public had an unusually great interest in the proceedings and a right to receive information about them. This right would be best served by serving the public with "precise and accurate information from the proceedings, rather than secondary reporting such as that which would appear should the applicant be denied the right to broadcast the proceedings on its television station" (p. 8).

Marcus then referred to Section 16 of the Constitution - the freedom of expression clause - and quotes in that context from the affidavit: "(T)he nature of modern communication is such that the public are dependent upon the media for access to important information. This is pre-eminently the case when it comes to reporting on proceedings such as those in question, because few members of the public are able to be physically present during these proceedings. Given the vast publicity that this matter has attracted, the need to ensure that all members of the public have access to the proceedings, via television broadcast, is crucial. The parties in the position of the applicant fulfil a vital function in the public interest. They are in a real sense the ears and eyes of the public, without which the public generally would be ignorant of what takes place in courts of law and other tribunals such as this commission." (p. 8-9.)

Freedom of expression, Marcus argued, is fundamental to democracy. The wording of Section 16 of the Constitution is significant, because it guarantees not only "the right to freedom of expression, including freedom of the press and other media", but also specifically the "freedom to receive and impart information and ideas". When exercising his powers in terms of the Commissions Act, Judge King had to act within the spirit of the Constitution, and that included giving full effect to the guarantee of freedom of expression, Marcus said (p. 9).

After quoting from American and South African case law to establish the general principle that public access to judicial proceedings was desirable and in the interest of justice and democracy (p. 10-12), Marcus listed three main benefits of allowing television cameras to record or broadcast the commission's proceedings (p. 12-13).

Firstly, it would "significantly expand public access to (the) proceedings" and improve the quality of that access by providing "accurate and immediate" access to the proceedings. Secondly, the commission's proceedings would have a far wider reach than it might otherwise have. "It can be accepted," said Marcus, "that a substantial portion of the South African public acquire their news primarily from television". Thirdly, it would "enhance the status and credibility of the process itself" and help establish public confidence that the allegations of match-fixing in cricket were being thoroughly investigated.

Possible disadvantages, Marcus said, were that witnesses may be intimidated by the presence of cameras or even not come forward to testify, and the possibility that participants may "play up to the cameras", turning proceedings into a farce. But these, he argued, could easily be circumvented. The chairman could limit the number of cameras in the commission room to minimise the disruption and the intimidatory effect. Television stations could conclude a pool arrangement so that only two cameras would be necessary. These could be placed in a fixed

condition. The transmission, instead of being live, could be delayed to avoid turning the commission into a spectacle, and the chairman could at any time bar the cameras if he felt it necessary in any particular instance (p. 13).

Cainer's argument was similar in respect of public access to proceedings via electronic media, but he added a further element (p. 17): "There is a right for the public to have access to what is actually being said ... There are two means of transmitting this. One would be in text form, which is what you are allowing, and the other would be in audio form". A very large part of the public have access to news only via the electronic media, especially radio, and it would therefore be unfair not to allow radio stations to record and broadcast the commission's proceedings, he argued. Microphones were unobtrusive and a pool arrangement could minimise the disruptive effect.

Cainer also addressed the argument that the electronic media, by broadcasting sound bites of evidence rather than the proceedings in full, would distort those proceedings (p. 24-26). It was the job of the journalist "to take a huge amount of information, distil it, (and) provide it to the public in forms they can digest". To suggest the media could distort by reporting selectively rather than broadcasting the full proceedings was "ludicrous", he said. At any rate, he added, this was a charge that could be brought with equal force against the print media. In fact, by recording and broadcasting the words of participants in the hearings, the electronic media were more likely to get it right than print journalists working from shorthand notes, Cainer said.

The application was opposed by Advocate John Dickerson SC, in behalf of Hansie Cronjé ; Advocate John Fitzgerald SC, on behalf of 37 other cricketers summoned to give evidence before the commission; by Louis Gishen, on behalf of the cricket players Derek Crookes and

Daryll Cullinan, both of whom had also been summoned to give evidence; and by Advocate Shamila Batohi, the commission's leader of evidence.

Dickerson argued that the presence of live electronic media during the hearings would "place an unnecessary and undesirable strain on the participants", including his client (p. 14). The principles of freedom of expression would not be compromised by the exclusion of live audio-visual media because journalists from television and radio stations were free to attend and report on the hearings in exactly the same way print journalists could. All the evidence before the commission would be freely available to them and to any other members of the public. E-tv's interest in broadcasting the hearing, Dickerson said, may have more to do with commercial considerations than the public interest: the station had already started selling advertising in anticipation of being able to broadcast hearings which would undoubtedly be watched by many viewers (p. 15).

"We suggest that the interests of this commission would not be advanced or furthered by allowing the (live) media to be present. To do so would make many of the witnesses and other participants unwilling participants in a television drama to be played out throughout their homes, the country and abroad ... That has a number of ramifications, not least of which is the obvious reluctance on the part of those individuals to testify or to testify freely. We believe that the object of the inquiry ... would best be furthered by a comfortable and relaxed environment, which obviously is going to be reported on, but not at the sort of level which involved the intrusion of cameras. (W)e have all seen and experienced the problems that arise with trial by television. Nobody needs to be reminded of the O.J. Simpson fiasco and we would suggest that that should be avoided at all costs." (p. 15-16.)

Batohi, Gishen and Fitzgerald concurred with Dickerson, with Fitzgerald adding only the rather surprising argument that to broadcast his clients' testimony - given in public in an open tribunal - would infringe their right to privacy under the Constitution (p. 20).

The next day, June 8, Judge King delivered his ruling.

The right of freedom of expression was not unqualified or absolute, but, like all the other fundamental rights listed in the Constitution, subject to the general limitations clause. It had to be exercised "according to the prevailing circumstances in the particular situation", Judge King said (p. 117).

"This commission is seeking the truth and the source of that truth is to be found almost exclusively, but certainly very materially, in the evidence, in the oral testimony of witnesses. And I believe that unless the ambience in which they testify is witness-friendly ... there is a very real possibility that they will not come forward with the truth. This would stifle the commission, and it is a risk which must, I believe, at all costs be avoided, even if it means that the public is deprived of valuable sources of information.

"In that context, it must be borne in mind that these hearings are public, transcripts of the evidence will be available and the wider public will be informed, not only by the print media, but also by the audio and visual media, although not to the extent the latter would like.

"My concern at the inhibitions which may affect witnesses outweighs the desirability of the additional facilities which would be available to the public were I to grant this application. Accordingly, what is sought by e-tv and Live Africa is not necessary to the smooth running of the commission and does not derogate from the public's entitlement to coverage of the sittings of

the commission. And, having regard to the possible adverse effect on witnesses and the consequent debilitation of the commission, the presence of these media is not desirable and because it could seriously impact on the effectiveness of the commission, that is doubly so. Accordingly, in the exercise of my discretion, neither television nor the audio service provided by Live Africa will be permitted to operate at and during the sittings of this commission." (p. 118-119)

He added: "I shall now take short adjournment, so that those media can please excuse themselves from further attendance."

Those bearing cameras and microphones duly excused themselves; Cainer and Live Africa News Network, however, did not let the matter rest. They approached the Cape High Court on an urgent basis for an order to set aside Judge King's ruling. E-tv and the SABC joined the application at a later stage, but too late to be included in the court's eventual ruling.

On June 20, before the court delivered its ruling, Hansie Cronjé testified. In terms of an agreement between Cronjé's lawyers, Cainer and e-tv, cameras and microphones were allowed into the commission room to broadcast Cronjé's statement. Millions of viewers around the world watched as the former captain made his emotion-charged 45-minute statement, which was broadcast live by SABC3, e-tv, a number of local radio stations as well as foreign broadcast media. It was television at its best, critic Robert Kirby (2000: 7) said: "For all its ... shortcomings, in coverage like this television is unbeatable. Radio comes near but is almost invariably more a matter for the mind, for detached consideration, for the stripping to essentials of the news. Telly gives you every grimace, every writhing hand, every nervous glance."

The next day, June 21, Mr Justice John Hlope delivered the Cape High Court's order in the matter between Dotcom Trading 121 (Pty) Ltd (trading as Live Africa News Network) and the Honourable Mr Justice Edwin King And Others (Case No. 4301/2000. Appendix F). Justices Fritz Brand and Jeanette Traverso concurred.

The court set aside Judge King's decision to disallow recording equipment. In a brief explanation, the court noted that Judge King's ruling was inconsistent with the Constitution because it infringed Live Africa Network News' rights in terms of Section 16, the freedom of expression clause. Judge King had failed to interpret the provisions of the Commissions Act "in a manner which promotes the spirit, purport and objective of the Bill of Rights", the court noted.

The full judgment, delivered by Mr Justice Brand (no relation to the author) on August 2, is a landmark in South African law relating to freedom of expression and the media (Appendix G).

The nub of the issue, said Judge Brand [25], was whether the right to freedom of expression, guaranteed in Section 16 of the Constitution, includes the right to broadcast and/or listen to a broadcast of the actual proceedings of the commission; and if so, whether that right could be curtailed in terms of the general limitations clause. As far as South African courts were concerned, the issue was *res nova* (new law). The court was entering uncharted waters.

In considering this issue, Judge Brand took into account two judgments from foreign jurisdictions cited by the respondents in support of their argument that freedom of expression did not include the right to broadcast the commission's proceedings. The first was a Canadian case, *Regina v Squires* (1986 23 CRR 31), and second a very recent judgment in the Scottish High Court: *Re: The British Broadcasting Corporation*, handed down on 20 April 2000. Judge

Brand wasted little time on the BBC case, noting that it could not be applied to the present case because the legal framework differed.

In the *Squires* case, referred to above, a television journalist was charged under the Ontario Judicature Act with filming a person leaving a courtroom in the provincial court building. One of the defences raised by the accused was that the relevant section of the act was inconsistent with the right to freedom of the press as guaranteed in the Canadian Charter of Rights and Freedoms. The Ontario Provincial Court ruled that the Charter gave journalists no greater rights than ordinary members of the public, but merely guaranteed the right of the electronic media to attend and observe judicial proceedings and report on what has been seen and heard. It did not "confer upon the electronic media a constitutionally guaranteed right to televise judicial proceedings or persons involved in such proceedings."

The judgment was, however, overruled on appeal by the Ontario Court of Appeal. The court held that the prohibition in the Ontario Judicature Act on filming people entering or leaving courts was an infringement of the right to freedom of the press. A majority of the five-member court held, however, that it was a justified infringement.

Judge Brand cited with approval the following passage from the Ontario appeal ruling:

"The freedom of expression enjoyed by television journalists ... is the freedom to film events as they occur and to broadcast the film to the public. If television journalists are unable to photograph persons entering or leaving a courtroom, their freedom of expression is curtailed."

[42]

This argument, said Judge Brand, applied with equal force to broadcasting by means of radio [43]:

"It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the activities of that medium of communication ... I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcaster's medium of communication does not constitute an infringement of the radio broadcaster's freedom (of expression). It is not without reason, so it appears to me, that Section 16(1)(a) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. In modern times there are many forms of communication. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the emphasis, the tone of voice, the hesitations, et cetera, can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media ... [45] The equivalent of the newspaper journalist's shorthand notes to the radio broadcaster is *not* shorthand notes, but an audio recording. I do not think it can be argued that a prohibition against a newspaper journalist taking shorthand notes would not constitute an infringement of that journalist's rights under Section 16(1)(a). I believe that, by the same token, to prevent a radio broadcaster from utilising its broadcasting and recording equipment constitutes an infringement of his rights..."

The second consideration was whether the ban on radio broadcasting of the commission's proceedings was justifiable in accordance with Section 36(1) of the Constitution (the limitations

clause). Section 31 (1) reads in part: "The rights in the Bill of Rights may be limited only ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors."

The application of Section 36, said Judge Brand [51], involves a process of weighing competing values and balancing competing interests. This can be done only on a case-by-case basis, with reference to the facts and circumstances of a particular case. Judge Brand accepted that the intense media interest and the presence of television and radio equipment could have been inhibiting and intimidating to witnesses and disruptive of the process, but ruled that Judge King was not justified in banning all electronic media, including radio, from the proceedings. The right to freedom of expression, an essential component of a democracy, in this case outweighed other considerations [59].

Judge King could have used a less restrictive means of reducing the intrusive effect of the electronic media, the court found. He was wrong not to distinguish between television and radio and he "ought to have considered the compromise of allowing radio but excluding television cameras" [61]. Accordingly, the court ordered him to allow the applicant and his recording and broadcasting equipment into proceedings of the commission.

6. THE EFFECT OF THE CAPE HIGH COURT RULING

6.1 Where does it leave electronic coverage of courts?

Firstly, the ruling is confined to the question of radio broadcasting. But it is obvious that the argument, in principle, would apply with equal force to television. The television journalist, like

the radio journalist, has his unique method of communication. To prevent him from using that means of communication - his camera - would constitute an infringement of his right to freedom of expression in the same way as preventing a radio journalist from using his recording equipment is an infringement of his freedom of expression.

Secondly, the ruling applies to the proceedings of a commission of inquiry, not to a court. Judge Brand is careful to make this distinction [49]: "The question whether the electronic media in general and television in particular should be allowed to broadcast court proceedings, is a matter of policy." The court did not have to deal with that question, and would in any case be hesitant to deal with "such an important matter of policy on inadequate material and without the matter being fully canvassed in evidence before it" [49]. But that also means that a general policy decision could be taken on whether or not to allow electronic coverage of court proceedings, and that the decision could be taken on the basis of evidence as to the desirability or otherwise of such a step. Such a decision would, presumably, be up to the Judges-President of the various divisions of the High Court, the Chief Justice or the President of the Constitutional Court; in the case of magistrate's courts, the decision would lie with the department of justice.

It is also important to note that the *Dotcom Trading* case has already been cited as authority to allow radio coverage of a High Court case in the Western Cape: in the case of *Andre Coetzee v Ajax Cape Town and National Soccer League* (2639/2000) on November 2, 2000, Ms Justice Traverso granted an application, again by Cainer of Live Africa Network News, to make recordings for broadcast purposes. The application was unopposed by parties to the dispute, leading Judge Traverso to conclude there was no reason not to allow radio access. This case was rightly described by the *Cape Argus* (3 November 2000) as a "landmark", because it was the first time ever that an audio recording for the purpose of radio broadcasts was permitted in any South African court.

The rulings in *Coetzee* and *Dotcom Trading*, however, do not necessarily open the courtroom doors to television, or even to radio on a regular basis. In *Coetzee*, Judge Traverso indicated that a more careful balancing of interests would have been necessary had any of the parties in the dispute opposed radio coverage. And in *Dotcom Trading*, Judge Brand pointed out that considerations in favour of permitting radio coverage were not necessarily applicable to television, a medium with a (potentially) much more disruptive presence. In weighing up whether a ban on television coverage would be a justifiable limitation of the right to freedom of expression, that should be taken into account. In his opposing affidavit, Judge King described the "scrum" of reporters and cameras which occurred when Cronjé made his statement to the commission [54] (this author was present at that occasion and can attest that Judge King's description, if anything, is an understatement). The behaviour by the media, said Judge King, was "so intrusive" that he could not accept Cronjé would find it "anything but inhibiting and intimidating". His "initial fears were justified, that the commission could very well be transformed in a forum which resembles the O.J. Simpson trial, if the electronic media were allowed".

Judge Brand accepted that the performance by the media, including radio and television, when Cronjé gave evidence "would most likely be inhibiting and intimidating to the majority of witnesses and that it should not be allowed". The mistake Judge King made, he said, was to ban the electronic media entirely from the proceedings [56].

In deciding whether a limitation of a right is reasonable, a number of factors have to be taken into account, including the nature and importance of the right in question, and the availability of less restrictive means to achieve the same purpose (Constitution of South Africa Act, 1996, Section 36). Freedom of expression is recognised as a cornerstone of democracy, and cannot be lightly limited [59]. And in the case of the King Commission, Judge Brand held, there was a less restrictive means available to achieve his purpose: he could have banned television, and

allowed radio; and he could have imposed conditions on radio coverage, such as limiting the number of microphones, to make it less obtrusive [61].

The same argument, it could be argued, applies to television. Anybody who has been present at an important news event would know how disruptive a battery of television cameras could be, and few would feel totally uninhibited and nerveless when faced by them. But, as noted in the discussion of cameras in courts in the United States, television can also be made unobtrusive. Various restrictions could be imposed: the number of cameras could be limited to one small, immovable instrument; only delayed broadcasts or the broadcast of recorded footage could be allowed instead of live broadcasts; television lights could be eliminated; pooling arrangements could be ordered to reduce the number of operators necessary in the courtroom; restrictions could be placed on the manner of filming - for instance, the camera operator could be ordered not to zoom in on the faces of witnesses, lawyers or judges. If this, less restrictive, remedy is available in place of an outright ban on cameras, would the importance of the right to freedom of expression not then outweigh other considerations against television coverage in courts?

6.2 The King Commission as an experiment

In complying with the Cape High Court's order, Judge King allowed not only Cainer and Live Africa Network News to record and broadcast the proceedings, but any other radio and television journalists who wanted to. The only restriction was that no special lighting would be allowed, and that cameras were restricted to one small area facing the judge and the witness stand.

Judging by the reaction of journalists and lawyers who observed or participated in the proceedings (at least, those lawyers who were prepared to discuss the matter), the live broadcasting of the commission's proceedings was a successful experiment.

Judge King himself, although loath to discuss the matter in detail before the conclusion of his investigation, indicated during an informal conversation with the author that the conduct of the media had pleasantly surprised him after the excitement of the first few days and that of Hansie Cronjé's testimony. Jeremy Gauntlett SC, the chairman of the General Council of the Bar of South Africa, who represented the United Cricket Board of South Africa at the commission's proceedings, said the experience with electronic media at the commission would strengthen the hand of those advocating access for television cameras to courts (Gauntlett, 2000, pers. com.). The GCBSA has appointed a committee to investigate the issue of televising judicial proceedings with a view to making a submission to the Judicial Service Commission. The JSC is considering a request from e-tv to allow live broadcasting of its interviews of candidates for the bench; Gauntlett indicated the GCBSA's submission may go wider than simply the proceedings of the JSC, and also touch on electronic coverage of court proceedings.

"Many of us are a bit torn. On the one hand there is genuine concern for people who are under acute stress in courts, and (cameras) can be an additional source of stress. But it is a matter of balancing competing interests ... At the King Commission I was at first a bit sceptical but once cameras were allowed in I was quite impressed. They were far less obtrusive than I had thought they would be. The King Commission allayed most of my own fears and prejudices ... The legal profession is thinking about it, and moving from a position of outright 'no' to a position where it could be looked at." (Gauntlett, 2000, pers.com.)

The High Court decision was also unanimously welcomed by journalists and media professionals. The Freedom of Expression Institute called it "a breakthrough in terms of access to information and media freedom" and said it had "demystified" the investigation into cricket match-fixing "as the electronic media are the vehicle through which the majority of the population receive their information" (Freedom of Expression Institute, 2000).

