

**EASTERN BROADCASTING CORPORATION (DYRE) PETITIONER, VS.
THE HON. JOSE P. DANS, JR., MINISTER OF TRANSPORTATION &
COMMUNICATIONS, THE HON. CEFERINO S. CARREON,
COMMISSIONER, NATI...**

G.R. No. 59329. July 19, 1985

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

This petition was filed to compel the respondents to allow the reopening of Radio Station DYRE which had been summarily closed on grounds of national security.

The petitioner contended that it was denied due process when it was closed on the mere allegation that the radio station was used to incite people to sedition. It alleged that no hearing was held and not a bit of proof was submitted to establish a factual basis for the closure. The petitioner was not informed beforehand why administrative action which closed the radio station was taken against it. No action was taken by the respondents to entertain a motion seeking the reconsideration of the closure action.

The petitioner also raised the issue of freedom of speech. It appears from the records that the respondents' general charge of "inciting people to commit acts of sedition" arose from the petitioner's shift towards what it stated was the coverage of public events and the airing of programs geared towards public affairs.

On March 25, 1985, before the Court could promulgate a decision squarely passing upon all the issues raised, the petitioner through its president, Mr. Rene G. Espina suddenly filed a motion to withdraw or dismiss the petition. The petitioner alleged:

"1. Petitioner Eastern Broadcasting Corporation has already sold its radio broadcasting station in favor of Manuel B. Pastrana as well as its rights and interest in the radio station DYRE in Cebu including its right to operate and its equipment;

"2. Respondent National Telecommunications Commission has expressed its willingness to grant to the said new owner Manuel B. Pastrana the requisite license and franchise to operate the said radio station and to approve the sale of the radio transmitter of said station DYRE;

"3. In view of the foregoing, petitioner has no longer any interest in said case, and the new owner, Manuel B. Pastrana is likewise not interested in pursuing the case any further."

The case, therefore, has become moot and academic. However, for the guidance of inferior courts and administrative tribunals exercising quasi-judicial functions, the Court issues the following guidelines;

(1) The cardinal primary requirements in administrative proceedings laid down by this Court in *Ang Tibay v. Court of Industrial Relations* (69 Phil. 635) should be followed before a broadcast station may be closed or its operations curtailed.[1]

(2) It is necessary to reiterate that while there is no controlling and precise definition of due process, it furnishes an unavoidable standard to which government action must conform in order that any deprivation of life, liberty, or property, in each appropriate case, may be valid (*Ermita-Malate Hotel and Motel Operators Association v. City Mayor*, 20 SCRA 849).

(3) All forms of media, whether print or broadcast, are entitled to the broad protection of the freedom of speech and expression clause. The test for limitations on freedom of expression continues to be the clear and present danger rule — that words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the lawmaker has a right to prevent. In his *Constitution of the Philippines* (2nd Edition, pp. 569-570) Chief Justice Enrique M. Fernando cites at least nine of our decisions which apply the test — (*Primicias v. Fugoso* [80 Phil. 71] *American Bible Society v. City of Manila* [101 Phil. 386], *Cabansag v. Fernandez* [102 Phil. 152], *Vera v. Area* [28 SCRA 351], *Navarro v. Villegas* [31 SCRA 931], *Imbong v. Ferrer* [35 SCRA 28], *Badoy v. Commission on Elections* [35 SCRA 285], *People v. Ferrer* [48 SCRA 382], and the *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills Co., Inc.* [51 SCRA 189]. More recently, the clear and present danger test was applied in *J.B.L. Reyes* in behalf of the *Anti-Bases Coalition v. Bagatsing* [125 SCRA 553].

(4) The clear and present danger test, however, does not lend itself to a simplistic and all embracing interpretation applicable to all utterances in all forums.

Broadcasting has to be licensed. Airwave frequencies have to be allocated among qualified users. A broadcast corporation cannot simply appropriate a certain frequency without regard for government regulation or for the rights of others.

