VOL. XV

MINUTES
OF THE
SUPREME BENCH
OF
BALTIMORE CITY

January 1, 1953
TO
December 31, 1954

MINUTES

A regular monthly meeting of the Supreme Bench of Baltimore City was held on Saturday, March 7, 1953, at 10:00 A. M. All of the Judges were present with the exception of Judge Moser. Chief Judge W. Conwell Smith presided.

Upon the motion of Mitchell Stevan, Alan M. Resnick and Henry Millner were admitted to practice as members of the Baltimore Bar by the Supreme Bench.

A motion for new trial in the case of George Edward Grammer, who was convicted of murder in the first decree, was heard. The Supreme Bench then held the motion sub curia.

There being no further business, the meeting was adjourned.

Joseph R. Byrnes
Secretary

Supreme Bench Reserves Decision On Grammer New Trial Motion

The Supreme Bench of Baltimore City on Saturday reserved its decision on the motion for a new trial of George Edward Grammer, who was convicted of murder in the first degree, after hearing arguments on the motion for nearly four hours.

Anselm Sodaro, State's Attorney for Baltimore City, and J. Harold Grady, Assistant State's Attorney, appeared on behalf of the State while Grammer was represented by Judge Joseph Sherbow, former member of the Supreme Bench, Theodore Sherbow and Edward F. Shea, Jr.

Two New Attorneys Are Admitted To Practice By Supreme Bench

Alan M. Resnick and Henry Millner were admitted to practice as members of the Baltimore Bar by the Supreme Bench of Baltimore on Saturday upon the motion of Mitchell Stevan.

MINUTES

A special meeting of the Supreme Bench of Baltimore City was held on Friday, March 13, 1953, at 1:30 P. M. All of the Judges were present. Chief Judge W. Conwell Smith presided.

The Supreme Bench denied the motions for new trials of

McConnell Peachie, found guilty of violating the narcotic laws;
Clarence Williams, convicted of larceny; and
The Television Company of Maryland, found guilty of violating the Sunday Sales law.

The Bench reserved its decision upon the motion for new trial of Robert Kane Hepp, who was convicted of robbery with a deadly weapon and assault charges.

After considerable discussion, the motion for new trial in the case of State vs. George Edward Grammer was denied by a vote of 8 to 2. Chief Judge W. Conwell Smith and Judges Tucker, Moylan, Mason, Manley, Warnken, Carter and Cullen voted in the affirmative. Judges Niles and Byrnes voted in the negative. Judge Moser was not present during this part of the meeting.

It was decided to withhold announcement of the decision until 12:30 P. M., Monday, March 16, 1953, at which time all Judges who cared to do so could file opinions.

There being no further business, the meeting was adjourned.

Joseph R. Byrnes
Secretary

Motions For New Trials Are Decided By Supreme Bench

The Supreme Bench of Baltimore yesterday denied the motions for new trials of McConnell Peachie, found guilty of violating the narcotic laws; Clarence Williams, convicted of larceny and The Television Company of Maryland, found guilty of violating the Sunday Sales law. The Bench reserved its decision upon the motions of Robert Kane Hepp, who was convicted on robbery with a deadly weapon and assault charges.

No decision was announced on the motion of George Edward Grammer, who was found guilty of murder in the first degree, and which was argued before the Bench on March 7th. Chief Judge W. Conwell Smith stated that the Judges will confer again on Monday at 12:30 P. M. and will then make public their decision on the Grammer motion.

M I N U T E S

A special meeting of the Supreme Bench of Baltimore City was held on Monday, March 16, 1953, at 12:30 P. M. All Judges were present with the exception of Judge Moser. Chief Judge W. Conwell Smith presided.

The purpose of the meeting was to sign the Order denying the motion for a new trial in the case of State vs. George Edward Grammer. The Order denying the motion was signed by

Chief Judge W. Conwell Smith
Judge John T. Tucker
Judge Charles E. Moylan
Judge E. Paul Mason
Judge Michael J. Manley
Judge S. Ralph Warnken
Judge Joseph Carter
Judge James K. Cullen

Memorandum opinions were filed by Chief Judge Smith, Judge Warnken and Judge Tucker, and a joint opinion dissenting from the majority opinion was filed by Judges Niles and Byrnes.

There being no further business, the meeting was adjourned.

Joseph R. Byrnes
Secretary

Grammer Loses Appeal To Supreme Bench For New Trial

G. Edward Grammer, convicted of first degree murder in the "near perfect crime" death of his wife last August, has lost his appeal for a new trial.

The Supreme Bench of Baltimore City, in an eight to two vote, turned down his appeal. Judge Emory H. Niles and Joseph Byrnes dissented. Trial Judge Herman Moser did not participate.