The Cape Argus described the ruling in an editorial on 23 June as "a catalyst for a major advance in the interests of press freedom, and another triumph for our constitution". While acknowledging that television cameras could be an inhibiting factor, "especially for those who are under stress", the newspaper said the public's "right to know" outweighed such concerns. For the commission's own sake, too, it was good that radio and television could bring its proceedings into the homes of listeners and viewers because it would enhance public confidence in the investigation: "There have been fears that the commission may be something of a cover-up. Those are groundless, of course, but South Africa has become a sceptical nation and live broadcast along with print reporting can only enhance Judge King's attempts to get to the bottom of a very shady business." (Cape Argus, 2000.)

Raymond Louw, former editor of the Rand Daily Mail and press freedom advocate, welcomed the ruling and said: "The more open society can be in all its facets - and that includes the proceedings of the courts and commissions of inquiry - that is of great importance to society and would contribute to clean and transparent administration." (2000, pers. com.)

Louw said while people in the past had relied on newspapers for their information, most people now relied on radio and television: "These media should be allowed to render that information to people in the way that is best suited to them, which means using footage and recordings or live broadcasts."

Kenneth Makatees, SABC bi-media news editor in Cape Town, said the decision to allow television and radio into the commission was "a great advantage for us": "You could give your viewers and listeners all the drama of the case. You basically pointed the camera; the script was written for you. If you could not broadcast footage, what could you do on your news bulletins? You wouldn't have been able to give your viewers and listeners anything more than print journalists, because you would have had to paraphrase everything that happened." (2000, pers. com.)

Interviewees also pointed out that many of the fears about televising the proceedings had proved unfounded. Most agreed that the television cameras and microphones caused less disturbance than they had expected, and could be made even more unobtrusive through judicious regulation. Louw said the "disturbance" argument is based on old-fashioned technology and need not be applicable today: "I can understand that a press photographer using a flash may cause a disturbance, but these day press photographers don't need to use flash anymore. Television and radio can also be unobtrusive. There would have to be a certain degree of regulation. Print journalists sit in a specified area, and in the same way cameramen could be positioned in one place, and radio recording equipment would could be placed in an unobtrusive position."

Journalists who covered the proceedings said the cameras, if anything, had a beneficial effect on witnesses and lawyers. Cainer, of Live Africa Network News, said: "I don't think anybody was intimidated. On the contrary, I think it improved the quality of the cross-examination. The lawyers were more on their mettle." (Cainer, 2000, pers. com.) Louw said the cameras would quickly become an accepted and almost unnoticed part of the court set-up: "Once the cameras are there they'll become commonplace, just as press reporters became commonplace - remember, 200 years ago there were no press reporters in courts. People would notice the

cameras at first, but after a while they won't realise they're there. Parliament was once sacrosanct - now Parliament and the Parliamentary committees are broadcast live and it has no effect on anybody taking part in the proceedings." Asked about the prospect of lawyers "grandstanding" and "playing up to the camera", Louw replied: "They do it already with the press, don't they?"

On the question whether television and radio distort events by using footage selectively, the consensus was that this problem was not confined to electronic media. Cainer said: "The concern is justified, but that is true of every single piece of reporting. That is the nature of the media in general. It would happen whether or not you use audio clips. And in fact, audio clips are in a way more reliable: Reporters can get their quotes wrong, but audio clips are always accurate." Anika Larssen, who covered the commission for Cape Talk radio, said the fact that the proceedings were broadcast made her pay more attention to accuracy in her half-hourly news reports, when she did not have time to include audio clips: "It made it much more difficult. People were watching live, they could see what I was reporting on every half-an-hour. You couldn't misquote; you had to get it right. It forced you to be incredibly pedantic about quotes. Normally you have a bit more latitude." (Larssen, 2000, pers. com.) Louw said gavel-to-gavel coverage was not a feasible option, because very few cases would merit such treatment. The answer is simple: good journalism: "The normal rules of presentation should apply. Coverage should be accurate and fair, and give both sides of the story."

Handled correctly, broadcasting of court proceedings need not undermine the dignity and decorum of the courts, Gauntlett said. Proper regulation and control could prevent courts being turned into circuses: "Frankly, I would have thought it was a matter of judicial control. A judge should control the proceedings." Cainer said: "There should not be a free for all. There should

be a proper system, a set of rules as to what the camera crews and microphones may or may not do.”

7. CONCLUSION

It is unlikely that the *Dotcom* and *Coetzee* cases will be the last word about electronic coverage courts in South Africa. More likely, they have just opened the door. The next time a Winnie Mandela, Allan Boesak or Louis Luyt appears in court, chances are that a television or radio station will ask permission to broadcast. Live Africa Network News' Cainer says he intends challenging the traditional exclusion of audio equipment from courts in every trial his reporters cover (2000, pers. com.). E-tv has asked permission to cover live the Judicial Service Commission's interviews of candidates for the bench; the commission, headed by President of the Constitutional Court Arthur Chaskalson, is considering the request and has asked for submissions from interested parties. To date, the commission has not allowed cameras into its hearings. It is widely expected in legal circles that the JSC could be used as an experiment on the effect of cameras in judicial proceedings, including courts. Gauntlett (2000, pers. com.) says the General Council of the Bar would in its submission to the JSC also address the issue of televising court proceedings.

Gauntlett notes that current law allows judges to permit cameras and microphones into their courts and that a policy decision in this regard would not necessitate statutory reform: "Section 16 of the Supreme Court Act is an open court provision. We could build on that ... At present, 'open court' is interpreted as meaning I can sit there with my notebook and pen. Why doesn't 'open court' mean I can sit there with my microphone, or even I can sit there with my unobtrusive camera as long as I don't disrupt proceedings? It wouldn't require a formal

legislative amendment, but it may require a change in mindset from some judges.” (2000, pers. com.)

Gauntlett said the GCB would, in its submission to the Judicial Service Commission, propose a system of regulated electronic coverage: “One is looking for something which builds on the open courts provision of the Supreme Court Act, and which permits cameras in courtrooms subject to certain restrictions: one, on practitioners, that they don’t turn it into entertainment, and two, on the media, that they don’t turn it into a three-ring circus.” (2000, pers. com.)

Another high-profile proponent of courtroom cameras is Constitutional Court Justice Richard Goldstone, who argues they would help educate the public about their human rights:

“If we want to avail ourselves of the rights in the Constitution we must ensure these rights flourish. To spread this understanding there is a need for education on how the constitution works and what it means for us. One of the problems at schools is how few teachers are qualified to impart these essential values. That will take years to remedy. In the meantime, there is a special obligation on the media to explain the values of the Constitution to the public ... But the importance of many constitutional decisions is not matched by the media attention they deserve ... The Constitutional Court assists the media by issuing informal summaries, in accessible language, of forthcoming judgments. To encourage television coverage, we have relaxed the traditional rules and allow cameras in the courtroom when the members of the court take their places on the Bench and when they deliver judgments. More recently, the Supreme Court of Appeal has followed suit.

“My own preference would be to allow the televising of all proceedings of the Constitutional Court and the Supreme Court of Appeal. Neither hears evidence and there is no question of

embarrassing or compromising witnesses ... To allow the public access to the oral argument, the debate between counsel and the judges, would provide a living classroom which, in my view, is worth serious consideration.” (Goldstone, 2000: 21.)

One view is that we could go further, at least on an experimental basis at first. As Judge Brand noted in the *Dotcom Trading* case, cameras and microphones in courtrooms is really a matter of policy. Rather than wait for media organisations to mount legal challenges in every case they want to cover – which could lead to endless litigation – perhaps the better course would be to allow electronic coverage of trials, subject to strict guidelines for the media.

The Judicial Service Commission could set the process in motion by asking for submissions and formulating guidelines appropriate to South African Courts. These guidelines would, most likely, be similar to those formulated by American states and tested through experience. They could include:

- A restriction on the number of cameras and microphones.
- Rules on how equipment may be operated: for instance, cameras must be stationary in one section of the court and operators may not move around; no auxiliary lighting; equipment may not be installed or moved while the court is in session; and camera operators must respect the dignity of the court by dressing appropriately.
- News media must be responsible for any costs involved, and make their own pooling arrangements without burdening the court.
- Rules about what may and may not be recorded; for instance, a prohibition on zooming in on participants' faces, or recording private conversations between lawyers and their clients before and after the court session starts.

The commission could also look at a process through which media organisations have to notify the court of their intention to cover a specific trial, giving parties to the dispute the chance to object to coverage if they wish. If there is an objection, the court could treat matter as an application to be decided on evidence and argument. A judge could also have the discretion to bar cameras and/or microphones at any stage during a trial if he or she deems it in the interests of justice. Soon, judges would be able to decide these matters on the basis of precedent.

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APPENDIX A



North Dakota Supreme Court Rules N.D. Sup. Ct. Admin. R. ▲

Rule 21 amended
Effective July 1, 1995

Administrative Rule 21 - ELECTRONIC AND PHOTOGRAPHIC MEDIA COVERAGE OF COURT PROCEEDINGS

Section 1. Authority. This rule is adopted under the authority of Article VI, Section 3 of the North Dakota Constitution.

Section 2. Definitions. As used in this rule:

- a. "Good cause," for exclusion under Section 21(4)(b)(2), means expanded media coverage having a substantial effect on the objector which would be qualitatively different from the effect on members of the general public and from coverage by other types of media.
- b. "Judge" means the presiding officer in a judicial proceeding.
- c. "Judicial proceeding" or "proceeding" includes any civil or criminal trial, hearing, or other matter conducted before a court.
- d. "Expanded media coverage" includes broadcasting, televising, electronic recording, or photographing of a judicial proceeding for the purpose of gathering and disseminating information to the public by media personnel.
- e. "Media personnel" includes broadcasters, photographers, recorders, and any other bona fide member of the news media who gathers or disseminates information to the public.

Section 3. Media representative. Broadcasters and photographers shall designate a person with whom the court may consult as a representative of them.

Section 4. General. The court may permit expanded media coverage of a judicial proceeding in the courtroom while the judge is present, and in adjacent areas as the court may direct. Expanded media coverage provided for in this rule may be exercised only by media personnel. This rule does not apply to electronic recording of the official record of a judicial proceeding.

a. Coverage allowed. Media personnel may request the court before which a judicial proceeding is pending to authorize coverage of the proceeding or of all proceedings relating to a case. Expanded media coverage may be permitted of all judicial proceedings, except proceedings specifically excluded by statute, this rule, or in the exercise of the judge's discretion.

b. Judge's authority to deny expanded media coverage. The judge may deny expanded media coverage of any proceeding or portion of a proceeding in which the judge determines on the record, or by written findings:

1. Expanded media coverage would materially interfere with a party's right to a fair trial;
2. A witness or party has objected and shown good cause why expanded media coverage should not be permitted;
3. Expanded media coverage would include testimony of an adult victim or witness in a prosecution under Chapter 12.1-20, N.D.C.C., or for charges in which an offense under that chapter is an included offense or an essential element of the charge, unless the victim or witness consents;
4. Expanded media coverage would include testimony of a juvenile victim or witness in a proceeding in which illegal sexual activity is an element of the evidence; or
5. Expanded media coverage would include undercover agents or relocated witnesses.

c. Judge's authority to limit or end media coverage. The judge may limit or end expanded media coverage at any time during a proceeding, if the judge determines on the record, or by written findings:

1. The requirements of this rule or additional guidelines imposed by the judge have been violated; or
2. The substantial rights of an individual participant, or rights to a fair trial will be prejudiced by the expanded media coverage if it is allowed to continue.

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d. Coverage prohibited. Proceedings held in chambers, proceedings closed to the public, and jury selection may not be photographed, recorded, or broadcast. Conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench may not be recorded or received by sound equipment. Close-up photography of jurors is prohibited.

e. No appeal of expanded media coverage decision. A judge's ruling on expanded media coverage is not appealable.

Section 5. Requests. Expanded media coverage must be requested as provided in this Section:

a. Appellate court proceeding. A media representative must request expanded media coverage from the Supreme Court at least seventy-two hours before the scheduled proceeding. The request must be by regular mail and, if possible, by facsimile, with copies to counsel of record. The Court may determine the coverage of any proceeding.

b. Trial court proceeding. A media representative must request media coverage from the judge of the trial court before which the proceeding is scheduled at least seven days before the proceeding. Notice of the request for coverage must be given to all counsel of record and any pro se parties. A copy of the notice of request must be sent by the fastest reasonable means to all counsel of record, any pro se parties, and the judge. The notice must be in writing and filed with proof of service with the clerk of the appropriate court. If the proceeding is scheduled less than seven days in advance, a request for coverage and notice of request must be given as soon as practicable.

c. Single request for all proceedings. Following the procedures in subsection (b), a media representative may make a single request to cover all proceedings in a case. The judge may not grant the request for all proceedings if a criminal defendant is not represented by counsel.

d. Equipment and technical variance. Upon application of media personnel, the judge may permit the use of equipment or technology not provided for in this rule. An objection to any variance in equipment or technology must be made as provided in Section 6. The judge may rule on a variance without advance application or notice, if all parties and counsel consent.

e. Deadlines may be extended or reduced by court order.

Section 6. Objections to coverage in trial court proceeding. A party to a proceeding objecting to expanded media coverage in a trial court must file a written objection with the court, stating the grounds for the objection at least three days before the scheduled proceeding. Notice of the objection must be sent to the media representative who requested the coverage.

The judge shall rule on an objection before the scheduled proceeding or at the time the objection is raised. The judge may rule on the written objection and timely filed responses or the judge may give counsel, parties, witnesses, and requesting media personnel an opportunity to present additional evidence by affidavit or by other means as the judge may direct. The judge may extend or reduce the time for filing an objection. The judge may extend the right of objection to a person not specifically provided for in this rule.

Section 7. Equipment and media personnel. Unless the court directs otherwise, equipment used in a judicial proceeding is limited to a single television camera operated by one person and one audio system for radio broadcasts. Only one still photographer is allowed in a judicial proceeding. Any media pooling needed because of these limitations on equipment and personnel is the sole responsibility of the media and must be arranged before coverage without calling on the court to mediate. Every effort must be made for the joint use of broadcasting equipment within the courtroom. Wires, microphones, and similar equipment must be placed as unobtrusively as possible within the courtroom at least fifteen minutes before the proceeding and must be secured or taped down when appropriate. Artificial lighting and flashbulbs are not permitted. Only equipment that does not produce distracting noises is allowed in the courtroom. Media coverage outside the courtroom must be handled with care and discretion, but need not be pooled or held to the restrictions of this rule.

The quantity and types of equipment permitted in the courtroom is in the discretion of the judge.

Section 8. Technical.

a. All equipment, including television cameras, is to be designed or modified so participants in the judicial proceeding being covered are unable to determine when recording is occurring. Still cameras must be selected for quietness, and be operated unobtrusively and as quietly as possible.

b. Microphones for counsel and judges must be equipped with off and on switches to facilitate compliance with Section 4(d).

c. With the judge's approval, existing courtroom light sources may be modified (e.g., higher wattage light bulbs), if the modifications are made and maintained without public expense.

d. Audio pickup for expanded media coverage must use any existing audio system in the courtroom, if the pickup would

be technically suitable for broadcast. If possible, electronic audio recording equipment and any media personnel must be located outside of the courtroom.

e. Media personnel must be located in, and coverage of the proceedings must take place from, an area or areas designated by the judge. The area or areas designated must provide reasonable access to the proceeding to be covered.

f. Television cameras and audio equipment may be installed or removed from the courtroom only when the court is not in session.

Section 9. Decorum. The decorum and dignity of the court, the courtroom, and the proceedings must be maintained at all times. Court customs must be followed. Media personnel shall dress appropriately for the proceedings. Movement about the courtroom is limited, and efforts must be made not to leave the courtroom while proceedings are in progress. Loud talking is not permitted while proceedings are in progress.

Section 10. North Dakota Advisory Commission on Cameras in the Courtroom. The North Dakota Advisory Commission on Cameras in the Courtroom is appointed by the Chief Justice, and consists of two members of the North Dakota Bar Association, two members of the North Dakota Judicial Conference, one member of the Dakota Press Photographers Association, two members of the North Dakota Broadcasters Association, one member of the North Dakota Trial Lawyers Association, and, if appointed as a member, the person designated in Section 3. The associations or their presidents recommend their members for appointment. Members serve staggered three-year terms, and are eligible for reappointment. The Chief Justice designates the chair.

The Commission shall conduct a continuing evaluation of the operation of this rule and shall submit its findings and recommendations to the Supreme Court. The Commission shall receive and consider complaints from any person concerning the rules directed to it by the Supreme Court, and, if the complaint cannot be satisfactorily resolved by the Commission, submit a report to the Supreme Court.

Section 11. This rule as amended is effective July 1, 1995.

Dated at Bismarck, North Dakota, May 10, 1995.

Gerald W. Vandewalle, Chief Justice

Herbert L. Meschke, Justice

Beryl J. Levine, Justice

William A. Neumann, Justice

Dale V. Sandstrom, Justice

ATTEST:

Penny Miller, Clerk

Cross Reference: [Rule 10.1, NDROC](#); [Rule 53, NDCrimP](#); Canon 3, Code of Judicial Conduct.

SOURCE: Adopted March 29, 1984, effective July 1, 1984. Amendments adopted May 13, 1987. August 28, 1990, order continuing AR 21(E). Emergency amendments adopted effective May 18, 1994. AR 21 amendments adopted effective July 1, 1995, incorporate and amend AR 21E.

APPENDIX B



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The Arizona Supreme Court holds oral arguments several times a month except during the summer. The arguments typically involve high-profile or complex cases. Attorneys representing appellant and appellee are normally allotted 15 or more minutes each to speak before the Supreme Court.

Only one television news camera is allowed in the courtroom during oral arguments. Stations must work out arrangements among themselves to pool tape. No auxiliary lighting is permitted. News media representatives must dress in appropriate business attire.

See [Supreme Court Rule 122](#): Electronic and Photographic Coverage of Public Judicial Proceedings

- News media agencies should notify the court's Public Information Office at least one working day in advance of their intent to obtain film, audio, videotape or still photographic coverage of judicial proceedings in the courtroom.
- Only one news media television camera and one still camera, each mounted on a tripod, each with a single camera operator, will be permitted in the courtroom while court is in session.
- Cameras must be placed in designated locations, and operated from behind partitions supplied by the court.
- No auxiliary lighting, including flash bulbs, strobe lights and reflectors, may be brought into the courtroom by members of the news media.
- News media must arrange any pooling of footage or film among themselves. The court will not participate in any pooling agreement.
- Equipment and camera operators must be ready to record one hour before court proceedings begin.
- Equipment may not be installed, moved or removed from the courtroom while court is in session.
- Camera operators may not move around the courtroom while court is in session.
- Camera operators are required to wear proper business attire: jacket and tie for men; professional attire for women. (Jeans, tennis shoes and comparable casual garb may not be worn with required attire.)
- Television or still cameras which produce distracting sounds or lights are not permitted in the courtroom while court is in session.
- Reporters may use personal audio recorders in the courtroom, but usage must not be obtrusive or distracting.
- Members of the news media shall refrain from affixing microphones or other recording equipment to the podium in the courtroom. Reporters may obtain an audio recording of Supreme Court proceedings by requesting access to the Court's media monitoring room adjacent to the courtroom (Line out connection).