All forms of communication are entitled to the broad protection of the freedom of expression clause. Necessarily, however, the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media.

The American Court in *Federal Communications Commission v. Pacifica Foundation* (438 U.S. 726), confronted with a patently offensive and indecent regular radio program, explained why radio broadcasting, more than other forms of . communications, receives the most limited protection from the free expression clause. First, broadcast media have established a uniquely pervasive presence in the lives of all citizens. Material presented over the airwaves confronts the citizen, not only in public, but in the privacy of his home. Second, broadcasting is uniquely accessible to children. Bookstores and motion picture theaters may be prohibited from making certain material available to children, but the same selectivity cannot be done in radio or television, where the listener or viewer is constantly tuning in and out.

Similar considerations apply in the area of national security.

The broadcast media have also established a uniquely pervasive presence in the lives of all Filipinos. Newspapers and current books are found only in metropolitan areas and in the poblaciones of municipalities accessible to fast and regular transportation. Even here, there are low income masses who find the cost of books, newspapers, and magazines beyond their humble means. Basic needs like food and shelter perforce enjoy high priorities.

On the other hand, the transistor radio is found everywhere. The television set is also becoming universal. Their message may be simultaneously received by a national or regional audience of listeners including the indifferent or unwilling who happen to be within reach of a blaring radio or television set. The materials broadcast over the airwaves reach every person of every age, persons of varying susceptibilities to persuasion, persons of different I.Q.s and mental capabilities, persons whose reactions to inflammatory or offensive speech would be difficult to

monitor or predict. The impact of the vibrant speech is forceful and immediate. Unlike readers of the printed work, the radio audience has lesser opportunity to cogitate, analyze, and reject the utterance.

(5) The clear and present danger test, therefore, must take the particular circumstances of broadcast media into account. The supervision of radio stations — whether by government or through self-regulation by the industry itself calls for thoughtful, intelligent and sophisticated handling.

The government has a right to be protected against broadcasts which incite the listeners to violently overthrow it. Radio and television may not be used to organize a rebellion or to signal the start of widespread uprising. At the same time, the people have a right to be informed. Radio and television would have little reason for existence if broadcasts are limited to bland, obsequious, or pleasantly entertaining utterances. Since they are the most convenient and popular means of disseminating varying views on public issues, they also deserve special protection.

(6) The freedom to comment on public affairs is essential to the vitality of a representative democracy. In the 1918 case of *United States v. Bustos* (37 Phil. 73 1) this Court was already stressing that:

"The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts. Only thus can the intelligence and dignity of the individual be exalted."

(7) Broadcast stations deserve the special protection given to all forms of media by the due process and freedom of expression clauses of the Constitution.

WHEREFORE, the case having become moot and academic, the petitioner's motion to withdraw or dismiss the petition is hereby GRANTED.

SO ORDERED.

Melencio-Herrera, Plana, Escolin, Relova, Cuevas, and Alampay, JJ., concur.

Fernando, C.J., concurs and submits a brief statement.

Teehankee, J., concurs in a separate opinion.

Makasiar, J., I concur only in the dispositive portion — for dismissal as moot and academic.

Concepcion Jr., J., for dismissal being moot and academic.

Abad Santos, J., see concurring opinion.

De la Fuente, J., In the dismissal, as prayed for by petitioner per its motion to dismiss.

Aquino, J., no part.

[1] The requirements are: (1) the right to a hearing, which includes the right to present one's case and submit evidence in support thereof: (2) the tribunal must consider the evidence presented: (3) the decision must have something to support itself: (4) the evidence must be substantial. Substantial evidence means such reasonable evidence as a reasonable mind might accept as adequate to support a conclusion: (5) the decision must be based on the evidence presented at the hearing, or at least contained in the record and disclosed to the parties affected;

(6) the tribunal or body or any of its judges must act on its or his own independent consideration of the law and facts of the controversy and not simply accept the views of a subordinate: (7) the board or body should, in all controversial questions, render its decision in such a manner that the parties to the proceeding can know the various issues involved, and the reasons for the decision rendered.