The decision followed a week of study on the appeal by the Court. Argument was presented on March 7 by the defense counsel, former judge Joseph Sherbow, who contended Grammer was denied a fair and impartial trial.

The prosecution contended Grammer killed his wife for what the state called his "hopeless love" of Mathilda Mixibrocky, 28, former United Nations employe.

The State said Grammer bludgeoned his wife and then let her automobile run downhill and crash to make her death appear an accident.

Grammer now will be told his fate—death by hanging or life imprisonment, to be decided by Judge Moser.

He may carry his case to the Maryland State Court of Appeals after he is sentenced. (See opinion published in this issue on Pages 2 and 3.)

Supreme Bench of Baltimore City

Filed March 16, 1953.

Indictment 3544/1952

STATE OF MARYLAND
vs.
GEORGE EDWARD GRAMMER

Anselm Sodaro, States Attorney, and *J. Harold Grady*, Assistant States Attorney, for State.

Joseph Sherbow, Theodore Sherbow and *Edward F. Shea, Jr.*, for defendant.

OPINION ON MOTION FOR NEW TRIAL

WARNKEN, J.—(MASON, MANLEY, CARTER and CULLEN, JJ., concur in this opinion.)

Defendant's present counsel has argued the following five points in support of his motion for a new trial: (1) Two television broadcasts, one the same evening shortly after defendant signed a confession, another later in which Dr. Fisher appeared, and the information contained in newspaper items and a magazine article were of such nature as to make it impossible for defendant to obtain a fair and impartial trial; (2) because of such publicity the Court should have postponed the trial to an indefinite date; (3) the use of a fictitious name, with the consent of the trial judge, in taking bail from an important witness who lives in another state to endeavor to assure her appearance at the trial; (4) admission in evidence of the confession signed by the defendant; (5) the verdict of guilty in the first degree cannot legally be justified from the evidence. These points will be discussed in the above order.

(1) This point involves two parts, viz., (a) defendant, because of said publicity, would have been unable to obtain an impartial jury, and therefore had to elect to have the trial before the judge without a jury, (b) that Judge Moser was similarly affected by the publicity. The latter contention apparently was not shared by Mr. Federico, who tried the case, as he did not request a postponement of the trial or that Judge Moser retire as trial judge. On the contrary he consented to the suggested date of trial and volunteered that defendant was rather fortunate to have Judge Moser hear the case as he was sure Judge Moser will give defendant a fair and impartial trial.

As to the first part of the contention, at the arraignment of defendant on September 16, 1952, Mr. Federico elected a trial before the judge after stating that he was mindful of the hysteria that exists in this case and he did not feel any jury anywhere in the country could render his client a fair and impartial trial and for that reason elected a court trial. At that time he said it was agreeable to have the trial on October 6th, which was later postponed to October 14th at the request of the State's Attorney. On the latter date Mr. Federico made a "statement for the record" by proffering as evidence local newspapers, [matter broadcast from] local television and radio stations and Life Magazine issue of September 15th "for the legal reason that the" defendant "has been interfered with and deprived of by these publications to a free choice of mind in selecting a fair and impartial trial by a jury, thus depriving him of his constitutional rights of trial by jury." Judge Moser thereupon directed the clerk to again arraign defendant. After again pleading not guilty he was asked whether he elected to be tried by a jury or by the judge and he elected to be tried by the judge. Neither before nor after the election of a court trial did defendant move for delay in the actual trial. For that reason and as a jury trial was not requested, there was no need for the judge to examine the proffered publicity data. Mr. Federico made no further reference to it and willingly proceeded with the trial. In this state of the matter there should be nothing for us to consider. But defendant's present counsel says a motion for an indefinite delay should have been made and, in the interest of justice, we should so treat it. To do so would not only create an anomalous and unreal situation, but would be a precedent in the future for discarding all semblance of orderly procedure in criminal trials. In this case change of counsel affords the opportunity to indulge in hindsight, but it also has its limitations.

As there is a total lack of proof in the record that Judge Moser was so affected by said publicity that he could not give a fair and impartial trial, a motion, even if it had been made, for delay would have had no factual support and therefore is not important at the present time. This requires defendant to rely on what is, after all, his main contention, viz., that he elected a court trial because he could not obtain an impartial jury trial. This point assumes Mr. Federico did not act advisedly in the action he took or failed to take and that he desired to advise his client to take a jury trial rather than a court trial. This important question must be decided early by counsel in every serious criminal case. While there are various considerations that bear on the decision to be made there is, at least, some element of chance involved. After a choice and an adverse result, one not responsible for the choice is free (as an advocate) to prefer the other method of trial. It is quite possible that very few lawyers, familiar with the facts in this case, would have advised their client to elect a jury trial, but we do not have to resolve this matter. In any event as no request for a jury trial was made, whether an impartial jury could be obtained was never presented to or decided by the trial court. Therefore, it cannot be contended that defendant has been prejudiced. Judge Moser specifically commented on the fact that "there had been no testing of prospective jurors to find out whether such proffered proof, if seen and if read, had such an effect upon their minds that it would be impossible for them to give a fair and impartial trial based only on the evidence heard from the witness stand, which is the test." He also mentioned that with the absolute right of removal from Baltimore City which defendant has, there has been no proof to show that it would not have been possible for defendant to have the benefit of a qualified jury in some other jurisdiction of the state.