Arizona Supreme Court Public Information Office
1501 W. Washington, Ste. 411, Phoenix, AZ 85007-3231
(602) 542-9656 * Fax(602) 542-9484

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APPENDIX C

Administrative Rule 16

RULE 16.01 DEFINITIONS

(a) "Judge" means a municipal division judge, associate circuit judge, or circuit judge presiding in a trial court proceeding, or the presiding judge or justice in an appellate proceeding.

(b) "Judicial proceedings" or "proceedings" as referred to in this Administrative Rule No. 16 includes all public trials, hearings, or other proceedings in a trial or appellate court for which media coverage is requested, except for those specifically excluded by this Administrative Rule No. 16.

(c) "Media coordinator" as referred to in this Administrative Rule No. 16 includes the designees of each coordinator.

(d) "Media coverage" includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public or for the purpose of education.

(Aug. 21, 1995.)

RULE 16.02 IN GENERAL

Broadcasting, televising, recording, and photographing will be permitted in the courtroom under the following conditions:

(a) Permission first shall have been expressly granted by the judge, who may prescribe such conditions of coverage as provided for in this Administrative Rule No. 16, including the manner in which objections may be raised under Administrative Rule No. 16.03(c).

(b) Media coverage of a proceeding shall not be permitted if the judge concludes that under the circumstances of the particular proceeding such coverage would materially interfere with the rights of the parties to a fair trial.

(c) Media coverage is prohibited of any court proceeding that, under Missouri law, is required to be held in private. Further, no coverage shall be permitted in any juvenile, adoption, domestic relations, or child custody hearing. Notwithstanding the foregoing, the news media, if permitted by the judge, may record and photograph a juvenile who is being prosecuted as an adult in a criminal proceeding.

(d) Media coverage of prospective jurors, jurors, and jury selection is prohibited.

(e) There shall be no audio pickup or broadcast of conferences in a court proceeding between attorneys and their clients, between co-counsel, between counsel and the judge held at the bench or in chambers, or between judges in an appellate proceeding.

(f) There shall be no focusing on nor photographing of materials on counsel tables; however, the media will be given access during periods of recess to exhibits that have been introduced and received into evidence, absent objection from counsel in the proceedings.

(g) The quantity and types of equipment permitted in the courtroom shall be subject to the discretion of the judge within the guidelines set out in this Administrative Rule No. 16.

(h) Notwithstanding the provisions of any of the guidelines set out in this Administrative Rule No. 16, the judge, upon application of the media coordinator, may permit the use of equipment or techniques at variance therewith if the application for variance is included in the advance notice of coverage. Such variances may be allowed by the judge without advance application or notice if all counsel and parties consent to it. Ruling upon any variance application shall be in the sole discretion of the judge.

(i) If media coverage of a proceeding is granted, members of the media shall not record interviews for broadcast in the hallways immediately adjacent to the entrances to the courtroom. Photographing through the windows or open doors of the courtroom is prohibited.

(j) The judge may, as to any or all media participants, limit or terminate photographic or electronic media coverage at any time during the proceedings if the judge finds:

- (1) that these guidelines or rules imposed by the judge have been violated or
 - (2) that substantial rights of individual participants or rights to a fair trial may be prejudiced by such manner of coverage if it is allowed to continue.
- (k) The privilege of photographic and electronic coverage provided for by this Administrative Rule No. 16 may be exercised only by persons or organizations that are part of the news media or educational television.
- (l) There may be media coverage of investitive or ceremonial proceedings at variance with the provisions of this Administrative Rule No. 16 in the discretion of the presiding judge or judges.
- (m) No media coverage shall be permitted in criminal proceedings until the defendant is represented by counsel or has waived such representation.

(Aug. 21, 1995.)

RULE 16.03 PROCEDURAL

- (a) **Media Coordinator.** Media coordinators shall be appointed by this Court from a list of nominees provided by representatives of the media. The judge and all interested members of the media shall work, whenever possible, with and through the appropriate media coordinator regarding all arrangements for media coverage. This Court shall designate the jurisdiction of each media coordinator. In the event a media coordinator has not been nominated or is not available for a particular proceeding, the judge may appoint an individual from among local working representatives of the media to serve as the coordinator for the proceeding.
- (b) **Advance Notice of Coverage.** All requests by representatives of the news media to use photographic equipment, television cameras, or electronic sound recording equipment in the courtroom shall be made to the media coordinator in writing at least five days in advance of the scheduled proceeding. The media coordinator, in turn, shall give notice in writing of said request to counsel for all parties, parties appearing without counsel, and the judge at least four days in advance of the time the proceeding is scheduled to begin. In addition, the media coordinator shall file a copy of the notice with the clerk of the court in the county in which the proceeding is being held. These times may be extended or reduced by court order. When the proceeding is not scheduled at least five days in advance, however, the media coordinator shall give notice of the request as soon as practicable after the proceeding has been scheduled.
- (c) **Objections.** The judge shall prohibit the video recording, audio recording, and photographing of a participant in a court proceeding if the participant so requests and the participant is a victim of a crime, a police informant, an undercover agent, a relocated witness, or a juvenile. Upon the objection of a party, the objection of a participant, or on the court's own motion, and for good cause shown, the judge may prohibit any or all of the following, the visual identification, video recording, audio recording, or photographing of a participant in a court proceeding or any or all of the participant's testimony. At or before the commencement of the trial, the judge shall direct counsel to inform, and counsel shall inform, any witness that counsel will call that the witness will be subject to video recording, audio recording, and photographing unless the judge finds good cause to prohibit the video recording, audio recording, and photographing of the witness or the witness' testimony.
- (d) **Dissemination of Media Coordinator Information.** This Court shall establish a means by which the name and address of the media coordinators shall be disseminated among the judiciary, court personnel, and media.

(Aug. 21, 1995.)

RULE 16.04 TECHNICAL

- (a) **Equipment Specifications.** Equipment to be used by the media in courtrooms during judicial proceedings must be unobtrusive and must not produce distracting sound. In addition, such equipment must satisfy the following criteria, where applicable:
- (1) **Still Cameras.** Still cameras and lenses must be unobtrusive, without distracting light or sound.
 - (2) **Television Cameras and Related Equipment.** Television cameras are to be electronic and, together with any related equipment to be located in the courtroom, must be unobtrusive in both size and appearance, without distracting sound or light. Television cameras are to be designed or modified so that participants in the judicial proceedings being covered are unable to determine when recording is occurring. No modifications of existing courthouse facilities or systems to effectuate this Administrative Rule No. 16.04(a)(2) shall be required to be made at public expense.

(3) Audio Equipment. Microphones, wiring, and audio recording equipment shall be unobtrusive and shall be of adequate technical quality to prevent interference with the judicial proceeding being covered. Any changes in the existing audio systems must be approved by the judge. Microphones for use of counsel and judges shall be equipped with off/on switches to facilitate compliance with Administrative Rule No. 16.02(e). No modifications of existing courthouse facilities or systems to effectuate this Administrative Rule No. 16.04(a)(3) shall be required to be made at public expense.

(4) Advance Approval. It shall be the duty of media personnel to demonstrate to the judge reasonably in advance of the proceeding that the equipment sought to be utilized meets the criteria set forth in this Administrative Rule No. 16.04. Failure to obtain advance judicial approval for equipment may preclude its use in the proceeding. All media equipment and personnel shall be in place at least fifteen minutes prior to the scheduled time of commencement of the proceeding.

(b) Lighting. Other than light sources already existing in the courtroom, no flashbulbs or other artificial light device of any kind shall be employed in the courtroom. With the concurrence of the judge, however, modifications may be made in light sources existing in the courtroom (e.g., higher wattage light-bulbs), provided such modifications are installed and maintained without public expense.

(c) Equipment and Pooling. The following limitations on the amount of equipment and number of photographic and broadcast media personnel in the courtroom shall apply:

(1) Still Photography. Not more than one still photographer, using not more than two camera bodies and two lenses, shall be permitted in the courtroom during a judicial proceeding at any one time.

(2) Television. Not more than one television camera, operated by not more than one camera person, shall be permitted in the courtroom during a judicial proceeding. Where possible, recording and broadcasting equipment that is not a component part of a television camera shall be located outside of the courtroom.

(3) Audio. Not more than one audio system, which does not produce distracting sound, shall be set up in the courtroom for broadcast coverage of a judicial proceeding. Audio pickup for broadcast coverage shall be accomplished from an existing audio system present in the courtroom, if such pickup would be technically suitable for broadcast. Where possible, electronic audio recording equipment and any operating personnel shall be located outside of the courtroom.

(4) Pooling. Pooling arrangements shall be the sole responsibility of the media coordinator, and the judge shall not be called upon to mediate any dispute as to the appropriate media representatives authorized to cover a particular judicial proceeding. Requests for copies of audio recording, video tape or photographs shall be directed to the pool representative only, who shall supply copies upon request to media representatives at a price not exceeding actual cost.

(d) Location of Equipment and Personnel. Equipment and operating personnel shall be located in, and coverage of the proceedings shall take place from, an area or areas within the courtroom designated by the judge. The area or areas designated shall provide reasonable access to the proceeding to be covered.

(e) Movement During Proceedings. Television cameras and audio equipment may be installed in or removed from the courtroom only when the court is not in session. In addition, such equipment shall at all times be operated from a fixed position. Television tapes, still cameras and film and lenses, and audio cassettes shall not be changed within the courtroom except during a recess. Still photographers and broadcast media personnel shall not move about the courtroom while proceedings are in session, nor shall they engage in any movement that attracts undue attention. Still photographers shall not assume body positions inappropriate for spectators.

(f) Decorum. All still photographers and broadcast media personnel shall be properly attired and shall maintain proper courtroom decorum at all times while covering a judicial proceeding.

(Aug. 21, 1995.)

Administrative Rule 16 - Guidelines

On October 25, 1994, the Supreme Court of Missouri adopted Administrative Rule 16, which provides the terms and conditions under which cameras and other recording devices will be permitted in all Missouri courtrooms. Full text of Administrative Rule 16 is available from the Supreme Court, Office of Communications Counsel. The following general guidelines are offered for the convenience of media coordinators and members of the public. Please direct any questions concerning coverage of a specific judicial proceeding to the court where the case is pending.

Requests for Coverage

To request permission to film, videotape, audiotape or provide still photographic coverage of a judicial proceeding that is not specifically excluded from coverage under the Rule, members of the media must file a written request with the media coordinator appointed for the judicial circuit where the proceeding is pending. All requests for media coverage of a judicial proceeding must be filed at least five working days in advance of the proceeding to be covered.

Media Coordinators

Media coordinators are appointed by the Supreme Court from a list of nominees provided by members of the media or the presiding circuit judge. In the event a media coordinator has not been nominated or is not available for a particular proceeding, the judge may appoint an individual from among local working representatives of the media to serve as a coordinator for a proceeding.

Permission for Coverage

Permission for each news organization or entity requesting coverage must first be expressly granted by a judge who may prescribe the conditions of media coverage.

Media Coverage Prohibited

Media coverage shall not be permitted if the judge concludes that under the circumstances of the particular proceeding coverage would materially interfere with the rights of the parties to a fair trial. Media coverage is prohibited in juvenile, adoption, domestic relations matters or child custody hearings.

Restrictions on Media Coverage

Media coverage of jury panels, jurors, prospective jurors and jury selection is prohibited. No media coverage shall be permitted in criminal proceedings until the defendant is represented by counsel or has waived legal representation.

Equipment in the Courtroom

Only one news media television camera and one still camera, each mounted on a tripod with a single camera operator will be permitted in a courtroom while court is in session. Cameras must be placed in locations designated by the court. No auxiliary lighting, including flash bulbs, strobe lights and reflectors may be brought into a courtroom by members of the media. A judge, upon application from a media coordinator, may permit variances from the equipment requirements under the Rule.

Pooling Arrangements

Pooling arrangements are the sole responsibility of the media coordinator. The media should direct requests for copies of audio recordings, video tape or photographs to the pool representative who shall supply copies upon request to the media representative at a price not exceeding actual cost.

Media Coverage

Equipment and camera operators should be ready to record at least one hour before court proceedings begin. Members of the media may not install, move or remove equipment from the courtroom while the court is in session.

Courtroom Decorum

Members of the media, including camera operators and still photographers are, at all times, required to wear proper business attire in the courtroom.

APPENDIX D

Appendix

Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom

(Approved by the Judicial Conference of the United States, September 1990.
Revised June 1991.)

1. General Provisions.

(a) Media coverage of federal court proceedings under the pilot program on cameras in the courtroom is permissible only in accordance with these guidelines.

(b) Reasonable advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. In the absence of such notice, the presiding judicial officer may refuse to permit media coverage.

(c) A presiding judicial officer may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

(d) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(e) Nothing in these guidelines shall prevent a court from placing additional restrictions, or prohibiting altogether, photographing, recording, or broadcasting in designated areas of the courthouse.

(f) These guidelines take effect July 1, 1991, and expire June 30, 1994.

2. Limitations.

(a) Coverage of criminal proceedings, both at the trial and appellate levels, is prohibited.

(b) There shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judicial officer, whether held in the courtroom or in chambers.

(c) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted. Coverage of the prospective jury during voir dire is also prohibited.

3. Equipment and Personnel.

(a) Not more than one television camera, operated by not more than one camera person and one stationary sound operator, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each and one stationary sound person, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than one camera and related equipment, shall be permitted in any proceeding in a trial or appellate court.

(c) If two or more media representatives apply to cover a proceeding, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. The presiding judicial officer may not be called upon to mediate or resolve any dispute as to such arrangements.

(d) Equipment or clothing shall not bear the insignia or marking of a media agency. Camera operators shall wear appropriate business attire.

4. Sound and Light Criteria.

(a) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(b) Except as otherwise approved by the presiding judicial officer, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judicial officer.

5. Location of Equipment and Personnel.

(a) The presiding judicial officer shall designate the location in the courtroom for the camera equipment and operators.

(b) During the proceedings, operating personnel shall not move about nor shall there be placement, movement, or removal of equipment, or the changing of film, film magazines, or lenses. All such activities shall take place each day before the proceeding begins, after it ends, or during a recess.

6. Compliance.

Any media representative who fails to comply with these guidelines shall be subject to appropriate sanction, as determined by the presiding judicial officer.

7. Review.

It is not intended that a grant or denial of media coverage be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

Guidelines Addendum:

The Judicial Conference Committee on Court Administration and Case Management made a number of recommendations in a June 1991 report to the Judicial Conference Executive Committee. The recommendations, subsequently approved, include:

(1) That the Executive Committee endorse the [CACM] Committee's interpretation that the ban on the changing of film included in guideline 5(b), does not include the changing of video cassettes.

(2) That the Executive Committee approve an expansion of the experiment to permit the Southern District of New York to allow the use of two cameras during court proceedings.

(3) That the Executive Committee direct the Committee on Court Administration and Case Management to notify courts that strict adherence to the guidelines approved by the Conference is a condition for participation as a pilot.

APPENDIX E

**COMMISSION OF INQUIRY INTO CRICKET MATCH
FIXING AND RELATED MATTERS**

HELD ON 7 JUNE 2000

AT

THE CENTRE OF THE BOOK

COMMISSIONER: THE HONOURABLE JUSTICE KING

VERITAS TRANSCRIPTION SERVICES (PTY) LTD

**COMMISSION OF INQUIRY INTO CRICKET MATCH FIXING AND
RELATED MATTERS**

HELD ON: 07-06-2000

AT THE CENTRE OF THE BOOK

OPENING ADDRESS BY COMMISSIONER: Good morning. I would like to welcome you all to what has become known, for some or other reason, as the King Commission. I suppose if it had been held in England it would have been called a Royal Commission, but this is as close as we can get. 10

A particular welcome to two Ministers of the Cabinet who have graced us with their presence. They are the two concerned Ministers, the Minister for Sport and Recreation, Mr Ngconde Balfour and the Minister for Justice and Constitutional Development, Dr Penuell Maduna.

Additionally, we welcome the National Director of Public Prosecutions, Mr Bulelani Ngcuka and also I believe they are here, to the Portfolio Committee on Sport and Recreation of the National Assembly and the Standing Committee concerned with the same portfolio, of the 20 National Council of the Provinces. The Commission, as you know, has been ordered by the President, Honourable Thabo Mbeki and certain terms of reference have been stipulated which govern the functioning of this Commission.

Very briefly, for those of you who may not be totally conversant with what this Commission is about, let me paraphrase for you the first three terms of reference which are those which require the Commission's immediate attention.

The first concerns the disclosures made by Mr Hansie 30

Cronje, relating to a payment of some several thousand American dollars which he admittedly received, I think I can say, earlier this year during the course of the triangular cricket tournament between South Africa, England and Zimbabwe.

The second subject is whether during the period 1 November 1999 to the 17th of April 2000, apart from what I had just mentioned, any member of the South African cricket team or team official, received or was promised payment of any amount of money or any other benefit in relation to his functions as a member of the South African cricket team or as a team official. Then following upon that, certain more specific avenues of enquiry. 10

The 1st of November of last year coincides with the commencement of the England tour to this country and the 17th of April is the date of the termination of the South African leg of the South Africa/Australia one day international series.

The third issue involves the question as to whether a proposal was made to the South African cricket team during its tour to India in 1996, that it forfeit or otherwise influence the result of a cricket match and thereupon, or thereafter, certain more detailed questions. 20

The Commission is under something of a time constraint in that in terms of the reference, I am required to produce an interim report by not later than the 30th of this month. May I say in that context that lest it be thought that the proceedings to date have been unduly delayed, that has not been the case. A very great amount of preliminary and preparatory work has been done, notably by the members of 30

the Commission's staff.

The investigation is a continuing process, and it will in fact continue during the hearings of the Commission.

Now, the sittings will be in public, unless in my discretion and if I consider it necessary or desirable, that any portion of the sitting, the evidence of any particular person, should be held in camera, in other words with the exclusion of all those other than the legal representatives, I am empowered in terms of the Commissions Act to make a direction accordingly. I do not see that as happening frequently, if at all. I shall certainly ensure that as far as possible, the proceedings will be held in public. 10

The language of record of the Commission, will be English, but if there is any witness who feels more at home in one other language, either an official language of the country or, although this is unlikely, a foreign language, that person or his legal representative should make that known to the Secretary of the Commission, Mr John Bacon, and arrangements will be made for an interpreter.

I think it is necessary that I should emphasise that this is **not** a court of law, more particularly it is **not** a criminal prosecution. It is a Commission of Inquiry with a two-fold purpose 20

- first of all to ascertain whether and to what extent there has been malpractice involving members or officials of our cricket team, our national side and,

- secondly, having made those factual findings, and insofar as may be necessary, to make suggestions and recommendations so as to ensure that there is not a repetition of whatever it is that has occurred, or any other 30

form of malpractice.

