

Open justice and anonymity for the accused

The publication of an accused person's identity before conviction arguably violates the substance of the presumption of innocence. The law should not turn a blind eye to the serious consequences of conviction in the eyes of the public: shame, stigma and loss of business or livelihood.

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In The Straits Times recently, assistant news editor Toh Yong Chuan wrote about the need to balance open justice with victim protection. There is a third, vital interest to consider – the accused's.

The principle of open justice must be balanced against another foundational principle of our legal system, the presumption of innocence.

Open justice means that, in order for justice to be done, it must be seen to be done. Our courts have held that "if justice is to be properly administered, it is essential that the decisions of the courts and the decision-making process itself be open to public scrutiny. It is for that reason that in all but exceptional cases, hearings are conducted in public, judgment is delivered in public and proceedings can be freely reported".

Open justice is not absolute and is subject to qualifications in the interests of justice. This happens regularly, by way of gag orders that prevent disclosure of the identity of a person, or by holding proceedings in camera – that is, without public access.

Usually, these measures are invoked to protect vulnerable victims or sensitive information relating to national security. But the principle of open justice does not itself limit the number of categories in which it may be overridden by other interests – open justice exists to enable justice to be properly administered and would be self-defeating if applied indiscriminately to cause substantive injustice.

PRESUMPTION OF INNOCENCE

The presumption of innocence means that a person is innocent until proven guilty.

This is much more than a technical rule of evidence: The Minister for Law, Mr K. Shanmugam, has said that "the presumption of innocence is an important and fundamental principle, and is one of the foundations of our criminal justice system. The Government is absolutely committed to upholding the presumption of innocence, as a core principle in our commitment to rule of law".

The courts have held that "one of

the fundamental rules of natural justice... is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it". A person should not suffer the consequences of guilt without first being found guilty; this is basic fairness and a tenet of our justice system.

The publication of an accused person's identity before conviction arguably violates the substance of the presumption of innocence. While the accused is not punished by the courts, he may suffer the consequences of conviction in the eyes of the public: shame, stigma and loss of business or livelihood.

The law should not turn a blind eye to this. It is all very well to say that the solution is to educate the public as to the difference between an accusation and a conviction, but the reality of today's attention-starved world is that few people have the time or inclination to listen.

Even publishing news of an acquittal does not mean the accused will be vindicated: His reputation will already have suffered and there is no guarantee that any news outlets will necessarily pick the acquittal up, much less that anyone will read it. If the presumption of innocence is to be upheld as a matter of rule of law, its substance, and not just its form, must be honoured.

OPEN JUSTICE V PRESUMPTION OF INNOCENCE

There is no inherent contradiction between open justice and the presumption of innocence. We have argued above that open justice would be self-defeating if its indiscriminate application leads to substantive injustice. This is clearly the case where vulnerable victims are concerned, so why not also where accused persons are?

The recent case of Dr Yeo Sow Nam's acquittal, after his accuser's testimony failed to hold up in court, shows that accused persons are, in a sense, vulnerable as well. Dr Yeo had his life and practice irreparably damaged even though he was acquitted.

There would be no prejudice to the prosecution if disclosure of an accused's identity were to be prevented before conviction.

On the other hand, the defence would benefit greatly. In preparing his defence, the accused must be allowed to do so without the weight of public opinion around his neck. We have represented



Open justice is satisfied by publication of the accused's name after conviction, say the writers. They add that the public may still scrutinise the resulting news reports and judgement, and there is no compelling reason why the public must be made aware of the accused's identity earlier on in the process. PHOTO: ISTOCK

individuals who, like Dr Yeo, had their reputation dragged through the mud because their identities were made known to the public even before trial commenced.

Whether an accused is guilty of the offence he has been charged with, he must be allowed to prepare his defence just as if he were innocent and the revelation of his identity prior to trial can be detrimental to that preparation.

In extreme situations, it can lead to the withdrawal of support of loved ones or the loss of livelihood, which can in turn cause an accused to choose not to take the matter to trial, having been disheartened, disbelieved and convicted by the court of public opinion. Disturbingly, this can happen even when there is real doubt as to whether the accused did commit the offence in question.

In contrast, if an accused is found guilty after trial, having his name released at that stage would not prejudice either the accused or any other party to the suit.

To strike the right balance of protecting the rights of the accused and upholding our values of justice, we should consider all suitable approaches.

POSSIBLE APPROACHES

Mr Shanmugam recently said that there were two broad approaches to these issues: first, leaning in favour of anonymity, as in Ireland, Switzerland, New Zealand and Australia, and second, leaning in

favour of open justice, as in Britain.

Mr Shanmugam said that Singapore follows the British approach, but the position is open to review.

Open justice is satisfied by publication of the accused's name after conviction. The public may still scrutinise the resulting news reports and judgment. There is no compelling reason why the public must be made aware of the accused's identity earlier on in the process.

Mr Shanmugam also said that having the accused's name published allows for unidentified victims of serial offenders to come forward and seek help. However, first, most offenders are not serial offenders, and second, publication of the accused's name after conviction would likewise allow unknown victims to come forward.

There is no urgent need for them to come forward during the trial, as each victim would be a separate case that requires a fresh investigation and likely a separate trial. Often, the prosecution does not proceed with other charges until after the first trial is dealt with anyway.

The mechanism for securing the accused's anonymity could be a gag order – that is, an order preventing publication of the accused's identity.

Mr Shanmugam has previously said that a gag order might not be effective as those attending court in person would know the identity

of the accused. However, surely if a gag order is good enough to protect victims, it is good enough for the accused. The measure need not be perfect, only good enough. In most criminal cases, public observers are few and far between – it is publication in the news that attracts attention and in turn scrutiny upon the accused who has yet to and may not be convicted.

STATUTORY PROVISION FOR GAG ORDER

We suggest that a statutory power to, by default, gag the publication of the accused's identity could be considered, with appropriate exceptions where it is in the interests of justice for the accused's identity to be made public – where, for example, there is a compelling reason to believe that the accused may continue to commit offences while on bail, perhaps.

The gag order would be automatically lifted upon conviction or continue indefinitely if there is an acquittal. There could also be a provision to allow for the accused to apply for an extension of the gag order pending appeal, since acquittals do sometimes occur on appeal. This in no way impacts the protection of victims, who would also continue to enjoy the protection of gag orders.

Further, the courts could retain discretion to lift a gag order to avoid abuse of the provisions.

CONCLUSION

Open justice must mean that justice is meted out for all. This includes not just the interests of the public, but also that of the accused who is being put through the criminal justice system.

An accused person is not the same as a guilty person. An accused person is vulnerable; his livelihood and reputation are at stake. The presumption of innocence requires that we treat him, as far as possible, as if he were innocent.

Protecting his identity in no way prejudices the prosecution or victims. There is no detriment to the public either – people may still go to observe the trial, though not able to publish the accused's identity, and can scrutinise the (appropriately redacted) judgment in the case of an acquittal. The press can continue to report on the case even before conviction, at least in general terms.

In cases of conviction, the accused's identity will be known after conviction. This is not a zero-sum game: Protecting the identity of the accused prior to conviction harms no one and benefits only the innocent.

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