Counsel first had to consider, if the confession was admitted in evidence (and this was for the Court to decide), whether a guilty verdict could possibly be avoided, irrespective of the method of trial, in view of the evidence relating to defendant's infidelity and the terrible details with respect to the method of causing his wife's death. If it was determined that under such circumstances a verdict of guilty was inevitable, counsel then had to be concerned with the degree, that is, guilty of first or second degree murder. This important question would depend on whether a judge or a jury would be more analytical and detached from the gruesome facts to carefully weigh and consider the elements which constitute the difference between the two degrees of murder. This and other questions involving tactics and strategy have to be determined before the trial. It is too late now to try another course of action. We are unwilling to assume Mr. Federico did not give full consideration to these vital matters and that the action he took or failed to take was not deliberate and believed by him at the time to be in the best interest of his client.

Defendant insists that the matter publicized and the method used was prejudicial to defendant as a matter of law, or, at least, it was of such a character it should be inferred that every prospective juror in Baltimore City had been rendered so partial and prejudiced against defendant that, notwithstanding his oath, he could not give fair consideration to the evidence which would be produced at the trial. This contention must be rejected because of legal precedents, binding on us, involving similar or worse publicity. It is not feasible or necessary to review all the published or broadcast matter relating to the case. The television broadcast on the evening defendant signed a confession is probably the most pointed of all the publicity items set forth in defendant's so-called Exhibit 7. Thereafter the newspaper accounts were in substance reiteration in different forms of previously broadcast or published statements with comments, speculations, etc. The statements made during the television broadcast were in brief (omitting embellishments), that after long interrogation of defendant, the State's attorney and police had secured a statement from him, that he visited the scene of the murder with them, the case was concluded, Grammer has been brought to justice and will be charged with murdering his wife. This could only mean to a person of even very average intelligence that defendant had confessed although the word "statement" was used. Other details relating to the crime were published from time to time up to the time of trial.

While this television program was being broadcast the State's Attorneys of Baltimore City and Baltimore County and police officers, who took part in the investigation, were present in the studio and they were separately televised and comments made about their participation in the case. Although these law enforcement officers made no spoken comments during the broadcast, their voluntary presence must have been with knowledge of its purpose and, therefore, they are chargeable with any improprietics involved. We regard such a performance improper, undignified and unnecessary. We take this opportunity to express our disapproval of such practice and hope it will not be repeated in future cases. The courts probably have the traditional power to discipline officials who are a part of the administration of justice.

As above indicated no effort was made by defendant to prove that the published statements were prejudicial. And it is clear from the adjudicated cases they could not be found to be prejudicial merely from reading them. The law with respect to this subject matter was fully reviewed and stated in the recent case of *Baltimore Radio Show, Inc., vs. State*, 193 Md. 300. Although the case involved contempt proceedings against several radio stations, it grew out of the broadcast by radio of information about Eugene James, who was charged with the murder of a child. The latter, an eleven year old girl, was stabbed to death while at play. The information broadcast was furnished by the Police Commissioner of Baltimore City. It was not only stated in the broadcast that James had been arrested and charged with the crime, but he had signed a confession, showed where the carving knife was buried, which was found, had shortly before raped a woman in the vicinity and just recently had been released from a ten year prison term for stabbing attacks on women. He was found guilty by the court of murder in the first degree and sentenced to be hanged which was affirmed on appeal, after we denied a motion for a new trial. Counsel for James testified in the contempt case that he took a trial by the judge because the facts published about his client made him feel he could not pick a jury which would not be infected by knowledge of James' confession and his criminal background. This was held to be conclusions of the witness and not statements of fact. The court ruled that prejudice could not be inferred from the broadcasts themselves and there was no direct evidence of prejudice because of the broadcast information. Mr. Federico's statement to Judge Moser as to the reason his client elected a trial by the judge is no different and should be accorded the same characterization as the statement of James' counsel.