CONCURRING

FERNANDO, C.J.,:

I concur in the ponencia of Justice Gutierrez, Jr., notable for its reiteration of the clear and present danger principle as the standard of limitation on free speech and press, as decided by a unanimous court in *J.B.L. Reyes v. Bagatsing*.^[1]

As may be gleaned from the voting of the Justices, the majority favors the view that even if a case were moot and academic, a statement of the governing principle is appropriate in the resolution of dismissal for the guidance not only of the parties but of others similarly situated. There are three Justices, however, Makasiar, Concepcion Jr. and de la Fuente, who would strictly adhere to the concept that the case being moot and academic, the appropriate disposition is that of simply dismissing the action. That is to abide by the teaching of orthodox learning. The Philippines, however, has deviated from such a strict view. Nor is this approach of recent vintage. As early as *Alejandrino v. Quezon*^[2] decided in 1924, this Court, notwithstanding the absence of jurisdiction, expressed through Justice Malcolm what principle of law should govern. Similarly in *Osmeña, Jr. v. Pendatun*^[3] notwithstanding well-founded doubts as to jurisdiction and a finding that the case should be dismissed for being moot and academic, this Court, through the then Justice, later Chief Justice Bengzon, passed upon the legal question raised. In that sense, the Philippines has followed an approach distinct from that of the United States, notwithstanding the influence of American Constitutional law on our legal system.

Also let me state for the record that the original opinion prepared by Justice Gutierrez, Jr. could not have been released in April after the petitioner on March 25, 1985 "filed a motion to withdraw or dismiss the petition." After that date, some members of the Court wanted the matter discussed anew as to its appropriate disposition. That is the explanation why such an opinion was never sent to the Office of the Chief Justice. Nor is it to be forgotten that even if a decision signed by all the other members were thus submitted, the practice traditionally followed is for whoever is Chief Justice to take a few days for the expression of his views — if minded to do so.

[1] G.R. No. 65366. November 9, 1983. 125 SCRA 553.

[2] 46 Phil. 83.

[3] 109 Phil. 863 (1960).

CONCURRING

TEEHANKEE, J., :

Prefatory Statement: As stated in the resolution penned by Mr. Justice Gutierrez, the release in early April of this year of the Court's decision declaring null and void respondent commission's challenged summary order for closure of petitioner's radio station ("definitely attended by complete absence of any hearing before or after the closure itself") and granting the petition for issuance of a writ of mandatory injunction for the reopening of the

station, was overtaken by petitioner's "suddenly filed" motion to withdraw or dismiss the petition.

Initially, Mr. Justice Gutierrez was for applying the Salonga[a] formula and releasing nevertheless his sixteen-page extended opinion and decision on the merits. He was of the view, fully shared by me,[b] that "(T)he need for guiding principles on constitutionalism is particularly keen in critical times and in periods of transition. There is then a tendency to be impulsive in the exercise of power. The use of illegal shortcuts and the breakdown of traditional restraints and discipline, unfortunately, is most pronounced in troubled times. It becomes necessary for the Court to emphasize the importance of adherence to the mandates of the Constitution. The efforts, no matter how well meaning, to quell a rebellion or to stave off economic disaster cannot succeed if they transgress basic rights and, therefore, alienate our people." But since such approach did not gain the concurrence of the majority, he has replaced his original ponencia with the abbreviated Resolution (of a little over four pages) now released, which carries the required majority and issues guidelines "for the guidance of inferior courts and administrative tribunals exercising quasi-judicial functions."

