THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 425/2017

In the matter between:

HENRI CHRISTO VAN BREDA	**APPELLANT**
and	
MEDIA 24 LIMITED	**FIRST RESPONDENT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**SECOND RESPONDENT**
ADVOCATE LOUISE BUIKMAN SC	**THIRD RESPONDENT**

And in the matter between:

Case no: 426/2017

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**APPELLANT**
and	
MEDIA 24 LIMITED	**FIRST RESPONDENT**
HENRI CHRISTO VAN BREDA	**SECOND RESPONDENT**
ADVOCATE LOUISE BUIKMAN SC	**THIRD RESPONDENT**

Neutral citation: *The NDPP v Media 24 Limited & others and HC Van Breda v Media 24 Limited & others* (425/2017) [2017] ZASCA 97 (21 June 2017)

Bench: Ponnan, Leach, Mbha, Zondi and Van Der Merwe JJA

Heard: 18 May 2017

Delivered: 21 June 2017

Summary: Constitutional law – application by media to broadcast criminal proceedings – tension between the right to freedom of expression and the open justice principle, on the one hand and the right to a fair trial, on the other – those rights should as far as possible be harmonised with one another – court must exercise a proper discretion under s 173 of the Constitution in each case by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue – courts ought not to restrict the nature and scope of the broadcast unless prejudice is demonstrable and there is a real risk that such prejudice will occur – mere conjecture or speculation that prejudice might occur ought not to be enough.

ORDER

On appeal from: Western Cape Division, Cape Town (Desai J sitting as court of first instance):

(a) The appeal succeeds to the extent that paragraph 1.3 of the order of the high court is set aside.
(b) The matter is remitted to the high court for reconsideration in accordance with the principles set out in this judgment.
(c) The costs of appeal of the appellant, Henri Christo Van Breda, shall be paid by the first respondent, Media 24.

JUDGMENT

Ponnan JA (Leach, Mbha, Zondi and Van Der Merwe JJA concurring):

[1] 'TV, or not TV, that is the question:'[1] According to the Chief Justice of Canada, the Rt Hon Beverley McLachlin PC, 'Justice Brennan was right: the media and the courts are locked in a mutual, if sometimes uncomfortable embrace'.[2] McLachlin CJ was referring to Justice Brennan's observation in 1980 that:

'. . . there exists a fundamental and necessary interdependence of the court and the press. The press needs the court, if only for the simple reason that the court is the ultimate guardian of the constitutional rights that support the press. And the court has a concomitant need for the press, because through the press the court receives the tacit and accumulated experience of the nation, and – because the judgments of the court ought also to instruct and to inspire – the court needs the medium of the press to fulfil this task'.[3]

[2] Undeniably communications technology has evolved – 'from a reporter's prose description, to an artist's sketch pad rendition, to the still and movie cameras with their bright lights, and finally to the advanced portable video cameras – the media progressively has given the public a more intimate view of criminal proceedings.'[4] However, attempts by the media to introduce modern technology into the criminal trial court, have not been universally embraced. Consequently, this appeal, against a

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[1] I borrow from C Lassiter: 'TV or Not TV? That is the Question' (1996) 928 *Journal of Criminal Law and Criminology* 86 available at:
http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6882&context=jclc

[2] Remarks of the Right Honourable B McLachlin PC the Chief Justice of Canada 'The Relationship between the Courts and the Media' *Carleton University Ottawa, Ontario* 31 January 2012 available at: *http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2012-01-31-eng.aspx*.

[3] W.J. Brennan Jr. 'Why Protect the Press?' (1980) 18 *Columbia Journalism Review* 59. Justice Brennan added: 'This partnership of the court and the press is not unique; it is merely exemplary of the function that the press serves in our society. As money is to the economy, so the press is to our political culture: it is the medium of circulation. It is the currency through which the knowledge of recent events is exchanged; the coin by which public discussion may be purchased.'