Thus the information broadcast about James included other crimes and was more explicit than the publicity data in the present case. It is therefore clear we cannot hold that the defendant was prejudiced in the instant case. Defendant's counsel insists that the ruling on this point in *Baltimore Radio Show, Inc., supra*, is not controlling because that was a contempt case. In its discussion of the legal contentions in *Baltimore Radio Show, Inc., supra*, the Court pointed out and answered one of the questions involved.

"We are asked to hold that disclosure of the fact that the accused had confessed, and had previously been convicted of similar crimes, presented such a clear and present danger as to deprive the accused of his right to a fair trial." (p. 326).

* * * * *

"Assuming that the case at bar was 'pending' as soon as the accused was arrested and charged, but before his indictment, *Berlandi vs. Commonwealth*, 314 Mass. 424, 50 N. E. 2d 210, 216, it seems clear that the mere fact of public statements as to matters that might, or might not, be admissible in evidence against him, would not prevent a trial or vitiate a subsequent jury verdict. Our decisions so hold." (p. 328).

The Attorney-General in that case made the same point which defendant is now making but the Court's answer was emphatic and left no doubt for the future:

"The State earnestly contends, however, that the question is not whether there is such a showing of prejudice as to vitiate a trial, but whether the statements were reasonably calculated to influence a potential jury. We should have grave difficulty in holding that the same statements that would not be so prejudicial as to require the reversal of a death sentence, could still be so prejudicial as to support convictions for contempt. But even drawing the inference, we think the proof does not meet the present test laid down by the Supreme Court, which requires more than an inherent or reasonable tendency to prejudice, or even the probability that it will do so." (pp. 330-331).

That the accused in a criminal case must produce proof of prejudice from information published about him is, as the Court said in *Baltimore Radio Show, Inc., supra*, not a new principle of law in Maryland. In that case the Court referred to its previous decisions in *Garlitz vs. State*, 71 Md. 293, 300, *Downs vs. State*, 111 Md. 241; *Newton vs. State*, 147 Md. 71; *Jones vs. State*, 185 Md. 481, in two of which cases statements had been published to the effect that the accused had confessed. See also the recent case of *Larch vs. State*, 92 At. 2d 463, decided November 14, 1952. In furtherance of its discussion that mere opportunity for prejudice does not raise a presumption that it exists, that it must be proved and that the effect of the publicized information is necessarily one of degree, the Court in that case said:

"In a capital case he [defendant] has an unqualified right of removal. Code, Article 75, section 109. These rights are predicated upon the ever-present possibility of public indignation and prejudice against an accused, where a crime of a wanton or shocking character is committed. The mere fact of arrest, or indictment, implies that the police believe the accused to be guilty, or that the Grand Jury has found a *prima facie* case. Knowledge that the public authorities are active may have a tendency to allay public excitement and fears, so often magnified by word of mouth. Trials cannot be held in a vacuum, hermetically sealed against rumor and report. If a mere disclosure of the general nature of the evidence relied on would vitiate a subsequent trial, few verdicts could stand." (p. 330).

This really becomes a discussion of an abstract proposition of law because, as previously mentioned, defendant did not raise the question of inability to obtain an impartial jury, by motion, request for indefinite postponement or in any other way. This discussion, therefore, must be based on an assumption that does not exist. That is, that (a) the point was properly made before the trial started and (b) the Court ruled against the defendant. If that had been the case, in order for the defendant to prevail he would have to establish that there had been a denial of "due process of law" in violation of his rights under the Fourteenth Amendment of the Federal Constitution. The facts in the case at bar do not establish that the defendant was precluded from having a fair and impartial trial. Therefore, there has been no denial of "due process of law". As previously mentioned there is no proof of prejudice, and reading of the information broadcast does not of itself establish such prejudice as would have prevented defendant from obtaining a fair and impartial jury.

There is a difference in the Federal courts and in the state courts

respect to the latter question. al in the Federal court may be ed to be unfair even though is not a lack of "due process w" which is the minimal re- ment in order to justify the dation of a trial in a state *McNabb vs. U. S.*, 318 U. S. 40.

most recent controlling case his subject is *Stroble vs. Cali-*, 343 U. S. 181, decided April 52. It involved conviction of le of murder in the first degree girl six years of age. As stated e Court the search for and ap- nsion of the defendant was at- d by much newspaper publicity. een the time of the murder and of his arrest newspapers of al circulation in the Los An- area featured in banner head- the manhunt which the police conducting for defendant. On lay of his arrest these news- printed extensive excerpts his confession in the District ney's office, the details of the ssion having been released to ress by the District Attorney riodic intervals while the de- nt was giving the confession. e following Monday, four days the newspapers reprinted the ext of that confession as it was into the record at the prelimi- hearing. Defendant was vari- described in the headlines and e text of news stories as a rwolf", "a fiend", a "sex-mad " and the like. The District ney announced to the press his that the defendant was guilty ane. These facts greatly out- the information broadcast and appeared in the public press present case. The Court held the defendant had failed to that the newspaper accounts ed against him such prejudice e community as to necessarily nt a fair trial. The following ment of the Court would seem most apposite and conclusive e first point made by the de- nt in this case:

indeed, at no stage of the pro- lings has petitioner offered so h as an affidavit to prove that juror was in fact prejudiced he newspaper stories. He asks Court simply to read those cles and then to declare, over contrary finding of two state rts, that they necessarily de- ed him of due process. That cannot do, at least where, as , the inflammatory newspaper unts appeared approximately weeks before the beginning of tioner's trial, and there is no rmative showing that any com- nity prejudice ever existed or ny way affected the delibera- of the jury. It is also sig- ant that in this case the con- ion which was one of the t prominent features of the spaper accounts was made vol- arily and was introduced in dence at the trial itself." (p.).

the latter case the Court held was no showing of prejudice that there was no deprivation due process of law."

(2) The second point made by endant is that because of the ve mentioned publicity the trial hould have been postponed to an definite date. This point is large- y involved in the first point which as been discussed. It must be founded on the fact that defendant cannot obtain a fair and impartial trial, and that time is needed to erase or cause to fade the proof of the prejudice against defendant created by the information pub- lished about him. This point like- wise has no legal standing because no request was made by defendant's counsel for a postponement of the trial; indeed he acquiesced in an earlier date of trial than actually occurred. In support of this conten- tion, defendant's present counsel re- lies heavily on the case of *Delaney vs. United States*, 199 F. 2d 107 (U. S. C. A. 1) Oct. 10, 1952. De- laney was Collector of Internal Reve- nue for the District of Massachu- setts. He was indicted for certain improper action in his official ca- pacity relating to the collection of income taxes in violation of a Fed- eral statute. A Committee of Con- gress which was investigating ir- regularities in the offices of Col- lectors of Internal Revenue held extensive hearings in Boston and elsewhere, and the facts developed were given widespread publicity in the newspapers throughout the coun- try. There was considerable testi- mony with respect to Delaney's con- duct in office and matters amount- ing to larceny and embezzlement which occurred prior to his appoint- ment as collector. He was convict- ed by a jury, and upon appeal the conviction was reversed on the ground that under the circumstanc- es he was not able to obtain a fair and impartial trial. The gist of the decision is that the case should not have been heard at the par- ticular time and not until the ef- fect of the nationwide publicity had had a chance to wear off. There are two principal differences be- tween the case at bar and the De- laney case. The latter occurred in a Federal court where it was not necessary, in order for the Court to take the action it did, to find that there had been a violation of the due process clause. Secondly, Delaney's counsel not only request- ed the Congressional Committee to discontinue the hearings and the press releases and publicity flowing therefrom, but several motions were filed before the trial began for a continuance of the trial for a rea- sonable time, which after hearing were denied. Thus orderly pro- cedure was observed in raising the legal question and in presenting the facts in support thereof. The appellate court seems to have based its action on the belief that the lower court did not recognize any difference between a legislative pub- lic hearing prior to indictment and one where trial is impending under an existing indictment. In short that the trial judge did not exercise a sound discretion when seasonably asked to do so. This general ques- tion of delay of the trial was re- jected in the famous Communist trial, *United States vs. Dennis*, 183 F. 2d 201 (C. C. A. 2d), Oct. 1, 1950. In the Delaney case the Court found from the data submitted in support of the motion for a continu- ance that there was prejudice which should require the Court to exer- cise its discretion by postponing the trial. In the case at bar, applying the principles of law which are con- trolling on us, there is no proof of prejudice and we cannot, from merely reading the publicity data, find that there would be such preju- dice as to prevent an impartial trial either by jury or by a judge and, of course, there has also been no violation of defendant's constitu- tional rights as above mentioned.

(3) Defendant's third point is with respect to the fictitious name used by the witness Mathilda Mis- brocky. It appears that she works in New York and her parents live in Canada. She was required to appear in Baltimore pursuant to the uniform extradition procedure be- tween Maryland, New York and other states. Rather than be con- fined in jail as a material witness until the trial was had, she gave bail in the amount of $5,000. In doing so the bail piece showed her name to be Mary Matthews, which was done by the State's Attorney after consultation with Judge Moser. Apparently the purpose was to avoid annoyance by newspaper reporters while the case was awaiting trial. According to a statement made by the State's Attorney at the hear- ing, the correct name and address of this witness was promptly given to Mr. Federico, and when the facts about the fictitious name and the reason for giving it were mentioned during her interrogation at the trial the explanation for the use of the name Mary Matthews was given in open court by Judge Moser, and Mr. Federico stated he had no objection to it. Present counsel insists that the publication of the witness' true name and address had the possibili- ty of some person unknown to his client voluntarily coming forward and giving helpful testimony. It so happens that an industrious re- porter learned the name and address of Miss Misbrocky and her true name and her photograph appeared in the News-Post on September 26th, together with various facts with re- spect to her relations with the defen- dant.