The procedure will, despite the fact that I have made it clear that this is not a court of law, will follow very much the lines of court proceedings. There will be examination of witnesses by their legal representatives and if a particular witness is not legally represented, that witness will be led by the Leader of Evidence, Adv Shamila Botohi from the Staff of the Director of Public Prosecutions in Durban.

Witnesses will be here under subpoena, that does not mean that they come reluctantly and in fact, I had earlier on when this Commission was announced, indicated that I would use the power of subpoena sparingly, but on reflection it occurred to me that for the sake of good order, all those whom the Commission would wish to hear in oral evidence, should be subpoenaed. So do not draw any wrong conclusions from the fact that that has occurred. 10

It does also mean that witnesses, persons who have been subpoenaed, are obliged to attend these proceedings, not all of them have to be here all the time, arrangements will be made with their legal representatives to ensure as far as possible, that they are little inconvenienced. 20

They have certain rights, certain privileges attached to the giving of testimony, I am not going to go through all of those, they would have been told that by their lawyers. I need to stress what one might describe as the negative aspect of giving evidence before this Commission, because in terms of Section 6 of the Commissions Act, 8 of 1947, again I paraphrase - anyone who refuses to be sworn or to make affirmation, to give evidence, or anyone who having been 30

sworn or having made an affirmation, fails to answer fully and satisfactorily any question lawfully put to him, and I emphasise **lawfully**, or fails to produce any book, document or object in his possession or custody or under his control, which he has been summoned to produce, can be found guilty of an offence under the Commissions Act and liable to a fine or to imprisonment or to both.

I don't see that happening, I don't see the necessity arising and I sincerely hope it won't, but it is as well to bear that in mind.

10

Now members of the public and I hope that by the public this will be taken further than beyond, and beyond the confines of this hall, who feel that they have anything relevant which they could usefully contribute to the Commission, are invited to make contact with Mr Bacon, who is as I have said, the Secretary to the Commission, on his cellular number, 082 9288 687. There is also a possibility of what I believe is known as a "hotline" being established in terms of which that sort of information can be conveyed, not desirably but if necessary, under the cover of anonymity. Details of that, if indeed the arrangement is made, will be furnished in due course.

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Now there are a few no-no's - no smoking please in this hall, either during the sittings or at any other time; no cellular phones while the Commission is in session, either calls to be made or received; no TV cameras or still cameras to be used whilst the Commission is in sitting and no recording devices are to be used. This is all in the interest of the smooth operation of this Commission. Those are my decisions at this stage, they are open to amendment.

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If I can be persuaded that it will not be deleterious to the sitting of the Commission, that one or other of those particular injunctions should be altered or watered down.

Finally, may I say this, there appears from what I have been reading in the newspapers and hearing in the audio media, there appears to be a perception that this Commission should somehow or other be used or regarded as an instrument of revenge, a vehicle for some sort of witch-hunt. This is quite emphatically not so. I am going to be conducting an inquiry with the purpose as I have indicated of, in the first instance, ascertaining the truth. Any legitimate steps that may be taken which will assist in that objective, will carry my concurrence and my support. 10

Having said that, I am going to take what I trust will be a relatively short adjournment which will enable the gentlemen operating the TV cameras to pack them up and we will recommence as soon as we are ready. I anticipate it could take perhaps at the outside, half an hour.

The Commission will now adjourn.

COMMISSION ADJOURNS

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ON RESUMPTION AT 11H15

COMMISSIONER: I appreciate your courtesy in rising when I come in, but it won't be necessary in future, thank you. Mr Marcus?

MR MARCUS: Justice King, thank you. Justice King, yes, I am here on behalf of e.tv and I wish to address to you very briefly an application, the purpose of which is to obtain permission for e.tv and I should emphasise other television broadcasters to broadcast the proceedings of this Commission either live or by way of a delayed broadcast, much in the 30

same way as the proceedings of the Truth Commission and the Human Rights Commission have in the past been broadcast.

For purposes of this application, we have prepared an affidavit which is before you, which sets out the nature of e.tv's interest in broadcasting these proceedings. I would not wish to unnecessarily delay this application, save to highlight certain aspects of this affidavit if I may, and in particular, if I could refer to paragraph 11, in which really the gist of e.tv's interest in the matter is set out. There it is stated -

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"Insofar as the applicant's obligations as a broadcaster are concerned, the applicant is bound by its conditions of licence and its general obligations as a broadcaster.

The applicant is the holder of a private free-to-air television broadcast licence and broadcasts under the name and style of e.tv. The applicant broadcasts on a daily basis, not only a number of news bulletins, but various actuality and current affairs programmes, which are of public interest. Pursuant to its conditions of licence and its general obligations as a broadcaster, the applicant is required to present news of public interest."

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I respectfully submit, says Mr Patel -

"That the proceedings presently under consideration manifestly fall within the mandate of the type of facts and information which would ordinarily be carried by the applicant, and which the public at large have a right to receive.."

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Moreover says Mr Patel,

"I submit that given the nature of the current proceedings there is a larger than usual interest by members of the public in obtaining precise and accurate information from the proceedings, rather than secondary reporting such as that which would appear should the applicant be denied to broadcast the proceedings on its television station."

I make this submission not simply in terms of the general mandate of the applicant, pursuant to its conditions of licence, but also specifically in terms of the rights conferred on the applicant, and members of the public in terms of Section 16 of the Constitution. 10

I will make certain brief submissions in that regard in a moment. May I also highlight paragraph 16 of the affidavit, in which Mr Patel says the following -

"I respectfully submit that the nature of modern communications is such that the public are dependant upon the media for access to important information. This is preeminently the case when it comes to the reporting on proceedings such as those in question, because few members of the public are able to be physically present during these proceedings. Given the vast publicity which this matter has attracted, the need to ensure that all members of the public have access to the proceedings, via television broadcast, is crucial. The parties in the position of the applicant fulfil a vital function in the public interest, they are in a real sense the ears and eyes of the 20 30

public, without which the public generally would be ignorant of what takes place in courts of law and other tribunals such as this Commission."

Justice King, as is indicated, the application which we address to you is based fundamentally on the guarantee of freedom of expression enshrined in Section 16 of the Constitution and we submit that the terms of that guarantee, the specific wording are significant, because it states among other things that "everyone has the right to freedom of expression, which includes freedom of the press and other media" and most significantly, "freedom to receive or impart information or ideas". 10

It scarcely needs to be emphasised that courts throughout the world, and including the Constitutional Court, have recognised that freedom of expression is integral to democracy itself.

Justice King, as you pointed out in your opening remarks, your powers derive among other things from the Commissions Act, Section 4 of which requires that the evidence and addresses be heard in public. This is of course coupled with a discretion to which you have referred, to exclude individuals or classes of persons, whose presence is not necessary or desirable, but we would emphasise that the starting point is one of openness, and the application we direct to you, is designed to facilitate openness in the context of the technology that is available to us in the 21st century. 20

We would submit to you that when interpreting your powers and in exercising such discretion as you do enjoy, that that discretion must give full effect to the guarantee 30

of freedom of expression enshrined in the Constitution.

I would wish, only with your leave, to refer to one authority which I emphasise at the outset, I do by way of analogy, because I appreciate that what was at stake in the case to which I refer, was different. The authority to which I refer is a judgment of the Witwatersrand Local Division, of Justice Ackerman, in a case called S v Lephele, and it is reported in 1986 (3) SALR 661. There His Lordship Mr Justice Ackerman was considering an application by the Prosecution to exclude members of the press and the public from a criminal trial during the course of a particular witness, but in the course of the judgment Justice Ackerman referred extensively to the leading decision of the United States Supreme Court on open justice, and that is the case of Richmond Newspapers v Virginia, and the passage to which I would wish to refer you is from the United States Supreme Court. There in the leading opinion of Chief Justice Berger, the following was stated, and he is addressing the concept of open justice. He said the following:

"The early history of open trials in part reflects the widespread acknowledgement long before there were behavioural scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sense from experience and observation that especially in the administration of criminal justice, the means used to achieve justice, must have the support derived from the public acceptance of both the process and its results. When a shocking crime occurs, a

community's reaction of outrage and public protest often follows."

The United States Supreme Court went on to say -

"A result considered untoward may undermine public confidence and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed, and at worst, has been corrupted. To work effectively it is important that society's criminal processes satisfy the appearance of justice. The appearance of justice can best be provided by allowing people to observe it." 10

Chief Justice Berger goes on to say -

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case. Instead of acquiring information about trials by first hand observation, or by word of mouth from those who attend it, people now acquire it chiefly through the print and electronic media. In a sense this validates the media's claim of functioning as surrogates of the public, while media representatives enjoy the same right of access as the public they often are provided special seating and priority of entry so that they may report what people in attendance have seen and 20 30

heard. This contributes to public understanding of the rule of law, and to comprehension of the functioning of the entire criminal justice system."

Finally Justice King, it was stated -

"Public access is essential therefore if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."

Those sentiments have been followed by other South African courts and I would submit to you, are entirely consonant with the demands of the Constitution. I readily accept and appreciate that we are not concerned, as you have been at pains to emphasise, with a criminal trial, but we are concerned with an inquiry of an enormous public interest. 10

We would submit that the benefits of the kind of television coverage which we have in mind, are three-fold.

First, it would significantly expand public access to these proceedings in a manner which enhances the quality of that access, and by that I mean it would provide accurate and immediate accessibility to these proceedings; 20

secondly it would have a far wider reach. It would reach an audience that might otherwise have little prospect of informing themselves of an event of undoubted significance. It can be accepted, we would submit, that a substantial portion of the South African public acquire their news primarily from television, and this is at least in part a product of the nature of our particular society.

The third advantage we would submit is that it would 30

enhance the status and credibility of the process itself, which it scarcely needs emphasising, is being watched with an intensity the world over. It would engender, we submit, a confidence that the issues which have touched our nation, are being scrupulously investigated.

Having said that, Justice King, we recognise that there are also potential countervailing interests, and let me address those briefly.

It may well be that certain witnesses might feel intimidated by the presence of cameras, or for some other reason, would be reluctant to testify if they knew that their testimony was being filmed. It is also possible that participants in the process may be unable to resist the temptation to play up to the cameras. Those are real fears and they are fears which we do not discount. There may well be practical questions which might trouble you, for example the number of television cameras and the potential disruptive impact that that may have on these proceedings. 10

I am authorised to convey to you that my client has undertaken to make available to any other television broadcaster its facilities, so that the result would be merely the presence of possibly two cameras, by e.tv and any other television broadcaster which is interested in carrying the broadcast, would work off e.tv's feed, so that would obviate any potential disruption of these proceedings. 20

What we seek therefore, Justice King, is permission, unobtrusively and subject to your overriding discretion in any particular individual instance or class of cases, to broadcast these proceedings, either live or by delayed transmission, and subject to any reasonable condition that 30

you may consider ought to be imposed.

COMMISSIONER: Can you give me some idea of what you would regard as a reasonable condition to be imposed?

MR MARCUS: The kind of conditions that I have in mind, would for example relate to the positioning of the cameras, might also relate for example to the extent to which the cameras are required to be in a fixed or rigid position, or the extent to which they may rove and any other condition, for example relating to lighting, sound equipment, anything of that sort, which might in any way be considered to hinder either the witness or the Commission itself. 10

COMMISSIONER: Intending taking technical considerations, is what you are suggesting?

MR MARCUS: Yes.

COMMISSIONER: Could be ameliorated ...

MR MARCUS: Yes, those are the problems that can and would be ameliorated subject to any direction from yourself.

COMMISSIONER: Thank you Mr Marcus. We will start at this side of the table, Mr Dickerson, first of all I think for the record, would you indicate who your team is, and who your client is? 20

MR DICKERSON: Mr Chairman, I represent Hansie Cronje and I am together with Mr Sackstein, my Instructing Attorney from Israel, Sackstein, and Mr Druker from KG Druker.

As far as the present application is concerned, our stance is that we are opposed to the introduction of live visual media during the hearings. We believe that it would place an unnecessary and undesirable strain on the participants in these proceedings. The pressures which have already been brought to bear upon certain of the 30

participants, my client, other players, administrators, has been enormous and the introduction of live media during proceedings, will only exacerbate that.

The principles of freedom of speech are not, in our view, in any way infringed by the exclusion of the visual media. e.tv has till now without inhibition expressed its views on the subject matter of this Commission and it will doubtless continue to do so. There is a running transcript of these proceedings, which we understand will be made available shortly after evidence is given by any particular witness. That will be available to the printed media, to the visual media and any other interested parties. 10

On that basis, there can be no complaint that e.tv is confined to second-hand reporting. They will have the actual evidence and the transcript. It was suggested that the crux of e.tv's interest in this matter was expressed in paragraph 11 of the affidavit. Perhaps a more relevant and immediate concern appears in paragraph 7.2, where no doubt urged by the precepts of freedom of speech, we are told that e.tv immediately set about selling advertising time. 20

There are other media interests in these proceedings, presumably who also have commercial interests and we don't see why in principle one should be advantaged above another.

Furthermore, we suggest that the interests of this Commission would not be advanced or furthered by allowing the media to be present, live media. To do so would make many of the witnesses and other participants unwilling participants in a television drama to be played out throughout their homes, the country and abroad in circumstances where we have little doubt that they would not 30

choose to be in that position.

That has a number of ramifications, not the least of which is the obvious reluctance on the part of those individuals to testify or to testify freely. We believe that the object of the inquiry, which after all is to investigate the matters raised in frames of reference, would best be furthered by a comfortable and relaxed environment, which obviously is going to be reported on, but not at the sort of level which involves the intrusion of cameras. And lastly, we have all seen and experienced the problems that arise with trial by television, nobody needs to be reminded of the O.J. Simpson fiasco and we would suggest that that should be avoided here at all costs. 10

I have nothing further to add, thank you.

COMMISSIONER: Thank you Mr Dickerson. Mr Gishen, before I call on you, I have received a note to say that a Mr Paul Cainer of Live Africa, wishes to address the inquiry, really in the same manner as Mr Marcus has advanced the case for e.tv. Is Mr Cainer here? Are you a lawyer, Mr Cainer?

Are you a representative of the company? Alright. Now you have heard what Mr Marcus has had to say, Mr Cainer, you don't need to repeat Mr Marcus' argument, if you wish to add to it, you are welcome to do so. 20

MR CAINER ADDRESSES: Thank you. Your Honour, our case is in relation to another form of media, which is radio, but we believe that this radio request would actually meet many of the desires and interests of television as well.

We are the largest provider of radio news to the independent radio sector in South Africa, we would also be willing in a pool basis, to provide the facility for the 30

court's proceedings to be transmitted to the public via audio as opposed to television.

Our view is that there is a right for the public to have access to what is actually being said. It is not in our view necessary for the actual picture though, of the individual who is appearing to be shown to the wider public. The key issue is what the person has to say. There are two means of transmitting this, one would be in text form which is what you are allowing, and the other would be in audio form, the actual words of the participant as heard by yourself, and we believe that modern media is such that at least half of the public's access to the media is through audio or televisual film, in other words electronic form, and therefore to privilege one section of the media, that is the print media over other parts of the media, is unequal in terms of the Constitution, and in terms of general principle. 10

Where the opportunity exists as it now does, to convey what is actually said by the individuals, to the public, by means of audio, we believe it must be done. The other advantage of this is that there is no need for any operator to be seen in your courtroom, in your hearing room. The microphones can be wired in such a way that just as you can see the microphone cables now, they would lead outside to a room beyond your purview and these will then be put into a mixing desk and any electronic media who wishes to access this audio, would plug their own machines into that, and take that down to their studio. 20

You could, as my learned colleague here said, you could decide in your own judgment, that this should not be done 30

live, it should be done in delayed form, or as part of normal news broadcasts, these are restrictions which you might decide to impose in the interest of fair running of the proceedings. We would not object to that. We do not claim that it has to run live, otherwise it would be an unfair abuse of the system, we think that is within your discretion. You should decide Sir whether this should be done live or not, but what we think is uncontestable is that the public has the right to hear the words of the individuals in their own voice, and we think that this would also be a very fair compromise for television, because they could use those same audio clips in their news bulletins with a still photograph of the individual concerned. You won't see the lips moving, but you will certainly hear what they had to say and that would certainly meet the equal treatment of the media to which we have referred. 10

Thank you Sir.

COMMISSIONER: May I just ask you. I am not altogether au fait with the procedures that you have outlined. What is the difference between the process being done on a live basis and that being done on a delayed basis, could you just shortly tell me please? 20

MR CAINER: Certainly we can, Judge. Some feed would come from that little box, could be sent by a system called ISDM, and CODEC, straight to the studios of the radio stations and television stations concerned, and they would be broadcasting those words as they happen. That is technically feasible and not difficult to achieve. But you could make a ruling Sir that this is not conducive to justice and that the proceedings should be delayed, and that 30

only a certain amount can be broadcast in this way or you could say that they should only be able to use their normal news broadcasts, perhaps hourly bulletins or nightly news bulletins, to carry this audio.

I think it will be fair for you to make any such ruling, although I would of course prefer that they would be allowed to be carried live.

COMMISSIONER: Thank you. Mr Dickerson, do you, are you able to express a view on this new suggestion, would you like to think about it?

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MR DICKERSON: Mr Chairman, I think that is quite a compelling case for not allowing television in. As far as the introduction of recordings are concerned, the recordings are already being made and they are going to be transcribed. There doesn't seem to be any need to actually duplicate that process.

I might also add that the recording made by the Commission and the transcription will not be edited, which inevitably involves a sort of selection process on the part of the media person concerned, which as we all know, can result in a fairly substantial and selective distortion of what has actually been said or done.

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COMMISSIONER: Mr Gishen, would you tell me who you are appearing for?

MR GISKEN: Mr Chairman, I, together with my colleague, Mr Auswan, represents Mr Crookes and Mr Cullinan. We concur entirely with what Mr Dickerson has put before you, Mr Chairman. I don't think I have much to add in that regard, thank you.

COMMISSIONER: So specifically Mr Crookes and Mr Cullinan

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would prefer not to be televised?

MR GISKEN: Exactly.

COMMISSIONER: And what about Mr Cainer's proposal?

MR GISKEN: I think the same applies.

COMMISSIONER: Mr Fitzgerald, would you also please announce yourself and your team?

MR FITZGERALD: Mr Commissioner, I appear for a total of 37 present and former players. For your convenience I prepared a list of my clients, which perhaps I should hand up to you. Mr Commissioner, for the record, I am instructed by Mr Peter Wheelan of Findlay & Tait. 10

COMMISSIONER: Would you like to address me?

MR FITZGERALD: Our clients similarly oppose the application, both in regard to TV coverage and radio coverage. It has been interesting both Mr Cainer and Mr Marcus have emphasised the Constitutional rights of their clients, our clients similarly have Constitutional rights. Giving evidence at the best of times is a daunting experience and in our submission, it places unnecessary pressure upon our clients if everything that is here to take place, is recorded either by means of television or by means of radio. 20

COMMISSIONER: What particular aspect of the Constitution are you referring to, is it to privacy or ...