[4] G K McCall, 'Cameras in the Criminal Courtroom: A Sixth Amendment Analysis' (1985) 1546, *Columbia Law Review* 85 at 1546–1547.

successful application to the high court to broadcast a criminal trial, requires us to examine what McLachlin CJ described as that 'mutual, if sometimes uncomfortable embrace'.

[3] The issue arises for determination against the following factual backdrop: The first appellant, Mr Henri Christo van Breda (the appellant), is charged with murdering three of his family members with an axe. The only survivor of the attack, which occurred at the family home in an exclusive security estate near Stellenbosch, is his younger sister, M. The incident and appellant's trial, which is currently under way, before Desai J in the Western Cape Division, Cape Town on charges of murder, attempted murder and defeating or obstructing the administration of justice – to which the appellant has pleaded not guilty – has attracted widespread media attention.

[4] Shortly before the trial was due to commence, the first respondent, Media24, a publisher and purveyor of news to the general public both in South Africa and internationally, brought an urgent application that it be allowed to install two video cameras in the trial courtroom in order to record and broadcast the proceedings, alternatively to be permitted to broadcast the proceedings by microphone and sound. It also applied to be allowed to take still photographs and video footage in court for 30 minutes before the commencement of court and after the adjournment of proceedings each day.

[5] Both parties to the criminal proceedings, the appellant and the second appellant, the National Director of Public Prosecutions (the NDPP), opposed Media 24's application.[5] Desai J heard the application on Friday, 24 March 2017 and issued the following order on Monday, 27 May 2017:

'1. Subject to what is ordered in paragraph 5 below:-

1.2. For 15 minutes before the commencement of court each day, and after the adjournment of proceedings, the applicant may take still photographs in court, and video footage in court;

[5] Advocate Louise Buikman SC, M's curator, was cited as the third respondent, but took no part in the proceedings either before the court below or this Court on appeal.

1.3. During the sitting of the court, the applicant is permitted to install two video cameras to record and or broadcast the proceedings, with the following guidelines:

1.3.1. The cameras shall be set up by not later than 15 minutes before the commencement of proceedings every day, and shall be removed by not later than half an hour after the adjournment of proceedings at the end of the day;

1.3.2. The video cameras shall be stationary, erected on tripods, and shall not be attended by a person;

1.3.3. The video cameras shall be left to record and broadcast the proceedings, and shall be located in such positions as the court may direct from time to time;

1.3.4. The cameras shall be located discreetly to cause as little intrusion in the proceedings of the court as possible.

2. None of the arrangements above shall be extended to [M], in respect of whom no photographs, audio recordings or video footage shall be taken before, during or after the hearings, whether she is present as a witness, spectator or in any other capacity, save with the prior written consent of the third respondent;

3. There is an absolute bar on:

3.1. audio recordings or close-up photography of bench discussions; and

3.2. audio recordings or close-up photography of communications between legal representatives or between clients and their legal representatives;

4. No exhibits shall be photographed, videotaped or published by the media, unless expressly permitted by the court.

5. The parties are at liberty to approach the court for any variation or amendment of this order as the occasion warrants.'

[6] The learned judge delivered reasons for the order on Tuesday, 4 April 2017. Both the appellant and the NDPP filed applications for leave to appeal against the judgment and order of the court below, which was dismissed on 6 April 2017. Applications by both for leave to appeal directly to the Constitutional Court were refused on 13 April 2017 on the basis that it was 'not in the interests of justice to hear the matter at this stage'. The appellant thereafter applied to this Court for leave to appeal, as did the NDPP – the latter by way of a separate application. On 26 April 2017 both the NDPP and the appellant were granted leave by this Court to appeal against the whole of the judgment and order of Desai J. The operation of the order was suspended pending the outcome of the

appeal. Practice directives were issued for the filing of the record, practice notes and heads of argument, and the matter came to be heard by this Court on an expedited basis on 18 May 2017. Media Monitoring Africa (MMA), a non-profit organisation, seeking to advance quality media and the free flow of information to the public on matters of public interest, was admitted as an amicus curiae.