We see no reason for Judge Moser to have disqualified himself merely because he signed the bail piece to assure the appearance of what the State's Attorney regarded as a mate- rial witness. We also do not find that the defendant was prejudiced either by that act or by permitting the witness to use a fictitious name in the manner described.

(4) The only real point made against the admission of defendant's signed confession in evidence grew out of some confusion with respect to a statement made to defendant by Captain of Detectives Murphy; that is, whether the statement was made before or after the confession was given. Captain Murphy and other police officers were recalled and stated specifically that the state- ment made by Captain Murphy was after the confession was given. Judge Moser found that the confes- sion was voluntary on the part of the defendant and admitted it in evidence. We find no basis in the stenographic transcript for a differ- ent conclusion.

(5) Defendant also contends that under the evidence the most severe verdict that could have been ren- dered was murder in the second degree. After carefully consider- ing the whole record, we think there is ample evidence to justify a ver- dict of murder in the first degree, and it would serve no useful pur- pose to review the facts that would sustain this conclusion.

Finally, defendant's counsel urges that, irrespective of inadequacy of procedure at the trial to raise some or all of the points now presented, we should grant a new trial in the exercise of our so-called unlimited discretion, and *Murphy vs. State*, 184 Md. 70, 74, is cited in support of the suggestion. In that case, which was a conviction of rape and a death sentence, the Court affirmed the sentence but said in its opin- ion that because of the gravity of the sentence it would disregard im- perfections of the record and ex- amine all *rulings* of the trial court, which it was claimed were preju- dicial to the defendant. We have also considered all rulings of the trial court but none of them was erroneous. We cannot, however, re- construct the trial, assume the em- ployment of other tactics by coun- sel, and set up and decide legal questions without knowledge of the context or which may never have had any factual basis for support.

Our discretion is unlimited only in the sense that when we grant a new trial there can be no appeal or review of our action by a higher au- thority. But it would seem to be implicit that such action should not be taken unless we find that the trial court committed prejudicial errors in its rulings or we feel that injutice has been done.

The motion for a new trial should be denied.

SMITH, C. J. (MOYLAN, J. Con- curs)—

After a careful reading of the lengthy record in this case, and full consideration of the argument of present defense counsel (about things which are not in the record), I conclude that Judge Moser de- serves praise, rather than censure for the conduct of the trial.

The rights of the accused were scrupulously accorded him. His statements were properly admitted in evidence. No fair minded person could reasonably doubt that he in- flicted the cruel blows which re- sulted in his wife's death. The circumstantial evidence of premed- itation is abundant.

That he was forced to the elec- tion of a court trial, rather than a jury trial, by the advance publici- ty, I believe to be a false conclu- sion, not based on fact. That he ever wanted a trial by jury, I seri- ously doubt. It was merely the kind of case in which his chances of escaping a first degree verdict were better before a Court than a jury. He freely elected a trial by the Court.

For this Court to assume, without proof, that the minds of all persons were so poisoned against him by the keen public interest, and wide public comment in the press, that he could not receive a fair trial, either by the Court or jury, and that the trial should, without any request by the accused, have been postponed indefinitely is simply fan- tastic.

I might concur in the separate opinion of Judge Warnken, but for his statement that the power of this Court in considering new trial applications, is limited to errors of law, lack of due process, and con- victions of clearly innocent persons. Our powers are much broader, and extend to every element and inci- dent of the trial. No artificial nar- rowing of those powers is necessary for the approval of the verdict in this case, which is fully supported by competent evidence in the record.

TUCKER, J.—

It is my opinion that Judge Moser was not disqualified by any pre- trial action on his part, or other- wise, from sitting as court and jury in the case, that the court did not err in admitting the defendant's signed confession into the evidence, that there was ample evidence to justify a verdict of first degree murder, and that under the law, as applied to the facts that were prof- fered at the trial and presented at the hearing on the motion for new trial, the defendant was not deprived of any right under the due process provisions of the Con- stitution.

I concur in Judge Warnken's opinion as to the result.

NILES and BYRNES, JJ. (Dissent)

In our opinion a new trial should be granted in this case, because the most fundamental right of a citi- zen of Maryland has been violated. This is the right to a trial by a fair and impartial jury.

The Constitution of Maryland has provided for more than 175 years, and now provides, that

"That in all prosecutions every man hath a right * * * to a speedy trial by an impartial jury, with- out whose unanimous consent he ought not to be found guilty."