MR FITZGERALD: There is a right to privacy and that inter alia I would have regard to. Even the Constitutional rights contended for by Mr Marcus are subject to limitation, it is a weighing-up process and in our submission, the balance should fall in favour of the privacy, rights to privacy, inter alia of our clients, they are in fact the ones that 30

are testifying and it seems to me, with respect, to be unfair that they should be exposed to additional pressures.

The media is in any event here, there is a verbatim record of the proceedings, and it is with respect unnecessary that one should go beyond that. We would therefore urge you in the exercise of your discretion, not to grant the application.

COMMISSIONER: In terms of the relevant Section of the Commissions Act, I must be guided by whether what is sought is either necessary or desirable. So if one of those is not applicable, then I think my discretion must be exercised against the application, you are saying it is unnecessary?

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MR FITZGERALD: And in fact undesirable in the circumstances.

COMMISSIONER: For the reasons ...

MR FITZGERALD: For the reasons that I have submitted. Section 6 of the Commissions Act, does provide, as Mr Marcus pointed out, that the public should have access to the proceedings, our submission is that the access that they have is more than sufficient in the circumstances. Thank you Mr Commissioner.

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COMMISSIONER: Could you first of all announce your team and who you are representing?

MR MANCA ADDRESSES: Yes, Mr Commissioner, I represent the United Cricket Board of South Africa. As you are aware, I appear together with my learned Senior, Mr Jeremy Gauntlett, who unfortunately is not able to attend this morning. I am here on instructions of Alex Abercrombie of Hofmeyr Herbsteins and Ginwalha Inc. Mr Commissioner, the UCB supports an open and transparent inquiry. The manner in which the proceedings are to be conducted is however a

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matter entirely in your discretion and in the circumstances we leave this decision with respect, in your hands and we abide the decision. Thank you.

COMMISSIONER: Thank you. Mr Cainer I will hear you first in reply, I think, just on that ...

MR CAINER: Thank you Mr Commissioner.

COMMISSIONER: Sorry, just a moment. Forgive me Ms Batohi, I neglected to call upon you to express your views.

MS BATOHI: I suppose being the only lady here, I am easily overlooked.

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Mr Commissioner, I agree with all my colleagues that have expressed their opposition to this application. I don't think it is in the interest of this Commission of Inquiry to have TV cameras or a radio transmission. My learned friends have referred to the Constitution and the rights, etc. I am sure everybody knows no right is absolute, there are limitations and in this regard, I submit that this application ought to be refused in the interest of the inquiry, all witnesses should feel absolutely at ease and not feel restrained in any way by the presence of either radio or TV.

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COMMISSIONER: I suppose really one has to balance on the one hand what I think is undoubtedly so as Mr Marcus has submitted, and that is that it will reach a wider audience if - and Mr Cainer makes the same point - if their particular form of media is allowed. But on the other hand it is quite apparent from the submissions by yourself and your colleagues for the individuals represented, that it could have a seriously adverse effect on the freedom with which they feel able to give their evidence in what will in

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any event, undoubtedly be quite a formidable experience.
Yes?

MR CAINER: Thank you Mr Commissioner. You rightly pointed out Sir, that the Act makes it necessary for us to show you that it is both necessary and desirable for the proceedings to be carried in the way that we are proposing. Obviously I differ from my colleague from E.TV as to the necessity of visual moving pictures, but I do not differ from him at all in the argument that the public's access to the media is in both print form and electronic form, and in fact it is known, we can show you studies, that the majority of the public intake of information these days, and there are many surveys to prove this, the majority of the public in this country and abroad, but particularly in this country, the majority of the public receive their primary source of information, is the electronic media and in particular radio, which has a higher listenership than television. But we are not going to debate the merits of the two. The fact is that it is old-fashioned, antiquated and wrong to believe that simply by allowing the words that people say in a hearing like this, to be printed at a later stage, that this is sufficient public access.

It is a very strong case for arguing that at least the audio part of what people say, must be carried. Secondly, transcripts have been referred to as being recorded and then being handed out later. This we all know, and you know Sir, from your many years of experience on the bench, takes time, and considerable time. The public have the right to know as things happen and not weeks later.

Secondly the transcripts in previous occasions, have

not been accompanied by an audio transcript, they have been written transcripts, so that argument does not hold any water.

COMMISSIONER: May I just interrupt you.

MR CAINER: Yes.

COMMISSIONER: Of course what I think could be arranged without any great difficulty, is for both your client, your company and Mr Marcus' client, to be represented by a media journalist representative who would take the notes that his or her colleagues are obviously busy taking and they would have access to their particular public in that way and it would be contemporaneous. 10

MR CAINER: May I come back on that Sir? Sir, with respect, not the primary way in which both television and radio are set up. Of course we may take text and report on it, and that is done, but the whole raison d'etre of radio and television is to convey what is happening in the world, through the actual words and the actual pictures in their case, of what goes on.

It would be like taking a Rolls Royce and expecting it to run like a Volkswagen. It has to be run, television has to be run through the use of the words Sir, of the people involved. To limit them to simply getting a text transcript and reading it out to their viewers or listeners, is in my view, completely unacceptable. 20

The second point, the press, I think it was the lawyer for Mr Crookes, said that the press tends to select and distort, or that television or radio, if we took extracts as opposed to doing the entire trial, would select or distort. This is exactly the same argument as a newspaper. Any news- 30

gathering operation, and I am the Head of a large one, has to select in the public interest, it is our job, it is in our fact our Constitutional role, to take a huge amount of information, distil it, provide it to the public in forms which they can digest and to suggest that just because we cannot carry the entire transcript, every word, that by taking aspects of it, we are selecting or distorting any differently to what the print media does, is absolutely ludicrous Sir. It is in fact much more likely that the public will get what is actually said, if they hear the exact words. 10

It is so self-evident that I don't think I need to go on, on that.

Secondly, sorry thirdly, the case was made by the lawyer representing Mr Cronje, that I had actually made a good case against television, that was the opening remark by the lawyer for Mr Cronje. This is not my intention Sir, I actually in a sense, speaking on behalf of both types of media. I was only saying that the actual visual image conveyed by setting up two cameras, which could be seen to be distorting or intimidatory, is not necessary because the lack of intimidation of wires that just lead out of the courtroom to a back room, can actually meet the needs of television as well. I am saying that television is not indispensable, television does have the right to convey what is going on here by electronic means. I was just suggesting an alternative way that it could be handled in a less intrusive way. I do accept that we don't want an O.J. Simpson style of hearing. 20

What we are proposing is exactly the opposite, it is 30

dignified, it allows media access, the electronic media access without distorting or intimidating the witnesses. I am therefore at a total loss to understand how lawyers representing the players could argue that having microphones, is going to intimidate witnesses. They are already speaking into microphones. Therefore the only argument they could possibly have would be perhaps that be hearing their voices on the radio, this will somehow produce an intimidatory effect. I cannot see how hearing their voices on the radio or seeing a still picture and hearing their voices on television, how this would produce an intimidatory effect on these gentlemen, especially Sir, when these gentlemen are public figures. 10

These people are paid considerable salaries to play a game of cricket on a field, to which the public is admitted by payment. The public has the right to know whether the money that they have been paying to go and watch these people play and earn large salaries, has been earned by fair competition or by some pre-arrangement which in a sense is what you Sir, are trying to find out. The public has a perfect right to know this and to know it in the best means, electronic or otherwise, available to it. 20

It is a public game, the public have the right to know what they have been getting.

COMMISSIONER: Of course they will know in due course when I produce my report.

MR CAINER: Yes Sir, but the point made by the UCB that they would like the hearings to be transparent and open and your own remarks this morning, that you want this hearing to be available instantly and immediately, you want it to be 30

available to the public, and the Minister of Justice's comment on that point when he gave a press conference at the UCB's Headquarters and the Minister of Sport's comments to exactly the same effect, have all been geared to the understanding that there is a relevance and a need for the public to know now and not when your report comes out Sir. If the public have the right to know now, they have the right to know by both print methods and electronic methods, which are both integral parts of the means of freedom of information in this country, Sir.

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MR MARCUS: Thank you. Having heard my colleagues ranged on that side, it might be said to use a metaphor which will no doubt become current, that the odds are stacked against me, save for the UCB, that is.

It seems as if the opposition might be distilled down to the following.

The first is that there are alternatives to the kind of broadcasting for which we urge, that is of course correct. There are alternatives and they have been canvassed, but they are alternatives which are not of the sort which are conducive to this particular medium. The very medium with which we are concerned here, television, is a visual medium. We are seeking to present this inquiry through that medium, in the best means possible.

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It has been suggested that we do not want this inquiry to generate into a trial by television, and the notorious example of the O.J. Simpson trial has been mentioned. It would be quite wrong, in our respectful submission, to elevate perhaps the most notorious example as being the norm, and there is no reason to assume whatsoever that the

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kind of antics which were seen in that particular trial, will be repeated before this inquiry.

Then it is said that there is the risk of distortion by means of selected editing. That is a bad argument to make precisely because the possibility of a live broadcast is the most effective means of obviating the need for any editing whatsoever. It is an argument indeed in favour of broadcasting, whether by radio or by television.

COMMISSIONER: But it can still be edited?

MR MARCUS: It can still be edited, and when it is edited, then television, radio and the print media are all in the identical situation, the risk of distortion is neither greater nor reduced, regardless of the medium concerned. 10

My learned friend, Mr Fitzgerald, rightly points to the fact that his clients also have Constitutional rights, nothing I have suggested, would wish to detract from that proposition, but it is a fallacy to assume in our submission that what we are dealing with here are rights which are in conflict with each other.

This is an open inquiry and the real question is how best will the requirement of openness and transparency be served and we would submit for the argument that I have already presented, that the kind of broadcast, the unobtrusive broadcast which we have in mind, at most would entail a minor deviation from the recognised and indeed centuries old principle of openness. 20

It is absolutely correct, Justice King as you have pointed out, that you have a discretion in this regard, but it is a discretion which we would submit, which must be exercised, having regard to the demands of the Constitution. 30

Indeed Section 39(2) of the Constitution enjoins every Court and every Tribunal and this is a Tribunal, to interpret any statute and that would include the Commissions Act in a manner that promotes, that is the word used, that promotes the spirit, purport and the objects of the Constitution.

We would submit that there is really little to be said for a blanket form of opposition. We accept that in individual cases there may well be arguments which justify a curtailment of the rights to broadcast which we propose, but to cast it in blanket terms, we would submit is wrong. 10

In conclusion we would simply say this, it is possible that during the course of these proceedings, and we don't know how long they will take, but it is conceivable that the situation might change and if it does, we would obviously wish to have the ability to approach you afresh, should the need and the occasion arise.

COMMISSIONER: Mr Marcus, I was going to say just before you sit down, but of course you are seated, if as Mr Fitzgerald for argument's sake, has indicated, he has handed me a list of 37 clients and if he tells me that, as I have 20 no doubt is the case, this has been anticipated, that he has instructions from his clients, that they will feel adversely affected by the presence of the TV cameras and or the form of production that Mr Cainer has in mind, I cannot easily go beyond that.

MR MARCUS: I don't wish to be understood as for one moment suggesting that the genuine concerns of Mr Fitzgerald's clients or anybody else here, should be lightly dismissed, but we would submit with respect that the position of the witnesses here needs to be really considered much in the 30

same way as witnesses in any court proceedings are considered. Presumably, and I speculate here, if asked the vast majority of witnesses in any civil or criminal trial would prefer not to have any publicity whatsoever, including publicity in print media.

That is perhaps a natural desire of those who are testifying in a forum about matters which might be unpleasant or untoward, anything of that sort. The desire to keep that kind of matter confidential, is a natural and understandable desire. But there are countervailing considerations, not the ... 10

COMMISSIONER: May I just interrupt you, this isn't a desire to keep any evidence secret. It is a desire not to feel intimidated or otherwise troubled by the presence of the electronic media, which from my perspective could very much have a seriously adverse effect on the value and quality and extent of their evidence.

MR MARCUS: Justice King, if that is the consequence of the attitude of a particular witness, then obviously it is a powerful factor which would weigh with you in the exercise of your discretion. What we would simply say is this, that it is, it justifies an investigation in each individual case to ascertain what the nature of that fear is, and whether or not that fear is indeed one which will be such that the testimony will be either inhibited or the quality of the evidence will in some way be impeded or the work of the Commission will be undermined. 20

If the answer to those questions is in the negative, we would submit that there is a powerful case for permitting the broadcasting to take place. 30

COMMISSIONER: You are selecting that somehow or other, which doesn't readily occur to me as to its practicality, one should be selective about it with each witness. I really don't think that would work, I must say, and apart from the fact that I have it from Counsel that all their clients are against what you seek and I certainly don't see myself or anyone else acting in the capacity of a sort of an inquisitor to try and you know, ascertain what it is that concerns them.

This is a general reaction. I am merely putting to you 10
as what you have already indicated to me quite correctly, is the case and that is a powerful consideration. Thank you.

Sorry, did you want - I interrupted you?

MR MARCUS: Justice King, I simply wanted to say that it is not our intention to place additional burdens upon yourself to conduct the kind of preliminary investigation which might be necessary, but there are again, we would submit, other ways of perhaps addressing that. They can, those kinds of problems might be able to be addressed and I speculate here, between legal representatives, so that if there were no 20
legitimate objection, it might be possible in advance for the Commission to be informed that there are particular witnesses who do not have such an objection and in those circumstances, it might be permissible to approach you for permission for their testimony to be broadcast.

COMMISSIONER: Well, I would certainly be attentive to an understanding between legal representatives in any particular individual case, I don't know about the practicalities of moving all these cameras in and out, but leaving that aside, if there was for argument's sake, just 30

because their representatives have taken a less positive stand than the other representatives, you were to reach some sort of an agreement with witnesses who are in the camp of the United Cricket Board, I don't close that door. I am not sure it would be a good idea to draw distinctions and - or have this go to a wider audience on a piecemeal basis, it might be unfair, but certainly my door is open to that - in the event that I should find against you on your main application, of course.

Be brief please.

MR CAINER: May I be very brief. Mr Commissioner, I think the main point here is as my learned colleague next to me said, it clearly would be in the interest of everybody who gives evidence in a difficult matter, to have as little publicity as possible about that matter, so it is hardly surprising that you get a list of 37 cricketers or more, who would rather than not, get even more publicity than they are getting, but most of them are perfectly innocent one would suggest, if not all, I would not like to pre-judge that. Those who have nothing to hide, should stop trying to hide behind sections of media, saying only parts of media can report properly as it were, and others can't. It is impermissible for witnesses to say "because something might come up which I am uncomfortable with, I would rather that a large section of the media should be denied the correct access that it should have, to give the public its right to know". The fact that you have a list, in my view, is not a powerful argument Sir, the fact that they should object is just normal, par for the course, if I may use golfing parlance.

I don't think it carries much weight that they should object to widespread publicity and may I very briefly tell you that the Pakistan inquiry is a very useful guide to you, Sir, may I suggest, because what happened there was, that - and I followed that very closely because I was involved in the very first reports about match-fixing.

COMMISSIONER: Mr Cainer, I must again urge you to be brief.

MR CAINER: I will be very brief, but I think that Pakistan showed the classic reason why you should have allowed, they should have allowed electronic media in a form, because when text were published from that media and the normal journalists were in the audience and reported, the next day the same players who had said thing A, said no, they hadn't said it, they said thing B. 10

If there is the transparency of the audio being provided to the media, then you will not get these contradictions which elongated the process and distorted the process, let the process be clear, open, unambiguous and let's get to the bottom of the matter Sir, without obfuscation or the attempts by players to avoid their public duty to let us know what really happened Sir. 20

MR FITZGERALD: Mr Commissioner, I apologise for interrupting, but I must just place on record that I resent some of the submissions made by Mr Cainer. The objection of the players to television and radio coverage is not an attempt to hide behind anything. There is full media presence here, there is a verbatim record, which I understand is a running record and will be available as it were, the next day and in the circumstances I submit that 30

the argument of Mr Cainer is purely without any foundation.
COMMISSIONER: In fact, I suppose you would also say that the very fact of the sort of reproduction that is sought, would have an inhibiting effect on a witness who might otherwise not feel intimidated and give his evidence freely and ...

I am, thank you for the assistance that you have given me on this matter. I would like to think about it, and I will give a ruling in the first instance tomorrow morning, and if I haven't said so earlier, may I just say now or 10 repeat that the proceedings will start at 09H30 tomorrow morning and I will give you a ruling on these two applications. Thank you very much.

Then we will continue, Ms Batohi, we will now continue or commence with the evidence?

MS BATOHI: Yes, thank you.

The witness will be Neill Andrews, he is just outside, he won't be a minute.

COMMISSIONER: Mr Andrews, if you will stand for a moment, I am going to administer the oath to you. 20

NEILL ANDREWS: (sworn states)

COMMISSIONER: Yes, Ms Batohi?

EXAMINATION BY MS BATOHI: Thank you Mr Commissioner. Mr Andrews, is it correct that you have been involved in the gaming and wagering industry for about 15 years?

MR ANDREWS: On and off, yes.

MS BATOHI: Can you just explain to the Commission what your involvement in that industry has been?

MR ANDREWS: My fundamental beginnings were in horse-racing, horse-racing thoroughbred industry, and continues to 30

ON RESUMPTION: 08.06.2000

R U L I N G

08.06.2000

Prior to the commencement of this Commission, I made a ruling, the effect of which was to exclude from the public sittings of the Commission, television cameras and also audio live relaying of the evidence given.

Midi Television (Pty) Ltd, the proprietor of the TV station, e.tv, has now applied to me to set aside that ruling, and a similar application has been made on behalf of the organisation Live Africa. My ruling was made pursuant to 10 the provisions of Section 4 of the Commission's Act 8/47, which reads:

"Sittings to be public. All the evidence and addresses heard by a Commission, shall be heard in public, provided that the Chairman of the Commission may in his discretion exclude from the place where such evidence is to be given, or such address is to be delivered, any class of persons or persons whose presence at the hearing of such evidence or address, is in his opinion not 20 necessary or desirable."

In other words, if I believe in my discretion that the presence of any person or class of persons is either unnecessary or undesirable, I may exclude them from attendance.

It was argued yesterday, by Mr Gilbert Marcus SC, on behalf of e.tv, or Midi Television, and also by Mr Cainer, a representative of Live Africa, that my ruling will have infringed the constitutional right to freedom of expression, which is more particularly to be found in Article 16 of the 30

Constitution of the Republic of South Africa, and which provides, (1) thereof, that:

- "A. Everyone has the right to freedom of expression, which includes freedom of the press and other media.
- B. Freedom to receive or impart information or ideas."

I was told that live TV would ensure that a wider public would have live and contemporaneous access to the sittings of the Commission. And perhaps I should mention at this stage 10 that the right entrenched in Section 16 of the Constitution, is not an absolute or unqualified right, it must be exercised according to the prevailing circumstances in the particular situation.