[7] The appellant's appeal is directed at the court's decision to allow Media 24 to record and broadcast the criminal proceedings during sittings of the court as contemplated by paragraph 1.3 of the order of the high court. The appellant appears to have no difficulty with the recording and broadcast of counsel's argument and the rulings and judgment of the court. In contrast, the NDPP's position was one of blanket opposition to any part of the criminal proceedings being broadcast.

[8] The issue raised by this appeal is not altogether new. Whether the media should be allowed to broadcast court proceedings, and if so, the extent thereof has been debated for as long as audio-visual technology has existed.[6] Nonetheless, what confronts us is in some respects unchartered constitutional territory and thus calls all the more for a most careful consideration. Section 16 of the Constitution headed 'freedom of expression' is a useful starting point. It provides:

'(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;

(*c*) freedom of artistic creativity; and

(*d*) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(*a*) propaganda for war;

(*b*) incitement of imminent violence; or

(*c*) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[6] Lassiter fn 1 above, at 936. See also McCall fn 4 above, at 1547.

[9] In *R v Secretary of State for the Home Department Ex Parte Simms*, Lord Steyn stated:[7]

'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market": *Abrams v United States* (1919) 250 US 616 at 630 per Holmes J (dissent). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.'

[10] The right of the media to gather and broadcast information, footage and audio recordings flows from s 16 of the Constitution. The right to freedom of expression is one of a 'web of mutually supporting rights' that holds up the fabric of the constitutional order.[8] The right is not limited to the right to speak, but also to receive information and ideas. The media hold a key position in society. They are not only protected by the right to freedom of expression, but are also the 'key facilitator and guarantor' of the right.[9] The media's right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public.[10] In *Khumalo v Holomisa*[11] the Constitutional Court emphasised:

'In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a

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[7] *R v Secretary of State for the Home Department Ex Parte Simms* [1999] 3 All ER 400 at 408.
[8] *Case & another v Minister of Safety and Security & others*, *Curtis v Minister of Safety and Security others* [1996] ZACC 7; 1996 (3) SA 617 (CC) para 27.
[9] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions* [2006] ZACC 15*;* 2007 (1) SA 523 (CC) para 24 (*SABC* CC). See also *Brümmer v Minister for Social Development & others* [2009] ZACC 21; 2009 (6) SA 323 (CC) para 63.
[10] *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; 2007 (5) SA 540 (SCA) para 6.
[11] *Khumalo & others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 24. See also *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others* [2003] ZACC 19; 2004 (1) SA 406 (CC) para 49.

democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.'

[11] Free speech goes hand in hand with open justice. The latter is a fundamental principle of the common law and has been described as 'one of the oldest principles of English law'.[12] It is often expressed by the maxim that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. The principle is multifaceted.[13] It insists that trial proceedings be conducted publicly in open court and ordinarily, that is how trials in our criminal justice system are held. The principle of open justice is one which strikes at the very heart of what South Africa has been, and is still, trying to achieve in the post-apartheid era.[14]

[12] The arguments in favour of open justice are perhaps best summarised thus:

'First, it assists in the search for truth and plays an important role in informing and educating the public. Second, it enhances accountability and deters misconduct. Third, it has a therapeutic function, offering an assurance that justice has been done [a sense of communal catharsis]'.[15]