Declaration of Rights, 1776, Ar- ticle 19; 1867, Article 21.

The 6th Amendment to the Con- stitution of the United States is in substantially the same terms.

This view is in no way an expres- sion of opinion on whether the Defendant is guilty or innocent of the crime of which he is charged. Still less is it an approval of crimi- nal or any other misconduct by anyone accused of such crime. It is simply an affirmation of the most basic principle of criminal law, namely, that a citizen charged with a crime has the right to be tried by a fair and impartial jury, upon the evidence brought into court against him. He should not be denied the right to a jury trial by publicity which poisons or preju- dices the minds of his fellow citi- zens in advance, so that his right to obtain an impartial jury is im- paired, either wholly or in part. This is especially true when the publicity has been inspired or par- ticipated in by officers of the State itself.

Nor is this case one involving a clash between the principles of fair trial and freedom of the press. No question of freedom of the press or of contempt of court by publication is involved; nor is this a question of restricting the newspapers or other organs of publicity, as was the case in Baltimore Radio Show, Inc. vs. State, 193 Md. 300.

It should be expressly stated that this opinion implies no criticism of Judge Moser, who presided over the trial with dignity, ability and fairness, in difficult circumstances which were not of his making. Nor is there any criticism of the motives of the prosecuting attorney, the police, or other persons engaged in the case.

A reading of the testimony shows that the criminal question in this case is the degree of the crime, for on this point depends the differ- ence between the possibility of a sentence to prison and a sentence to death. No graver question is possible. This question is essen- tially and traditionally a question for the jury, and it seems to us to be beyond any reasonable doubt that the publicity given the case prior to the trial effectively pre- vented the Defendant from having an impartial jury.

In the circumstances in which this motion is now presented, there is indeed a conflict between funda- mental principles and technicalities. As was freely admitted by counsel for the Defendant at the argument for a new trial, motions and other measures might have been taken with more strict formality in order to effect a change of venue, to post-

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pone the trial, or to examine individual jurors as to their prejudices or beliefs as a result of public utterances. These are procedural matters, not matters of substance. It is obvious that rules of procedure are important and also that there is need for maintaining such rules to effect orderly judicial administration. But in a conflict between technicalities of procedure and substantive rights in a capital case, it can hardly be contended that technicalities should govern.

At the very beginning of the trial, counsel for Defendant made the point that he had been forced to waive a jury trial because of the public feeling engendered by the publicity over the case, and he proffered copies of newspapers, magazines, and radio scripts. The Court gave him leave to introduce them thereafter. These have now been offered as Exhibit 7, and this Bench has received them. But they add nothing to what every judge and every citizen knew already.

Everyone in Baltimore who read the newspapers, listened to the radio, or watched television knew of the hill down which the car was sent, the stone under the accelerator, the packet of letters, and the "mystery woman." All had been disclosed in articles referring to "the perfect crime," slanted to indicate the guilt of the defendant, who was then in the custody of the law. The implication of the Defendant's guilt became unmistakable with the announcement that the Defendant had made a "statement" which was but a transparent disguise for the only kind of statement which would have any importance, namely, a confession.

This flood of publicity culminated in the television shows of August 31 and September 2, 1952, in which the State's Attorney for Baltimore City, the State's Attorney for Baltimore County, the Chief Medical Examiner for the State of Maryland, and various police officers appeared in person, and received congratulations for having brought the case "to a conclusion" and "finally written an end to the story."

To suggest that such publicity was not prejudicial to the Defendant's right to an impartial jury seems to us to disregard common sense.

There are differences between a trial by a judge and a trial by jury. These differences are recognized in the Constitution, and insofar as the Defendant desires to take advantage of them, the Constitution guarantees his right to do so. We do not suggest that this Defendant did not have a fair trial by judge. But his right was to a fair trial by jury. He asserted at the beginning of his trial that that right had been made impossible for him, and stated that that was the reason for his election of a trial by the judge. Technical imperfections in the proceedings may exist, but the broad fact cannot be denied that by every indication, substantially the entire population of the city and State from which a jury might be drawn had been made to believe, in advance of the trial, that the defendant was guilty.

That there was "an avalanche of unfavorable publicity," to use Judge Magruder's words in the *Delaney* case cited below, is not even denied by the State. The State's position is merely that in other cases at other times, publicity by other persons has been worse than in the present case. The State cannot contest the conclusion that the result of the publicity was to raise a widespread, if not universal, belief in Baltimore: (1) That the defendant had killed his wife; (2) That he had pre-meditated "the perfect crime," and (3) That he had confessed to that crime.