While withdrawal of the petition for loss of interest on petitioner's part may be granted, still the Court should unequivocally set forth the guiding and controlling precepts or doctrines in pursuance of its symbolic function of educating bench and bar as in Salonga on the protection and preservation of basic constitutional rights. As stated in my separate concurring opinion, *infra*, public respondents' summary closure of petitioner's radio station failed to observe the special protection given to all forms of media by the due process and freedom of press and media clauses of the Constitution, as well as the basic clear and present danger test. As stated by the now Chief Justice in *De la Camara vs. Enage*[c] the fact that the case has become moot "should not preclude this Tribunal from setting forth in language clear and unmistakable . . . for the guidance of lower court judges [and other public officers] the controlling and authoritative doctrines that should be observed." so that full respect may be accorded to basic constitutional rights.

My separate concurring opinion which follows hereinafter was prepared and scheduled for promulgation on or about April 9, 1985 upon its return on said date to this ponente, Mr. Justice Gutierrez, for transmittal to the Office of the Chief Justice for the purpose. But this was overtaken by the filing of petitioner's motion for withdrawal or dismissal of the petition. Hence, my said concurring opinion should be read in such time context (in the same manner as in the 1974 martial law cases of *Aquino, Jr. and Diokno vs. Enrile*, 59 SCRA 183, 309, September 17, 1974, wherein the promulgation of the decision and separate opinions originally scheduled for September 12, 1974 was deferred to the following week with the intervening release from detention of Senator Jose W. Diokno).

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The main opinion reaffirms in language unmistakable that broadcast media (radio and television) while subject to government licensing (for allocation of the use of airwaves and frequencies) and regulation (considering their pervasive presence and instant impact) are equally protected by the preferred freedoms of speech and of the press and by the rudimentary requirements of due process against arbitrary deprivation of life, liberty and property; that the basic standard for restricting or punishing the exercise of these preferred freedoms is the clear and present danger test — danger of a serious and imminent evil sought to be prevented; that the summary closure in October, 1980 of petitioner's radio station ("definitely attended by complete absence of any hearing before or after the closure itself) violated its constitutional rights and must therefore be declared null and void, and consequently, the writ of mandatory injunction for the reopening of the station, as prayed for, must issue.

Congratulations are due the ponente Justice Hugo Gutierrez, Jr. who secured the Court's near-unanimous concurrence in the recent case of *Salonga vs. Pano*[1] which went back to the fundamentals and stressed, in discharge of the Court's "symbolic function of educating bench and bar on the extent of protection given by constitutional guarantees" that "(I)ninitely more important than conventional adherence to general rules of

criminal procedure is respect for the citizen's right to be free not only from arbitrary arrest and punishment but also from unwarranted and vexatious prosecution. The integrity of a democratic society is corrupted if a person is carelessly included in the trial of around forty persons when on the very face of the record no evidence linking him to the alleged conspiracy exists": that "x x x if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate": that "freedom of expression is a "preferred" right and therefore stands on a higher level than substantive economic or other liberties": that "this must be so because the lessons of history, both political and legal, illustrate that freedom of thought and speech is the indispensable condition of nearly every other form of freedom. Protection is especially mandated for political discussions. This Court is particularly concerned when allegations are made that restraints have been imposed upon mere criticisms of government and public officials. Political discussion is essential to the ascertainment of political truth. It cannot be the basis of criminal indictments"; that there must be tolerance of political hyperbole since "debate on public issues should be uninhibited, robust, and wide open and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action": that "political discussion even among those opposed to the present administration is within the protective clause of freedom of speech and expression. The same cannot be construed as subversive activities per se or as evidence of membership in a subversive organization" in the absence of proof that "such discussion was in furtherance of any plan to overthrow the government through illegal means"; that "respondent court should have taken these factors into consideration before concluding that a prima facie case exists against the petitioner. Evidence must not only proceed from the mouth of a credible witness but it must be credible in itself such as the common experience and observation of mankind can approve as probable under the circumstances"; and that "judge or fiscal, therefore, should not go on with the prosecution in the hope that some credible evidence might later turn up during trial for this would be a flagrant violation of a basic right which the courts are created to uphold. It bears repeating that the judiciary lives up to its mission by vitalizing and not denigrating constitutional rights. So it has been before. It should continue to be so."