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[12] Open justice has a very long history – so long, in fact, that its precise origin is unclear. In *Terry (previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB), Tugendhat J described it as 'one of the oldest principles of English law, going back to before Magna Carta'. In *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, Kirby J declared that '[t]he courts of England were open from the earliest times', and pointed to evidence of the existence of open justice in both the Saxon and Norman periods. In *Richmond Newspapers Inc v Virginia* 448 US 555 (1980), Burger CJ traced it back 'beyond reliable historical records'. See also S Rodrick 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 124 *Deakin Law Review* 19 at 130.
The idea that South African civil courts should be open to the public goes back to 1813. Marais J explained in *Financial Mail (Pty) Ltd v Registrar of Insurance & others* 1966 (2) SA 219 (W) at 220F-G: 'Until 1813, in consonance with the then universal practice in Holland . . . whilst judgments and orders of the Cape courts had to be pronounced in public, evidence and argument in trial cases were heard in camera, with only the parties and their lawyers in attendance. The British Governor of the Cape, in 1813, issued a proclamation requiring all judicial proceedings in future to be carried on with open doors as a matter of "essential utility, as well as the dignity of the administration of justice"; it would imprint on the minds of the inhabitants of the Colony the confidence that equal justice was administered to all in the most certain, most speedy and least burdensome manner.'

[13] *Kamasaee v Commonwealth of Australia & Ors* [2017] VSC 171.

[14] Deputy Chief Justice Moseneke 'The Media, Courts and Technology: Remarks on the Media Coverage of the Oscar Pistorius Trial and Open Justice' 15 May 2015 available at: *http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf*.

[15] *City of Cape Town v South African National Roads Authority Limited & others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) para 12. See also Moseneke fn 14 above, at 5.

In *City of Cape Town v SANRAL,* which concerned public access to records filed in court, it was stated:[16]

'Not all information is readily revealed by the state and even powerful media organizations sometimes face great difficulties in obtaining information in some areas. In an environment of secrecy, journalists become vulnerable to off the record briefings and strategic leaks by government. In this context, open justice is particularly important because through court cases information can be exposed and tested in ways that may not otherwise be possible. The judicial process generally shrinks from hearsay. Witnesses swear to the truth and if they lie make themselves open to perjury. The rules of evidence, which regulate what is revealed, are applied by an independent judiciary. The whole process is thus designed to limit the extent to which parties can craft and shape information for public consumption. In *Scott*, Lord Shaw of Dunfermline famously warned 'in the darkness of secrecy, sinister interest and evil in every shape have full swing against the dangers of justice behind closed doors'.

[13] In *Independent Newspapers*,[17] where a newspaper sought access to portions of a court record that had been kept confidential on the grounds of national security, the Constitutional Court held that open justice had essentially become a right of its own, stating:[18]

'There exists a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provision of the Bill of Rights. First, section 16(1)(*a*) and (*b*) provides in relevant part that everyone has the right to freedom of expression, which included freedom of the press and other media as well as freedom to receive and impart information or ideas. Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(*c*) which entitles every accused person to a public trial before an ordinary court.

. . .

From the right to open justice flows the media's right to gain access to, observe and report on the administration of justice . . .'

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[16] *City of Cape Town* fn 15 above, para 21.
[17] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae)* In re: *Masetlha v President of the Republic of South Africa & another* [2008] ZACC 6; 2008 (5) SA 31 (CC).
[18] Ibid, paras 39–41.

[14] Recently, in *SANRAL*,[19] this Court emphasised: '[I]t may be said that the right to public courts, which is one of long standing, does not belong only to the litigants in any given matter, but to the public at large. . . .' This vital rationale was recognised by the Constitutional Court in *Mamabolo*:[20]

'Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts.'