It may be suggested that the damage is now done, and that there is no cure for it. The United States Court of Appeals at Boston did not find it so. In Delaney vs. U. S., 199 F. 2d 107, that Court was confronted by a situation in which adverse publicity had far more justification than there existed in the present case. A Committee of Congress, acting within its undoubted powers, had released statements which had wide circulation indicating that the Defendant had been guilty of improper conduct in his position as Collector of Internal Revenue, and imputing a bad character to him generally. The U. S. Court of Appeals, speaking through Judge Calvert Magruder, held that the Defendant's right to a fair jury trial had been violated. The remedy, it said, was to delay the trial until the effects of popular excitement and prejudice had been dissipated.

The following words, used to describe what was done in Boston describe almost exactly the situation in Baltimore (p. 111):

"The newspaper publicity was characterized by flamboyant, front-page headlines in large, heavy type, covering colorful feature stories emphasizing the more striking aspects of the testimony. This was supplemented by radio and television exploitation of the same material. Naturally, due to local interest, the publicity was intensified in the Boston area, but it was also carried by the big press associations far and wide throughout the nation, * * *. One of the exhibits in the record is an issue of 'Life' for November 19, 1951 (a weekly with an advertised circulation of over 5,000,000), * * *"

On the question of whether it is proper for public officers to give out information supporting such publicity, the Court said (pp. 113-4):

"If all this material had been fed to the press by the prosecuting officials of the Department of Justice, we think that an appellate court would have had to say that the denial of a longer continuance was an abuse of discretion. We do not think that doubt is cast upon this proposition by *Stroble vs. California*, 343 U. S. 181 (1952). * * *

"Of course, it would have been a gross impropriety on the part of the prosecuting officials if they had made available to the press all this damaging material respecting Delaney; * * *"

With regard to technical faults in the record, the Court said (p. 116):

"Nor do we think it significant that the defendant failed to exhaust his peremptory challenges at the time the jury was being selected. Since he was obliged to stand trial in the hostile atmosphere engendered by the extra-courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions—all of them having affirmed, in answer to inquiry by the trial judge, that they were prepared to determine Delaney's guilt or innocence solely on the basis of evidence produced at the trial."

On the question of what can be done now, the Court said (p. 114):

"We think that the United States is put to a choice in this matter: If the United States, through its legislative department, acting conscientiously pursuant to its conception of the public interest, chooses to hold a public hearing inevitably resulting in such damaging publicity prejudicial to a person awaiting trial on a pending indictment, then the United States must accept the consequences that the judicial department, charged with the duty of assuring the defendant a fair trial before an impartial jury, may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed."

On the question of whether in fact prejudice resulted to the defendant, Judge Magruder, referring to the "avalanche of publicity" mentioned above, said (p. 115):

"* * * under the circumstances it is difficult to see how anyone could fail to perceive the risk of prejudice."

In argument, counsel for the defendant has charged that a number of errors were committed in the trial itself. We express no opinion with respect to these matters, including the admissibility of the confession; the making of sketches in the court room where photographs were prohibited; the use of a fictitious name for the "mystery woman." Nor does this opinion express any view as to the weight of the evidence, or whether it justified the verdict which was rendered. The prejudice to the Defendant by making a jury trial impossible is so much more important to this Defendant and to all citizens of Maryland, and so much clearer, that this opinion rests upon that ground alone.

It should be made abundantly clear that the problem now is not whether Grammer is guilty. It is whether the protections to which every citizen of Maryland is entitled have been afforded him, and whether they may in similar manner be denied to any other citizen. This defendant may be innocent or guilty. If the evidence at a later trial proves him guilty he should be, and in all probability will be, convicted of whatever crime or degree of crime the evidence may support. The right which has been violated is the right of every citizen of this State, and the immemorial protection of every citizen of this State.

On a motion for a new trial in a criminal case the Supreme Bench may review the facts. Such review can and should extend to important facts known to everyone, even though not perfectly included in the record. And in the review of a capital case, imperfections in the record may be disregarded (Murphy vs. State, 184 Md. 74).

The Maryland Court of Appeals, in the case of Jones vs. State, 185 Md. 481, decided in 1945, said (p. 486):

"A citizen should not be coerced to relinquish his right to a jury trial and submit to a trial before the court, in order to escape an intolerable situation of a trial before a prejudiced jury."

Maryland justice requires the recognition of the Constitutional rights of every person charged with crime, however low or despicable his crime. These rights must be preserved not in form, but in substance.

A basic right of this defendant has been violated. Lapse of time may not entirely remove the prejudice which effectively prevented a fair jury trial, but no harm will be done by the State's taking the only course which offers any hope of curing the evil which the State's own officers helped to create. Even though such course may involve inconvenience, impatience or expense, we believe that it should be taken, and that the Defendant should be granted a new trial.