Now I was reminded to get back to counsel's argument of the intense public interest which has been engendered by this Commission, and I was told that allowing a wider form of immediate publication would give status and credibility to the Commission. I did not read into that the innuendo that without it, the Commission would lack either status or 20 credibility, but as I was told and as I'm very well aware of, generally speaking, that would facilitate a greater degree of openness. That in very broad outline was the argument that was made on behalf of the two Applicants.

Counsel for the United Cricket Board, advised me that their client will abide with the Commission's decision. Counsel for Mr Hansie Cronje, Mr Dickerson SC, and counsel for 37 of the players and officials of South African cricket, Mr Fitzgerald SC, as also Ms Batohi who is leading the evidence, opposed the application.

Mr Dickerson suggested that allowing this wider and somewhat formidable form of further publication, was unnecessary and would put an undesirable strain on people who participate here as witnesses. He reminded me, not that I needed reminding, that his client was already under tremendous pressure from the media and that live media coverage of him giving evidence, would merely exacerbate this. Mr Dickerson also pointed out that the fact and the presence of this particular type of media would engender in witnesses, a reluctance to testify freely and voluntarily and 10 that witnesses will, or may well be intimidated and uneasy. I'm not saying this in any sense derogatorily of the medium that is sought to be used, I'm merely stating it as a factual submission from counsel.

This Commission is seeking the truth and the source of that truth is to be found almost exclusively, but certainly very materially, in the evidence, the oral testimony of witnesses. And I believe that unless the ambience in which they testify is witness friendly, as far as giving evidence before a Court or a Commission can ever be witness friendly, 20 unless it is that, there is a very real possibility that they will not come forward with the truth. This would stifle the Commission, and it is a risk which must, I believe, at all costs be avoided, even if that means that the public is deprived of valuable sources of information.

In that context, it must be borne in mind that these hearings are public, transcripts of the evidence will be available and the wider public will be informed, not only by the print media, but also by the audio and visual media, although not to the extent that the latter would like. 30

MR GISHEN

119

DN CROOKES

My concern at the inhibitions which may affect witnesses, outweighs the desirability of the additional facilities which would be available to the public were I to grant this application.

Accordingly, what is sought by e.tv and Live Africa, is not necessary to the smooth running of the Commission and does not derogate from the public's entitlement to coverage of the sittings of the Commission. And having regard to the possible adverse effect on witnesses and the consequent debilitation of the Commission, the presence of these media 10 is not desirable and because it could seriously impact on the effectiveness of the Commission, that is doubly so.

Accordingly, in the exercise of my discretion, neither television nor the audio service provided by Live Africa, will be permitted to operate at and during the sittings of this Commission.

I shall now take a short adjournment, so that those media can please excuse themselves from further attendance.

COMMISSION ADJOURNS

ON RESUMPTION:

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COMMISSIONER: Mr Fitzgerald, I understand we are carrying on with your witnesses, are we?

MR FITZGERALD: No, My Lord.

MS BATOHI: The next witness would be Derek Norman Crookes.

DEREK NORMAN CROOKES: (sworn states)

EXAMINATION BY MR GISHEN: Mr Crookes, you were picked as one of the cricketers for the South African team to tour India in 1996?

MR CROOKES: Yes, I was.

MR GISHEN: Do you recall shortly before the tour ended and 30

APPENDIX F

**HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

WEDNESDAY 21 JUNE 2000

BEFORE : HLOPHE JP et BRAND et TRAVERSO JJ

CASE NO: 4301/2000

In the matter between:

DOTCOM TRADING 121 (PTY) LTD t/a

Applicant

and

THE HONOURABLE MR JUSTICE EDWIN KING NO

First Respondent

**COMMISSION OF ENQUIRY INTO CRICKET
MATCH FIXING & RELATED MATTERS**

Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Third Respondent

THE MINISTER OF JUSTICE

Fourth Respondent

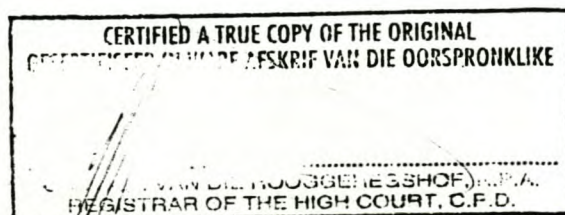
THE MINISTER OF SPORT

Fifth Respondent

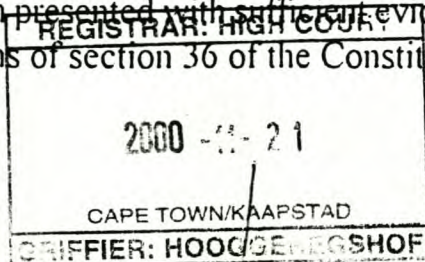
ORDER : 21 JUNE 2000

The following order is made:

1. The Rulings ("the rulings") of the first respondent on 7 and 8 June 2000 are hereby set aside to the extent that applicant is thereby precluded from operating its radio broadcasting and recording equipment at and during the sittings of second respondent.



2. In terms of section 172 (1)(a) of the Constitution, Act 108 of 1996 (“the Constitution”) the rulings are declared to be inconsistent with the provisions of the Constitution in that:
 - a. First respondent failed to appreciate that a blanket exclusion of applicant’s radio broadcasting and recording equipment from the sittings of the second respondent constituted an infringement of the fundamental rights which applicant and/or the general public derive from section 16(1) (a) and/or (b) of the Constitution.
 - b. Consequently, and in any event, first respondent failed to consider that these fundamental rights could only be limited in accordance with the provisions of section 36(1) of the Constitution.
 - c. First respondent failed to interpret section 4 of the Commissions’ Act, No 8 of 1947 in accordance with section 39 (2) of the Constitution in that he did not interpret the legislative provision in a manner which promotes the spirit, purport and objective of the Bill of Rights, and particularly section 16 (1)(a) and (b) read with section 36(1) thereof.
 - d. First respondent failed to consider whether a clear distinction should not be made between radio and television in applying the provisions of section 36(1) of the Constitution.
3. First respondent is directed to allow the applicant to operate its radio broadcasting and recording equipment during the sittings of the second respondent in such a manner as determined by first respondent. Provided that upon good cause shown in relation to a particular person giving evidence before the second respondent, he may direct that such equipment be excluded.
4. In determining whether applicant’s aforesaid rights are to be excluded or limited as envisaged in paragraph 3 hereof, first respondent must consider whether he had been presented with sufficient evidence so as to properly invoke the provisions of section 36 of the Constitution.



5. There will be no order as to costs.

BY ORDER OF THE COURT



COURT REGISTRAR

262 Murphy Wallace
CAPE TOWN

/avz

REGISTRAR: HIGH COURT
2000 11-21
CAPE TOWN/KAAPSTAD
GRIFFIER: HOOGGERECHSHOF

CERTIFIED A TRUE COPY OF THE ORIGINAL GEBESKEMMINGSKOPPIER VAN DIE OORSPRONKLIKE
REGISTRAR OF THE HIGH COURT, C.P.D.

APPENDIX G

**HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

REPORTABLE

CASE NO: 4301/2000

In the matter between:

DOTCOM TRADING 121 (PTY) LTD t/a

Applicant

and

THE HONOURABLE MR JUSTICE EDWIN KING NO

First Respondent

**COMMISSION OF ENQUIRY INTO CRICKET
MATCH FIXING & RELATED MATTERS**

Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA**

Third Respondent

THE MINISTER OF JUSTICE

Fourth Respondent

THE MINISTER OF SPORT

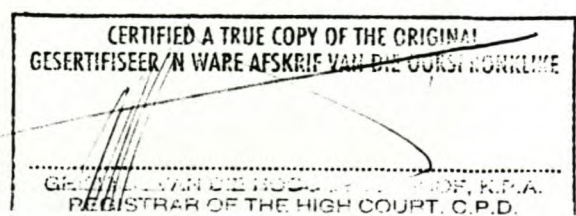
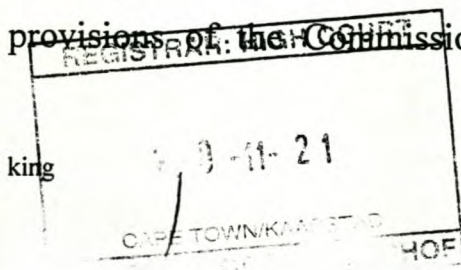
Fifth Respondent

JUDGMENT DELIVERED ON 2 AUGUST 2000

BRAND J:

[1] Mr Hansie Cronjé ("Cronjé") is the erstwhile captain of the South African National Cricket team. Recently the Indian police alleged that Cronjé and other members of the South African cricket team took money for fixing the outcome of international cricket matches. Cronjé then dropped the proverbial bombshell by admitting that he accepted money from a bookmaker for information regarding an international cricket test.

[2] As a result, the President of the Republic, together with the Minister of Justice, on 8 May 2000 appointed a commission of enquiry by virtue of the provisions of the Commissions Act, 8 of 1947. According to its creating

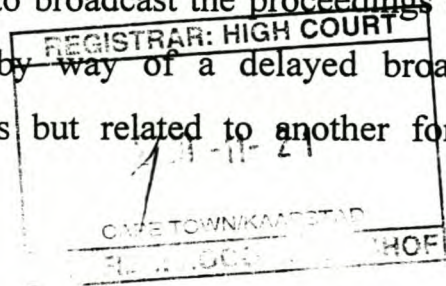


Proclamation, the commission was officially named as The Commission of Enquiry into Cricket Match-Fixing and Related matters. Colloquially it soon became known, however, as the King Commission. This name is derived from that of the chairperson of the commission, the Honourable Mr Justice Edwin King, who was, until his recent retirement from the bench, the Judge President of this court.

[3] Applicant is a provider of news, including sports news, to the independent radio sector in South Africa. The independent radio sector comprises a large number of community- and commercial radio stations, independent of the state controlled media.

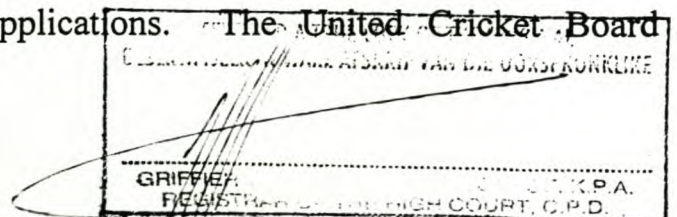
[4] On 7 June 2000, the King Commission commenced its proceedings. In the course of his opening address, the chairperson directed that he would not allow television and radio broadcasts of the proceedings of the commission.

[5] Immediately after these opening remarks, two applications were presented to the chairperson to relax his directions regarding the electronic media. The first was on behalf of Midi Television (Pty) Ltd ("Midi"), the proprietor of e-TV and the other by applicant's chief executive officer, Mr Paul Cainer ("Cainer") on behalf of applicant. Midi's application was to broadcast the proceedings of the commission by television, either live or by way of a delayed broadcast. Applicant's request was along similar lines but related to another form of electronic media, namely radio.



[6] The chairperson enquired from the parties represented before him as to their stance regarding these two applications. The United Cricket Board

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indicated that they would abide the decision of the chairperson. The representatives of all the other parties, including Cronjé and other members of the South African cricket team, who were potential witnesses at the hearing, conveyed that their clients would be unsettled by live broadcasts or recordings of the proceedings and that they thus objected to the presence of the electronic media.

[7] In the event, the chairperson afforded the representatives of all parties concerned, including Cainer, the opportunity to address him. Thereafter he reserved his ruling until the next morning, Thursday 8 June 2000.

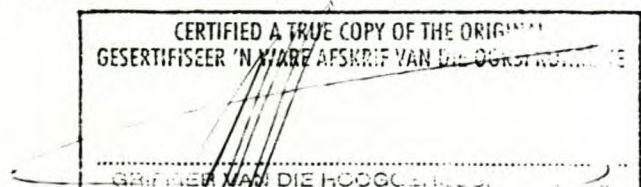
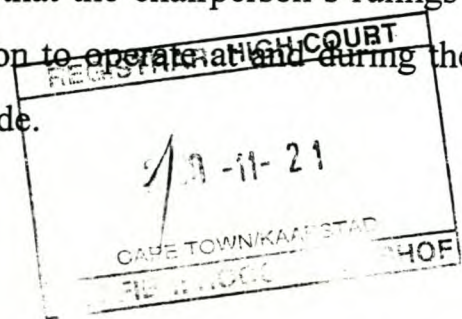
[8] On 8 June 2000, Mr Justice King then gave his ruling in terms whereof the applications of both Midi and applicant were refused. It is this ruling, and more particularly the chairperson's refusal to allow radio broadcasting of the proceedings of the commission that gave rise to the present application being brought before this court, as a matter of urgency, on 14 June 2000.

[9] The relief sought is, in essence, that the chairperson's rulings on 7 and 8 June 2000, refusing applicant permission to operate at and during the sittings of the commission be reviewed and set aside.

THE PARTIES

[10] Applicant has already been described. First respondent, is the chairperson of the commission, whereas the commission itself is cited as second respondent. Third respondent is the President of the Republic of South Africa, while the Minister of Justice and the Minister of Sport are, respectively, cited as fourth and

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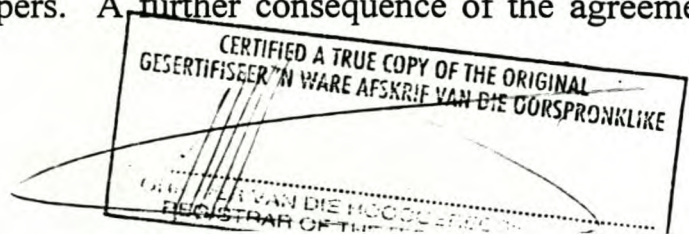
fifth respondents. The application is opposed by first and second respondents. Third, fourth and fifth respondent indicated that they abide the decision of this court. For the sake of convenience I propose to refer to first and second respondents collectively as “the respondents”, to the chairperson of the commission as “first respondent” and to second respondent as “the commission”.

THE FIRST HEARING

[11] At the first hearing of the matter before us on Wednesday 14 June 2000 there was representation on behalf of applicant and respondents as well as on behalf of various other interested parties. Included amongst the other interested parties were Cronjé and 37 other member and former members of the South African national cricket team. Cronjé was represented by his attorney, Mr K G Druker, while the other cricketers were represented by Mr Fitzgerald.

[12] Because the application was brought at very short notice, respondent's request on 14 June 2000 was in essence for an opportunity to file answering papers. Applicant, on the other hand, sought interim relief pending the filing of respondents' answering papers and the consequent postponement of the matter. The declared reason for applicant's anxiety that the proceedings before first respondent should not be allowed to continue without applicant being afforded some form of interim relief, was that Cronjé himself was destined to give evidence on the very next day, that is Thursday 15 June 2000. During an adjournment of the hearing, the parties entered into negotiations. The result thereof was that an order was made by agreement which provided for a postponement of the application until Monday 19 June 2000 as well as a time table for the filing of further papers. A further consequence of the agreement

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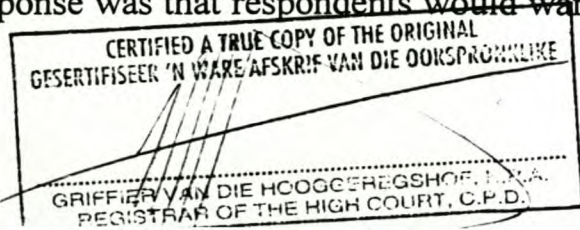
between the parties was that Cronjé consented to his evidence being broadcasted live by both radio and television. At the postponed hearing, argument was eventually concluded on 20 June 2000. Due to the obvious urgency of the matter, the court issued its order which is annexed hereto on 21 June 2000 (“the Order”). These are the reasons for the Order.

THE RESUMED HEARING

[13] At the resumed hearing on 19 June 2000, applicant was represented by Mr Albertus who appeared with Mr Katz while Mr Seligson appeared for respondents together with Mr Butler. The United Cricket Board as well as Cronjé and all other parties represented before the commission indicated that they abide the decision of this court.

[14] At the commencement of proceedings on 19 June 2000 the court was presented with three applications. Apart from this application, in which the parties were ready to proceed, there were two new applications. The first of these was an application on behalf of the South African Broadcasting Corporation (“the SABC”). Mr Albertus – who also appears for the applicant in this application – indicated that he and Mr Katz were appearing for the SABC as well. The second new application was by Mr Breytenbach who appeared with Ms Bawa, on behalf of the Institute for Democracy of South Africa (“Idasa”). Unlike the present application which only pertains to radio, the applicants in both new applications sought an order that first respondent’s ruling be set aside with reference not only to radio but to television as well. Applicants in both these applications also requested that their applications be heard and adjudicated upon together with the present application. Mr Seligson’s response was that respondents would want an

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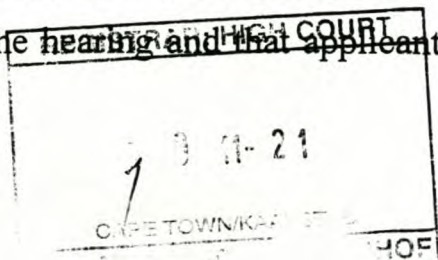


opportunity to deal with the two new applications by way of answering affidavits. It therefore became apparent that the request that the two applications be heard simultaneously with the present application was practically untenable and was thus refused. Mr Breytenbach then made an alternative request, that he be allowed to appear, together with Ms Bawa, as *amici curiae* in order to present additional submissions in support of the relief sought by applicant in this matter. Mr Albertus accepted this offer of support while Mr Seligson indicated that he would have no objection to Mr Breytenbach's request on condition that the *amici curiae* limit their submissions on the facts to those of the present application. In the event, the court acceded to Mr Breytenbach's request. As a consequence, the only application before the court concerned radio. More specifically, we were not asked to consider any application that first respondent's decision to exclude television should be reviewed and set aside as well.

FIRST RESPONDENT'S RULING

[15] In the course of his address to first respondent, applicant's representative, Cainer, motivated his request for permission to broadcast and/or record the evidence before the commission on the basis that applicant has the constitutional right to broadcast and the public has the concomitant right to hear what is actually said in the voice of the witness. He also explained to first respondent that the intrusion in the proceedings, caused by the introduction of applicant's electronic equipment, could be limited to the extent where it would be minimal. In this regard he, *inter alia*, gave the assurance that there would be no operator in the room where the hearing took place; that the microphones could be physically installed in such a manner that it would hardly be distinguishable from the existing microphones already in use at the hearing and that applicant would

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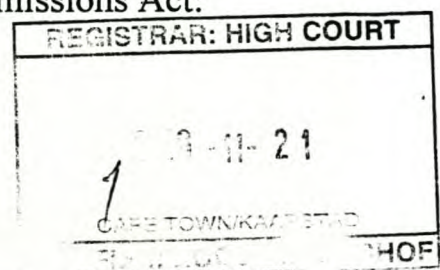


be prepared to allow other radio stations who were interested in the direct broadcasting of the proceedings, to utilise its electronic equipment. Moreover, Cainer suggested, if first respondent was of the view that radio broadcasts of the proceedings should be limited in other respects so as to protect witnesses, applicant would be prepared to submit to such restrictions as first respondent may decide to impose. Thus, for example, Cainer indicated that if first respondent were to decide that radio broadcasts should not be done live, but only in delayed form, applicant would not object to the imposition of a condition to that effect.