[15] The principle of open courtrooms is not new. According to Deputy Chief Justice Moseneke:

'In traditional African culture, the shade of a tree was the place where disputes of society were mediated and resolved. It was on this soil that the community would meet for a "lekgotla". There was room for all to have their say. Everybody was an active participant of the process. This is how justice was done. It is the age-old concept of justice under a tree.'[21]

This principle has indeed evolved and is now constitutionally entrenched.[22] It provides to all criminal accused the right to a fair and public trial.[23] In that regard s 152 of the Criminal Procedure Act 51 of 1977 provides '[e]xcept where otherwise expressly provided by this Act or any other law, criminal proceedings in any court shall take place in open court, and may take place on any day.' That provision is echoed in s 5 of the Magistrates' Court Act 32 of 1944[24] and s 32 of the Superior Courts Act 10 of 2013.[25] However, trials

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[19] *City of Cape Town* fn 15 above, para 18.
[20] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) para 29. See also *S v Shinga (Society of Advocates (Pietermaritzburg)) as Amicus Curiae); S v O'Connell & others* [2007] ZACC 3; 2007 (5) BCLR 474 (CC) para 25: 'Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which constitutional democracy is based.'
[21] Moseneke fn 14 above, at 4.
[22] *Independent Newspapers* fn 17 above, para 39.
[23] Moseneke fn 14 above, at 7.
[24] Section 5(1) reads: '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 recorded by the presiding officer or other officer appointed to record such proceedings.'

(or parts of trials) may be, and often are, held behind closed doors, amongst others, to protect the privacy or security of witnesses. Section 153 of the Criminal Procedure Act sets out the circumstances in which proceedings shall not take place in open court.[26]

[16] Freedom of the press and the principle of open justice are closely interrelated. The media, reporting accurately and fairly on legal proceedings and judgments, make an invaluable contribution to public confidence in the judiciary and, thus, to the rule of law itself. The Constitutional Court has made plain that in interpreting s 16 of the Constitution:

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[25] Section 32 reads: 'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

[26]'(1) In addition to the provisions of section 63 (5) of the Child Justice Act, 2008, if it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof.

(2) If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct-

(a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorized by the court;

(b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit-

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person; or

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and, by inspiring fear in the mind of such other person, compelling him to render such advantage, the court before which such proceedings are pending may, at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby.

(3A) Any person whose presence is not necessary at criminal proceedings referred to in paragraphs (a) and (b) of subsection (3), shall not be admitted at such proceedings while the other person referred to in those paragraphs is giving evidence, unless such other person or, if he is a minor, his parent or guardian or a person in loco parentis, requests otherwise.

(4) . . .

(5) Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person in loco parentis, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.

(6) The court may direct that no person under the age of eighteen years shall be present at criminal proceedings before the court, unless he is a witness referred to in subsection (5) and is actually giving evidence at such proceedings or his presence is authorized by the court.'

'We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. . . [and] . . . [U]nless an expressive act is excluded by s 16(2) it is protected expression.'[27] While the right of the media, under s 16 consists primarily of the right and freedom to disseminate information, the public in turn, has the right to receive information. And, in an open democracy based on the values of equality, freedom and human dignity, the right of the public to be informed is one of the rights underpinned by the value of human dignity.

[17] The broadcasting of court proceedings involves the use by the media of the video camera and sound recordings to communicate public events directly to members of the public. This is an activity that has expressive content[28] and is therefore plainly an expressive act. In the United States, there is 'strong evidence that suggests that television is a more pervasive medium than newsprint . . . reports show that television is the number one source of news across the nation'.[29] The same would appear to hold true for this country – given the high levels of illiteracy, the print media is the preserve of a few. The majority of South Africans rely principally on radio and television for their news and information. This was recognised by the full court in *Dotcom Trading*.[30] In that case, which was concerned with an application to broadcast the proceedings of a Commission of Enquiry, Brand J noted:[31]

'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 s 16(1)(*a*). It is not without reason, so it appears to me, that s 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

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[27] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & another* [2005] ZACC 7; 2006 (1) SA 144 (CC) para 47.
[28] *Canadian Broadcasting Corp v Canada (Attorney General)* 2011 SCC 2.
[29] Nancy T Gardner 'Cameras in the Courtroom: Guidelines for State Criminal Trials' *Michigan Law Review* Vol 84 No 3 (1985) 475 at 490 available at:
http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1403&context=fac_schol
[30] *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO* 2000 (4) SA 973 (C).
[31] Ibid, para 43.

modern times there are many forms of communication. Each of these media 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, 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.'