The same ponente has now likewise obtained the Court's near-unanimous approval of the decision at bar,[2] which restates basic and established constitutional principles under the Rule of Law that public officials do not possess absolute power to summarily close down a broadcasting station nor to arbitrarily deny its application for renewal of license; that their broad and peremptory regulatory powers "must be exercised with punctilious regard for the due process clause" which in the words of the Chief Justice signifies "freedom from arbitrariness [and] is the embodiment of the sporting idea of fair play";[3] that radio and television which "would have little reason for existence if broadcasts are limited to bland, obsequious, or pleasantly entertaining utterances" deserve the special protection of the preferred right of free press and speech; that comment on and criticism of public officials in the conduct of public affairs is not to be taken as "inciting to sedition or subversive acts" — that to curb or punish the exercise of such preferred right of comment and criticism there must exist the clear and present danger of a substantive and grave evil that the State has a clear right to prevent, and hence, there must be a clear showing to this effect of "the words used and when and how they were used"; that since the 1918 case of *U.S. vs. Bustos*,[4] the Court has taught that "the interest of society and the maintenance of good government demand a full discussion of public affairs."

Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom"; that the guarantee of free speech is a safety valve "allowing parties the opportunity to give vent to their views, even if contrary to the prevailing climate of opinion"

which is grounded on "faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind" and "serves to avert force and explosions due to restrictions upon rational modes of communication";[5] and that through the rights of free expression, free assembly and petition, "the citizens can participate not merely in the periodic establishment of the government through their suffrage but also in the administration of public affairs as well as in the discipline of abusive public officers" and that since "'the threat of sanctions may deter the exercise [of these "delicate and vulnerable . . . and supremely precious freedoms"] almost as potently as the actual application of sanctions, they 'need breather space to survive' permitting government regulation only 'with narrow specificity.'"[6]

The late Justice Jose Abad Santos, martyr of the Japanese occupation, left us over half a century ago the legacy of his dissent against what he deemed were unjustified "invasions on the part of the government and its employees of the sanctities of a man's home and the privacies of life" in *People vs. Rubio*[7] that the "commendable zeal (of internal revenue agents) if allowed to override constitutional limitations would become 'obnoxious to fundamental principles of liberty.'" And if we are to be saved from the sad experiences of some countries which have constitutions only in name, we must insist that governmental authority be exercised within constitutional limits: for, after all, what matters is not so much what the people write in their constitutions as the spirit in which they observe their provisions."

In the same vein, the late Chief Justice Ricardo Paras in the landmark case of *Primicias vs. Fugoso*[8] enjoined all to abide by the teaching of the 1907 sedition case of *U.S. vs. Apurado*[9] that instances of "disorderly conduct by individual members of a crowd [be not seized] as an excuse to characterize the assembly as a seditious and tumultuous rising against the authorities," for "if the prosecution be permitted to seize upon every instance of such disorderly conduct by individual members of a crowd as an excuse to characterize the assembly as a seditious and tumultuous rising against the authorities, then the right to assemble and to petition for redress of grievances would become a delusion and snare and the attempt to exercise it on the most righteous occasion and in the most peaceable manner would expose all those who took part therein to the severest and most unmerited punishment, if the purposes which they sought to attain did not happen to be pleasing to the prosecuting authorities. If instances of disorderly conduct occur on such occasions, the guilty individuals should be sought out and punished therefor."

Indeed, as I stressed in my dissenting opinion in the recent case of *German vs. Barangan*,[10] to require the citizen at every step to assert his rights and to go to court is to render illusory his rights. All concerned, the governors as well as the governed, must observe what they have written in their constitution in their very spirit and intent, so that as written by Justice Makasari in the *PBM* case[11] "the Bill of Rights [might not turn out to be] a useless attempt to limit the power of government and cease to be an efficacious shield against the tyranny of officials, of majorities, of the influential and powerful, and of oligarchs — political, economic or otherwise."