[16] Applicant's request, as already stated, was opposed on behalf of Cronjé and the 37 other cricket players. In motivating their objection, counsel for these parties did not distinguish between television and radio. They conflated their objection to both forms of electronic media on the basis that both would place an unnecessary strain on witnesses who were already under severe pressure. Counsel for the objectors also denied that an exclusion of the electronic media from the sittings of the commission would constitute an infringement of any right enshrined by the Constitution of the Republic of South Africa, No 108 of 1996 ("the Constitution".) According to their argument, the electronic media were entitled to the same unrestricted access to the proceedings as the general public and the print media, but no more. The constitutional right of freedom of the media, guaranteed by the Constitution, so counsel for the objectors contended, did not include the right to broadcast the proceedings of the commission either by television or radio or to record the proceedings for broadcasting purposes.

[17] First respondent introduced the motivation for his ruling by reference to the following provisions of section 4 of the Commissions Act:

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“4. Sittings to be public

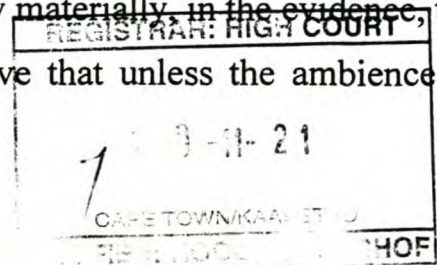
All the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address to be delivered any class of persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable.”

[18] What he thus had to decide, so first respondent directed himself, was whether in his opinion the presence of the electronic media with their equipment at the hearing could be said to be not necessary and not desirable. As to the requirement of necessity, first respondent had little difficulty in deciding that the electronic media and their equipment was not necessary for the smooth running of the commission.

[19] After consideration, which transpires from the ruling, first respondent also decided that the presence of the electronic media at the hearing was indeed not desirable. In motivating this decision, first respondent referred to statements by counsel for Cronjé and the other cricket players to the effect that television cameras and other equipment of the electronic media would put additional and unnecessary strain on witnesses; that it may intimidate witnesses and thus engender in witnesses a reluctance to testify freely and to tell the whole truth. Thereafter he proceeded to express himself as follows:

“This commission is seeking the truth and the source of that truth is to be found almost exclusively, but certainly very materially, in the evidence, the oral testimony of witnesses. And I believe that unless the ambience in

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which they testify is witness friendly, as far as giving evidence before a Court or a commission can ever be witness friendly, unless it is that, there is a very real possibility that they will not come forward with the truth. This would stifle the commission, and it is a risk which must, I believe, at all costs be avoided, even if that means that the public is deprived of valuable sources of information.

In that context it must be borne in mind that these hearings are public, transcripts of the evidence will be available and the wider public will be informed, not only by the printed media, but also by the audio and visual media although not to the extent that the latter would like.

My concern at the inhibitions which may affect witnesses, outweighs the desirability of the additional facilities which would be available were I to grant the application.

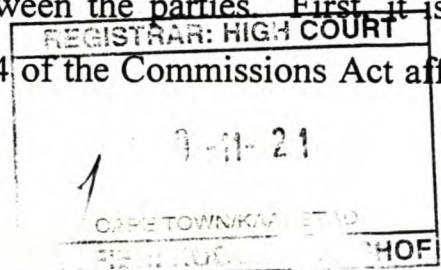
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Accordingly, in the exercise of my discretion, neither television nor the audio service provided by Live Africa, will be permitted at and during the sitting of this commission.”

THE ISSUES

[20] In formulating the issues to be decided I find it convenient to start by referring to that which is common cause between the parties. First, it is not disputed by applicant that in principle, section 4 of the Commissions Act affords

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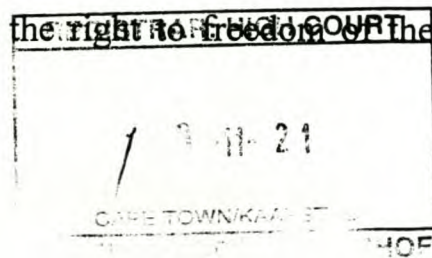
first respondent the discretion upon which he based his ruling. On the other hand it is not disputed by respondents that in the exercise of that discretion, first respondent was bound to give effect and to promote the principles of the Constitution.

[21] Shorn of unnecessary frills, applicant's case is that first respondent failed to appreciate that a total ban on radio broadcasting of the commission's proceedings would constitute an infringement of constitutional rights. First, on the constitutional right of freedom of the media and, secondly, on the constitutional right of the public to receive information, which rights are guaranteed, respectively, by section 16(1)(a) and (b) of the Constitution. As a consequence of this failure to realise that such total ban would result in an infringement of constitutional rights, so applicant's case proceeds, first respondent failed to appreciate that such limitation could only be justified pursuant to the provisions of section 36 of the Constitution.

[22] The ultimate consequence of first respondent's failure to appreciate that a blanket prohibition of radio broadcasting involves an infringement of constitutional rights, applicant concludes, was that first respondent had failed to exercise his discretion in a proper manner. Therefore, so applicant contends, first respondent's decision falls to be reviewed and set aside by this court.

[23] On behalf of respondents it is conceded that first respondent did not approach the exercise of his discretion on the basis that a refusal to broadcast the proceedings before the commission – either by way of television or radio – would constitute a limitation of constitutional rights. On the respondent's papers the answer to applicant's case is, however, that the right to freedom of the media

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enshrined in section 16(1)(a) of the constitution does not include the right to broadcast the proceedings before the commission directly, nor the right to record these proceedings for broadcasting purposes. As to applicant's contention that first respondent's ruling constitutes an infringement of the right to freedom of the general public to receive information – guaranteed in section 16(1)(b) of the constitution – first respondent answer is that this contention is equally unsustainable.

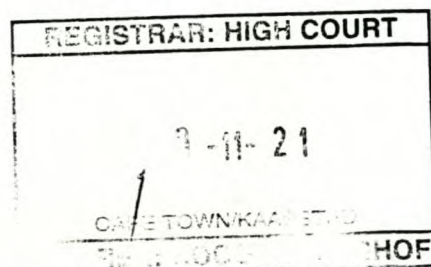
[24] Mr Seligson also relied on an alternative answer to applicant's case, namely that even if it should be found that any of the freedoms enshrined by section 16(1)(a) or (b) do extend to the broadcasting of the proceedings before the commission, first respondent's refusal to allow such broadcasting is objectively justifiable.

THE ALLEGED VIOLATION OF CONSTITUTIONAL RIGHTS

[25] As appears from the foregoing, the nub of the issues between the parties is whether the right to freedom of expression, guaranteed in section 16(1)(a) and (b) of the Constitution, includes the right to broadcast and/or to listen to a broadcast of the actual proceedings before the commission. This section provides:

“16(1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media
- (b) freedom to receive or impart information or ideas.”



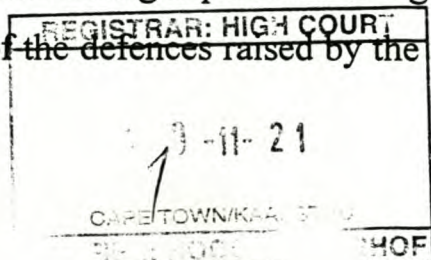
[26] Applicant's first contention in this regard is that the "right to freedom of expression ... which includes freedom of the press and other media" – contemplated in section 16(1)(a) – extends to the right to broadcast the actual proceedings before the commission by means of radio. First respondent's answer is that it does not.

[27] In support of respondents' case, Mr Seligson pointed out that, like all members of the public, and the print media, applicant had full access to the proceedings and that applicant was merely denied the opportunity to bring its recording equipment into the hearing for the purpose of broadcasting the proceedings. Section 16(1)(a) of the Constitution, Mr Seligson's argument proceeded, does not confer greater rights on the electronic media than on the print media. In the event, first respondent's ruling did not result in an infringement of applicant's constitutional rights.

[28] Both Mr Albertus and Mr Seligson as well as Mr Breytenbach were in agreement that as far as South African Courts are concerned the issue under consideration is *res nova*. As to decisions from foreign jurisdictions, Mr Seligson found support for respondent's case in two judgments. First in a judgment of the Ontario Provincial Court in the case of **Regina v Squires** (No 2) (1986) 23 C.R.R. 31. Secondly, in a thus far unreported judgment of the Scottish High Court of Justiciary in **Re: The British Broadcasting Corporation** (No 2), handed down on 20 April 2000.

[29] In the **Squires**-case a television journalist was charged under section 67(2)(a)(ii) of the Ontario Judicature Act with filming a person leaving a court room in the Provincial court building. One of the defences raised by the accused

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was that section 67 (2)(a) was inconsistent with the right to freedom of the press guaranteed in section 2(b) of the Canadian Charter of Rights and Freedom. In view of this defence the statutory provisions to be considered by the Court were those contained in section 67(2)(a) of the Ontario Judicature Act and section 2(b) read with section 1 of the Charter.

[30] Section 67(2)(a) of the Ontario Judicature Act, insofar as it is relevant hereto reads:

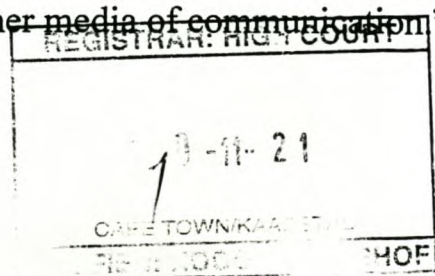
“(2) ... [N]o person shall

- (a) take or attempt to take any photograph, motion picture or other record capable of producing visual representation by electronic means or otherwise,
 - (i) at a judicial proceeding, or
 - (ii) of any person entering or leaving the room in which the judicial proceedings is to be or has been convened; or
 - (iii) ...”

Section (2)(b) of the Canadian Charter provides:

“2. Everyone has the following fundamental freedoms:

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other ~~media of communication~~”



Section 1 of the Canadian Charter – which is the counterpart of section 36 of our Constitution – provides that:

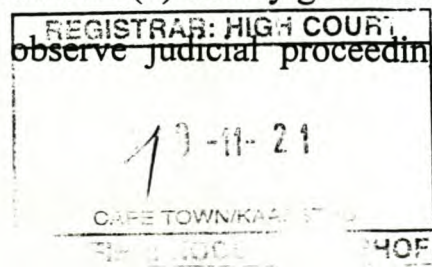
“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

[31] In the Provincial Court it was accepted as a point of departure by everybody concerned, including counsel and the presiding judge, that section 67(2)(a) has to be considered as a whole; i.e. that no distinction can be made between section 67 (2)(a)(i) – prohibiting the filming of judicial proceedings in the courtroom – and 67(2)(a)(ii) – i.e. the prohibition of filming persons entering or leaving the courtroom. Accordingly, the judge presiding, **Vanek Prov J**, formulated the questions to be decided by him as follows (at 37 of the report):

“What is in issue in this application is the complex and controversial question whether the media have a constitutional right under the Canadian Charter to photograph and to telecast judicial proceedings in court and persons who are present in the courtroom or the courthouse for the purpose of attending proceedings and, if so, whether s 67 of the Judicature Act is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.”

[32] After consideration, **Vanek Prov J** came to the conclusion that section 2(b) of the Charter affords the electronic media no greater rights than members of the general public. Accordingly, he found that section 2(b) merely guarantees the right of the electronic media to attend and observe judicial proceedings as

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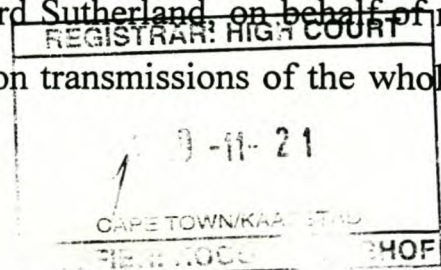
members of the public and to report on what has been seen and heard. However, even on a liberal construction of 2(b), the learned judge stated, he was unable to find any justification “to confer upon the electronic media a constitutionally guaranteed right to televise judicial proceedings or persons involved in such proceedings.” (60 of the report).

[33] In the view that **Vanek Prov J** took of the case, it was strictly speaking not necessary for him to consider whether, if section 67 (2)(a) of the Judicature Act constituted an infringement of constitutional rights, this section would nevertheless be justified under section 1 of the Charter. However, for the sake of completeness, he did consider this issue as well and came to the conclusion that even if section 67(2)(a) were inconsistent with section 2(b) of the Charter, it would be justified under section 1 of the Charter as a “reasonable limitation”. (76 of the report.)

[34] The second case relied upon by Mr Seligson, the judgment of the High Court of Justiciary in **Re: The British Broadcasting Corporation (No 2)** was an application preliminary to the well known Lockerbie-trial which was due to commence on 3 May 2000. The trial resulted from the destruction of a civilian aircraft at Lockerbie in Scotland on 21 December 1988. As a result of an agreement between the Government of the United Kingdom and the Netherlands, the trial was to take place in the Netherlands but would be conducted according to Scots law and be presided over by three Scottish judges.

[35] With the support of the Scottish Lord Advocate, an approach was made to the judge destined to preside at the trial, Lord Sutherland, on behalf of relatives of the victims of the air disaster for television transmissions of the whole of the

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trial proceedings to four remote sites in the United Kingdom and the United States of America where it could be viewed by immediate family members of the victims. Such permission was granted on a restricted basis. Included among the restrictions imposed by Lord Sutherland was the provision that the television signals would be incrypted so that they would not be able to be intercepted and used by others and that no journalist would be allowed to view the trial at any of the remote sites under any circumstances.

[36] Subsequently, the petitioner i.e. the British Broadcasting Corporation (“the BBC”) sought leave from the High Court of Justiciary in Scotland to broadcast the proceedings in the trial by means of television.

[37] As a basis for its application, the BBC relied upon section 57(2) of the Scotland Act, 1998 read with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”). According to section 57(2) of the Scotland Act:

“a member of the Scottish Executive has no power to make any subordinate legislation or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights ...”

Article 10 of the European Convention, insofar as it is relevant hereto, provides:

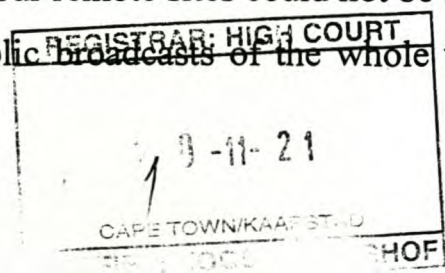
“Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority...”



[38] According to the judgment, the starting point of the petitioner's case was that consent had already been given to limited television transmissions of the trial proceedings to members of the public, subject to the restriction that the members of the public are to be limited to family members of the victims. Since permission had already been given, so the petitioner argued, the restrictions which prevented it from receiving the signal and from broadcasting the trial proceedings constituted a violation of its rights under Article 10 of the European Convention to receive and impart information.

[39] As I understand the opinions of the members of the court, the petition was refused for two reasons. First, on the basis that the restrictions objected to were not imposed by a member of the Scottish Executive but by the Court and that, consequently, section 57(2) of the Scotland Act did not find any application at all. The second reason appears to be reflected in the following *dictum* from the opinion of Lord Kirkwood:

“In my view the restriction imposed by the court cannot be said to be incompatible with the petitioner's rights under Article 10. Even if that restriction was held to be in contravention of the petitioner's rights under Article 10 it does not, in my view, necessarily follow that if the restriction is held to be unlawful the consequence will be that there will remain an unconditional permission to televise the trial to the general public. One obvious possibility is that if the restriction was held to be unlawful, the court which had imposed the restriction could refuse to permit any television transmissions at all ... In my opinion, the consent granted by Lord Sutherland for transmissions to the four remote sites could not be said to constitute consent in principle for public broadcasts of the whole trial

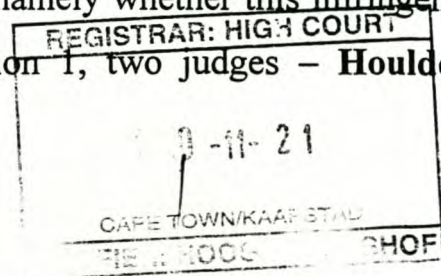


and, that being so, the fundamental basis of the petitioner's contention disappears."

[40] In considering the two judgments relied upon by Mr Seligson I refer to the Scottish case first, because the answer to Mr Seligson's reliance thereon is in my view a short and simple one. It was not the BBC's case that a refusal to allow them to broadcast the court proceedings by way of television would in itself constitute an infringement of a breach of their rights under Article 10 of the European Convention. The question whether such refusal would indeed constitute such infringement was therefore never asked nor answered by the Court. Consequently this judgment by the Scottish High Court of Judiciary does not support Mr Seligson's argument.

[41] The judgment by **Vanek Prov J** in the case of **Regina v Squires** (*supra*) does in fact lend support to Mr Seligson's argument. This judgment was however overruled on appeal to the Ontario Court of Appeal in **Regina v Squires** (1992) 78 C.C.C. (3rd) 97. The appeal bench consisted of five judges, **Dubin CJO, Houlden, Tarnopolsky, Krever and Osborne JJA**. Unlike **Vanek Prov J**, all five judges of appeal held that their considerations should be limited to the constitutionality of section 67(2)(a)(ii) of the Ontario Judicature Act, i.e. the prohibition on filming of persons entering or leaving the courtroom and that it was not necessary to consider the wider question of television cameras in the courtroom. As to the first question that arose for decision, namely whether section 67(2)(a)(ii) constituted an infringement of section 2(b) of the Canadian Charter, four of the judges – **Houlden, Tarnapolsky, Krever and Osborne JJA** – held that it did. As to the next question, namely whether this infringement of section 2(b) could be justified under section 1, two judges – **Houlden and**

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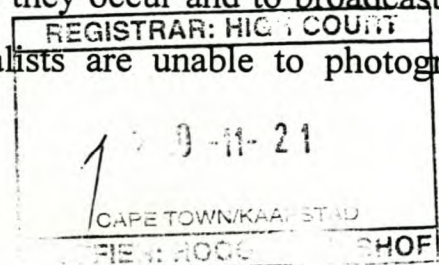
Osborne JJA – held that the infringement was justified, whereas two judges – **Tarnapolsky** and **Krever JJA** – held that it was not so justified. **Dubin CJO** agreed with **Houlden** and **Osborne JJA** that even if section 67(2)(a)(ii) constituted an infringement of section 2(b) of the Charter it would have been justified under section 1 thereof. He therefore found it unnecessary to pertinently decide the first question, namely whether section 2(b) was indeed infringed by the prohibition in section 67(2)(a)(ii).

[42] With regard to the first question, i.e. the one I have to consider at this stage, **Houlden JA** referred to the following *dictum* from the Canadian case of **R v Butler** (1992) 50 C.C.C. (3d) 129 at 154:

“ ... in creating film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. ... [T]he meaning of the work derives from the fact that it has been intentionally created by the author. To use an example, it may very well be said that a blank wall in itself conveys no meaning. However, if one deliberately chooses to capture that image by the medium of film, the work necessarily has some meaning for its author and thereby constitutes expression.”

Thereafter **Houlden JA** proceeded as follows (at 104 of the report):

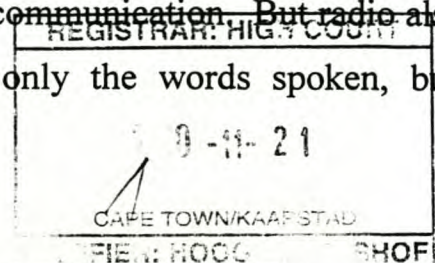
“The freedom of expression enjoyed by television journalists, such as the appellant, is the freedom to film events as they occur and to broadcast the film to the public. If television journalists are unable to photograph



persons entering or leaving a courtroom, their freedom of expression is curtailed.”

[43] I find myself in respectful agreement with the reasoning that transpires from these statements. Moreover, I hold the view that it applies with equal force to a limitation imposed on broadcasting by means of radio. It is true, as Mr Seligson argued, that the applicant in this matter was not denied access to the proceedings; that applicant’s journalists could make notes and that applicant could broadcast the contents of the evidence placed before the commission, even *verbatim* if it is so wished. *Non constat*, however, that the refusal to allow applicant to broadcast the proceedings or to make a sound recording of the proceedings does not constitute an infringement of applicant’s rights in terms of section 16(1)(a) of the Constitution. It is almost self-evident in my view that the prohibition of the direct radio transmission of proceedings by a radio broadcaster constitutes a limitation on what is essential to the activities of that medium of communication. I have heard no argument and I can see no reason in logic why a limitation on what constitutes the very essence and distinguishing feature of the radio broadcaster’s medium of communication does not constitute an infringement of the radio broadcaster’s freedom which is enshrined by section 16(1)(a). It is not without reason, so it appears to me, that the section 16(1)(a) of the Constitution does not limit its guarantee to the freedom of the press, but specifically extends this freedom to other media of communication and expression as well. In modern times there are many forms of communication. Each of these media of communication and expression has its own distinguishing features and each of them can be limited in a different way. The video camera most probably provides the ultimate means of communication. But radio also has its advantages over the print media. Not only the words spoken, but the

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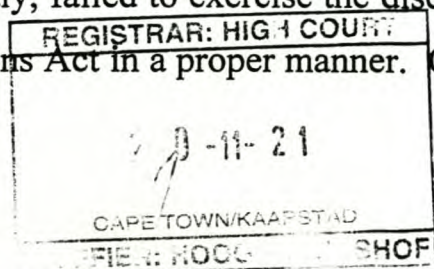
emphasis, the tone of voice, the hesitations etcetera can be recorded and communicated. To prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media.

[45] Consequently, the argument that a prohibition of radio broadcaster's right to broadcast directly does not interfere with the rights of that medium because it still has the same rights as the print media, in my view, amounts to a ***non sequitur***. The equivalent of the newspaper journalist's shorthand notes to the radio broadcaster is ***not*** shorthand notes, but an audio recording. I do not think it can be argued that a prohibition against a newspaper journalist taking shorthand notes would not constitute an infringement of that journalist's rights under section 16(1)(a). I believe that, by the same token, to prevent a radio broadcaster from utilising its broadcasting and recording equipment, constitutes an infringement of its rights contemplated by section 16(1)(a) of the Constitution.

[46] In these circumstances it is not necessary to consider the validity of the further contention by applicant that first respondent's ruling also constitutes an infringement of the public's right to receive information as contemplated in section 16(1)(b). Suffice it to say in my view that there is a great deal of merit in this contention.

[47] As indicated, applicant's case is that since first respondent failed to appreciate that a refusal of applicant's request to record and broadcast the proceedings would constitute an infringement of applicant's constitutional rights, he also failed to appreciate that such infringement could only be justified under section 36 of the Constitution and, consequently, failed to exercise the discretion afforded to him by section 4 of the Commissions Act in a proper manner. On the

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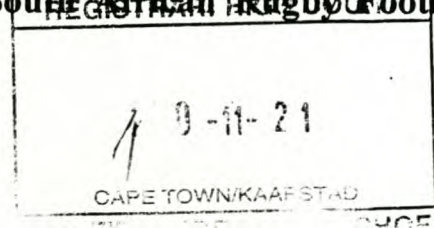
papers Mr Seligson, could not and did not argue that the provisions of section 36 of the Constitution were considered and applied by first respondent. What he did argue, however, was that if first respondent's ruling was found to be a limitation of applicant's rights under section 16, such limitation was in fact objectively justifiable in terms of section 36. I therefore proceed to deal with this alternative contention.

THE LIMITATION OF SECTION 16 JUSTIFIABLE

[48] In support of his contention that the limitation of applicant's rights imposed by first respondent could be justified objectively, Mr Seligson again relied on the judgment of **Vanek Prov J** in the case of **Regina v Squires (No 2)** (1986) 23C.R.R. 31. This time, however, he also found support for his submission in the views held by the majority in an appeal to the Ontario Court of Appeal in **Regina v Squires** (1992) 78 C.C.C. (3rd) 97.

[49] According to Mr Seligson's argument these judgments constitute authority for the proposition that as a matter of principle, exclusion of television cameras from court proceedings is an objectively justifiable limitation to the constitutional rights contemplated in section 2(b) of the Canadian Charter and consequently also of the rights contemplated in of section 16(1)(a) of our Constitution. Mr Seligson's reliance on these two cases gives me the opportunity to note what is **not** in issue in this case. This case, firstly, does not concern court proceedings but the proceedings before a commission which was established by the President in terms of the Commissions Act. It is a trite principle that such a commission is not a court but a mechanism for ascertaining facts and reporting to the President thereon. [See e.g. **President of the RSA v South African Rugby Football**

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Union 2000 (1) SA 1 (CC) [par 147] 70 D – E and **Bell v Van Rensburg** 1971 (3) SA 693 (C) 707.] Secondly, this case does not concern television broadcasting but broadcasting by means of radio. I agree with Mr Seligson’s argument that the question whether the electronic media in general and television in particular should be allowed to broadcast court proceedings, is a matter of policy. I am also in agreement with his further submission that this court should be hesitant to decide such an important matter of policy on inadequate material and without the matter being fully canvassed in evidence before it. As I have already indicated however, that is not the issue we have to deal with. The issue before this court is not even whether first respondent should or should not allow radio broadcasting of the proceedings before him. That is for first respondent to decide. The issue that we must decide is whether on the facts and considerations presented to first respondent, first respondent exercised his discretion in a proper manner and – as a result of Mr Seligson’s alternative argument – whether on the facts and arguments presented to this court, the decision to impose a blanket ban on radio is objectively justifiable.

[50] The question whether a total ban on radio broadcasting of the proceedings before first respondent is justifiable must be determined in accordance with the provisions of section 36(1) of the Constitution. This section provides:

“36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right

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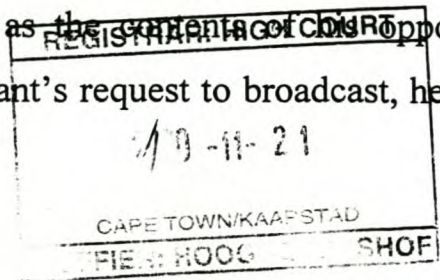


- (b) the importance and purpose of the limitation
- (c) the nature and extent of the limitation
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to ... the purpose.”

[51] The application of section 36 involves a process of weighing up of competing values and ultimately an assessment based on proportionality which calls for the balancing of different interests. Inherent in this process of weighing up is that it can only be done on a case-by-case basis and with reference to the facts and circumstances of the particular case. [See e.g. **S v Makwanyane and another** 1995 (3) SA 391 (CC) 436 – par 104 and **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999 (1) SA 6 (CC) 30 par 33.

[52] As a consequence, considerations which may lead to the exclusion of television broadcasting or video recording of court proceedings may or may not be relevant to the exclusion of radio broadcasting or audio recording of the proceedings of a particular commission. What is clear, however, is that the one does not necessarily follow from the other. Because the law should be developed on a case-by-case, or incremental, basis it is neither necessary nor desirable for this court to map out in advance what the future developments regarding the position of the electronic media should be.

[53] From first respondent’s ruling as well as the contents of the opposing affidavits, it appears that in refusing the applicant’s request to broadcast, he was primarily swayed by the consideration that:



“since its [the commission’s] primary purpose is to pursue the truth regarding the incidents outlined in its terms of reference, it is essential that every effort be made to ensure the candour and forthrightness of the witnesses to the extent that this can be achieved.”

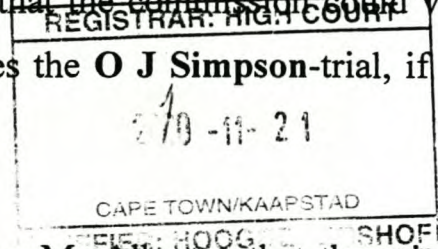
and that:

“therefore... the atmosphere should be witness friendly”

and that:

“this is not encouraged by the presence of television and radio broadcasters around the venue.”

[54] In his opposing affidavit, first respondent describes the “scrum” of reporters and cameras which occurred when Cronjé, pursuant to an arrangement between the parties, agreed to the radio and television coverage of his evidence in chief. This behaviour by the media, first respondent states, was so intrusive that he “cannot accept that Cronjé would find the presence of the media anything but inhibiting and intimidating”. According to first respondent, it is evident from these events that his initial fears were justified, that the commission could very well be transformed in a forum which resembles the **O J Simpson**-trial, if the electronic media were to be allowed.



[55] On behalf of applicant it was submitted by ~~Mr Albertus~~ that there is no evidential basis that an ambience of witness friendliness will induce or facilitate truth telling. He also submitted that there is equally no evidential basis for

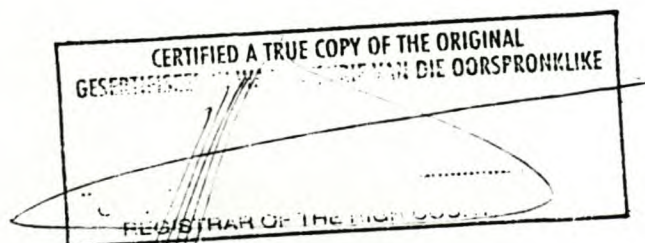
concluding that the presence of electronic media will inhibit potential witnesses from telling the truth.

[56] Despite the absence of pertinent evidence of the nature referred to by Mr Albertus, I am prepared to accept that the performance by the media – including radio and television - which resulted from their unrestricted access to the proceedings when Cronjé gave evidence, as described by first respondent, would most likely be inhibiting and intimidating to the majority of witnesses and that it should not be allowed. However, the question remains whether first respondent was justified to ban the electronic media, including radio, entirely from the proceedings.

[57] Otherwise stated, the question remains whether, having regard to the worthy consideration of a witness friendly atmosphere which does not inhibit witnesses from testifying, there is sufficient evidence to invoke the provisions of section 36(1) of the Constitution to justify the imposition of a blanket exclusion on radio broadcasting. I believe the short answer to this question must be “no”.

[58] I find it unnecessary to refer to all the limitation factors referred to in section 36(1). I agree with Mr Breytenbach's argument that two of these factors in particular suggest that the facts and considerations presented to first respondent are insufficient to justify a blanket exclusion of all radio broadcasting and recording equipment from the sittings of the commission. These two factors are the nature and importance of the constitutional rights which are infringed and the availability of less restrictive means to achieve the same purpose.

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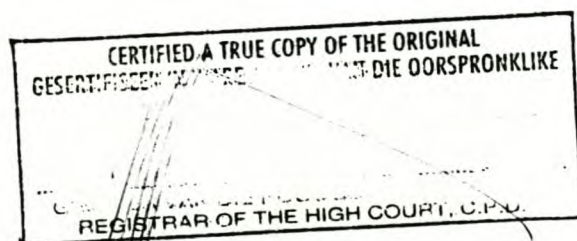


[59] The importance of the rights guaranteed by section 16(1) appears, for example, from the following *dictum* by O'Regan J in **South African National Defence Union v Minister of Defence** 1999 (4) SA 469 (CC) at 477 par 7:

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”

And from the following *dictum* by Hefer JA in **National Media Limited and Others v Bogoshi** 1998 (4) SA 1196 (SCA) 1207 *in fine* – 1208D:

“The freedom of expression ... has been referred to as ‘the matrix, the indispensable condition of nearly every other form of freedom’ (**Palko v State of Connecticut** 302 US 319 (1937) at 327); and in the majority judgment of the European Court of Human Rights in **Handyside v United Kingdom** (1976) 1 EHRR 737 at 754 ~~it was said that~~ freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man. That this is not an ~~overstatement~~ ~~appears~~ from McIntyre J’s reminder in **Retail, Wholesale & Department Store Union, Local 580 et al v Dolphin Delivery Ltd** (1987) 33 DLR (4th) 174 (SCC) at 183 that

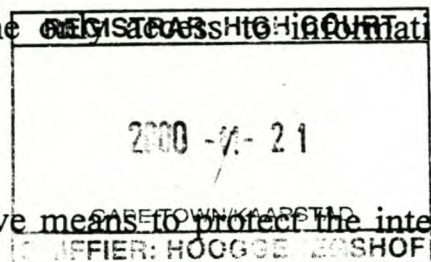


‘(f)reedom of expression ... is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society.’

Writing about the freedom of the press, Kranenberg **Het Nederlands Straatsrecht** at 524 also starts with the remark that

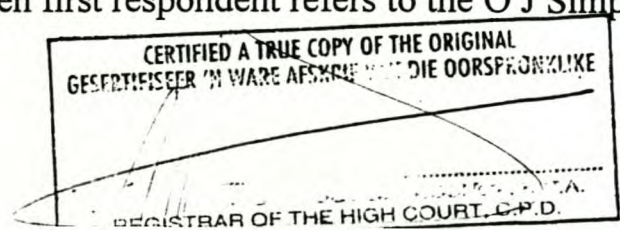
‘(d)e vrijheid van drukpers is een der belangrijkste grondrechten, ja, na de godsdienstvrijheid misschien het belangrijkste’.

[60] Regarding the importance of the right which is limited it is also significant, in my view, that on the undisputed facts, the matters being inquired into by the commission has provoked widespread national and international interest. This is hardly surprising inasmuch as the inquiry involves the conduct of members of the South African National cricket team and, obliquely, other international cricket players as well. What should also be borne in mind in considering whether and to what extent the rights of a radio broadcaster should be limited, is that on the uncontraverted facts, the radio constitutes the ~~only access to information~~ **only access to information** for many South Africans.



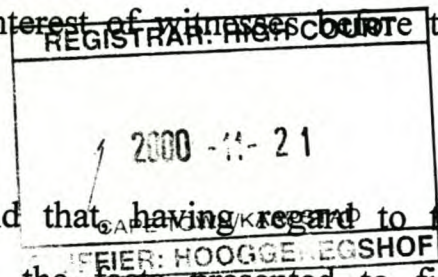
[61] As to the consideration of less restrictive means to protect the interest of witnesses, which essentially formed the basis for first respondent's concern, it appears from the record of the proceedings before the commission that counsel for the objectors did not distinguish between television and radio. They objected to both on the same basis. This failure to distinguish between the two electronic media was perpetuated in first respondent's ruling as well as on first respondent's papers before this court. In fact, when first respondent refers to the O J Simpson-

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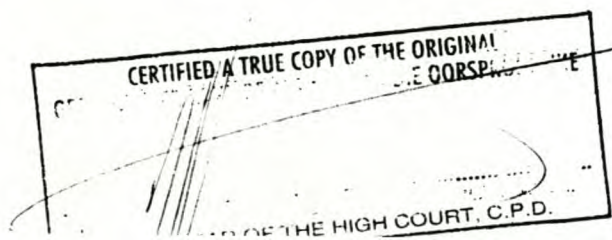
like performance by the electronic media which occurred when Cronjé gave evidence, it is apparent that his complaint is directed mainly at the intrusive effect of the video cameras. Applicant's case is that its radio microphones would be far less intrusive than video cameras. It appears to me that this must be so and that first respondent ought to have considered the compromise of allowing radio but excluding television cameras. Moreover, Cainer indicated to first respondent that, from a technical point of view, it would be possible for first respondent to impose restrictions which would render the presence of radio broadcasting and recording equipment even less obtrusive. He also tendered on behalf of applicant to be subjected to such restrictions. It does not appear from respondents' papers that first respondent considered the possibility of removing the objections against the presence of radio by imposing some or all of the restrictions suggested by Cainer, instead of imposing a blanket prohibition on all electronic media.

[62] On an objective approach, I do not believe that there are sufficient facts before this court to justify the conclusion that nothing short of a total ban on the electronic media would suffice to protect the interest of witnesses before the commission.

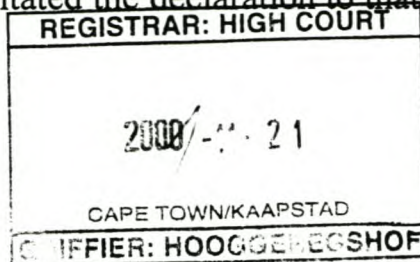


[63] In all the circumstances, I therefore find that, having regard to the provisions of section 36 of the Constitution, the facts presented to first respondent and to this court were not sufficient to justify the infringement of applicant's rights under section 16(1)(a) of the Constitution. Consequently, I find that the blanket exclusion of applicant's radio broadcasting and recording equipment from the sittings of the commission is inconsistent with the Constitution and therefore invalid. In accordance with the provisions of section

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172(1)(a) of the Constitution the latter finding necessitated the declaration to that effect in paragraph 2 of the Order.



COSTS

[63] As appears from paragraph 5 of the Order, it was decided not to make the normal costs order to the effect that costs should follow the event, but to make no order as to costs. A number of considerations gave rise to that decision. These considerations included the following. The application was brought on such short notice that, through no fault of respondents, it could not be finalised at the first hearing. At the second hearing we allowed argument by *amici curiae* which was of assistance to the court, but which unavoidably resulted into this hearing running into a second day. Thirdly, the application ventured into new territory and it was brought against a public office bearer acting in his capacity as such. In the circumstances the court found that a costs order against respondents would not be in the interest of justice.

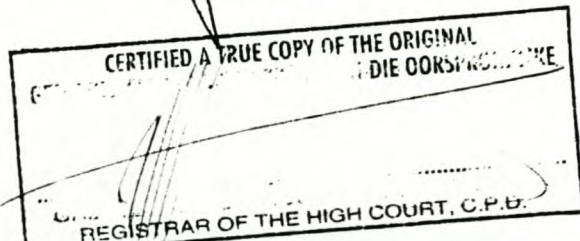

BRAND J

I agree


HLOPHE JP


TRAVERSO J

I agree



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