The Court's decision makes short shrift of respondents' procedural arguments that non-renewal of petitioner's license has made the petition "moot and academic" (brushed aside as "an afterthought or substitute for the respondents' original position that the closure was due to national security") and that mandamus would not lie to compel the reopening of the radio station brought about by their inaction on petitioners timely application for renewal of the license. It serves notice that in the exercise of the judicial power vested in it by the Constitution, it will issue the equitable writs of certiorari and mandamus to do substantial justice and restore the status quo. In this case, the summary closure of petitioner's radio station in 1980 having been declared null and void and no valid ground for non-renewal of its license having been shown, it is as if the said license has been duly extended up to the end of the current term or year. It is expected that respondents will forthwith return the crystal of the transmitter and place no further obstacle to the prompt reopening of the radio station so that petitioner may pick

up the broken pieces and rightfully resume its operations (after almost five years of closure) in accordance with the judgment at bar.

[a] In *Salonga vs. Paño*, G.R. No. 59524, February 18, 1985, while the prosecutors had secured the dismissal by the trial court of the questioned criminal charges against petitioner Jovito Salonga before our decision ordering such dismissal could be promulgated, the Court nevertheless issued the decision ruling squarely on the merits "cognizant of the need to educate prosecutors and judges that they must be zealously concerned for the rights of the accused before a criminal prosecution is initiated."

[b] See my separate opinions in *Cañete*, G.R. No. 63776, promulgated August 16, 1984, and *Sarmiento*, G.R. No. 62119, promulgated August 27, 1984, where on the issue of the effect of a decision of acquittal upon a P(C), I dissented from the perfunctory majority resolution dismissing the case as moot because the acquitted defendants were finally released several agonizing months after their acquittal, on the ground that such "decisive and fundamental issue of public interest and importance affecting the very liberties of the people . . . demands to be resolved, rather than emasculated with a dismissal of the case as moot, for the guidance of public respondents and all concerned."

[c] 41 SCRA 1, 4 (1971); see also *PACU vs. Secretary of Education*, 97 Phil. 806; *Gonzales vs. Marcos*, 65 SCRA 624; and *Aquino vs. Enrile*, 59 SCRA 183.

[1] G.R. No. 59524, Feb. 18, 1985. Eleven members concurred with abstentions of Justices Aquino, De la Fuente and Alampay.

[2] Twelve members concurred, with abstentions of Justices Aquino and Conepcion Jr.

[3] *Ermita-Malate Hotel A Motel Operators' Ass'n. vs. City Mayor*, 20 SCRA 849.

[4] 37 Phil. 731.

[5] *J.B.L. Reyes vs. Hagatsino*, 125 SCRA 553 (1983), per Fernando, C.J.

[6] *PBM Employees Organisation vs PRM Co. Inc.*, 51 SCRA 189, per Makasiar, J.

[7] 57 Phil. 384 (1932).

[8] 80 Phil. 71 (1948).

[9] 7 Phil. 422, 426, per Carson, J.

[10] G.R. No. 68828, prom. March 27, 1985.

[11] *Supra*, see in. 6.

CONCURRING

ABAD SANTOS, J., :

The petitioner has filed a motion to withdraw its petition for the reasons stated in its motion. The Court has granted the motion but this circumstance should not deter the Court from educating those who wield power which if exercised arbitrarily will make a mockery of the Bill of Rights.

The closure of the petitioner's radio station on grounds of national security without elaboration of the grounds and

without hearing deserves to be condemned in no uncertain terms for it is manifest that due process was not observed. If there is an idea which should be impressed in the minds of those who wield power it is that power must be used in a reasonable manner. Arbitrariness must be eschewed. The main opinion, that of Justice Teehankee and the case of *Ang Tibay vs. Court of Industrial Relations*, 69 Phil. 635 [1940]. should be made required reading materials for public officials who huff and puff with power making themselves not merely obnoxious but dangerous as well.

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