[18] The first instance of trial proceedings being broadcast by audio-visual technology to a remote public, albeit against the instructions of the court, was the *Bruno Hauptmann* case. The trial before the New Jersey court in 1935, which concerned the alleged kidnapping and murder of the Lindbergh baby by Hauptmann, attracted intense media attention.[32] In the aftermath of the overwhelming media coverage of the *Hauptmann* trial, the American Bar Association (ABA) House of Delegates adopted Judicial Canon 35, which recommended a ban of all photographic and broadcast coverage of courtroom proceedings. Notwithstanding Canon 35,[33] in the years following *Hauptmann,* some States began to embrace television. The State of Texas saw the first challenge to the prejudicial impact of cameras in the courtroom. In 1965, the United States Supreme Court considered the constitutionality of television coverage of trial proceedings. In reversing the trial court and the Texas Court of Criminal Appeals, the Supreme Court in *Estes v Texas*[34] found that televising and broadcasting portions of a trial in which there was widespread interest, over the objection of the criminal defendant, infringed upon the Due Process Clause of the Fourteenth Amendment.[35] However, the court left for another day the question whether the Constitution absolutely prohibited the televising of State criminal trials.[36]

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[32] Hauptmann appealed to the New Jersey Court of Errors and Appeals, which affirmed his conviction (*State v Hauptmann* 115 N J L 412 (N J 1935)). His petition to the United States Supreme Court for certiorari was denied (*Hauptmann v New Jersey* 296 US 649 (1935)).

[33] ABA canons are advisory and do not bind the State or Federal Courts.

[34] *Estes v Texas* 381 US 532 (1965)

[35] The Fourteenth Amendment to the US Constitution was ratified in 1868. It, amongst other things, forbids States from denying any person 'life, liberty or property, without due process of law' or 'the equal protection of the laws.'

[36] Lassiter fn 1 above, at 940.

[19] In 1981, the US Supreme Court had occasion to revisit the issue in *Chandler v Florida*.[37] By then, television was very much a part of mainstream life and many State courts had begun to experiment with cameras in the courtroom. *Chandler* involved the constitutionality of the revised Canon 3A(7) of the Florida Code of Judicial Conduct, which permitted electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge, and which implemented guidelines on trial judges obligating the court to protect the fundamental right of the accused in a criminal case to a fair trial.[38] The question for the *Chandler* court was rather narrow:[39] 'May a State allow broadcasting of a criminal trial without violating a defendant's constitutional right in spite of the defendant's objection?' The court answered: '[T]he Constitution does not prohibit a State from experimenting with [televising criminal trials]'. It held that televising a criminal trial does not automatically make the trial unfair to the defendant.[40] Chief Justice Burger stated:[41]

> 'An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pre-trial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter…The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.'

Calling the psychological impact of broadcasting coverage on trial participants 'a subject of sharp debate', the Chief Justice suggested making a distinction between 'general psychological prejudice' and 'particularized' prejudicial impact.[42] Again, he emphasized the judicial authority to prohibit broadcast coverage if it were demonstrated that the 'mere presence' of visual and broadcasting equipment in the courtroom would 'invariably and uniformly' affect the judges, witnesses, and lawyers, and other trial participants. '[A]t present,' he said, 'no one has been able to present empirical data sufficient to establish

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[37] *Chandler v Florida* 449 US 560 (1981).
[38] Lassiter fn 1 above, at 940.
[39] K.H Youm 'Cameras In The Courtroom In The Twenty-First Century: The US Supreme Court Learning From Abroad?' (2012) *Brigham Young University Law Review* at 1999 available at: *http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2699&context=lawreview*.
[40] Ibid.
[41] Ibid, at 2000-2001.
[42] Ibid, at 2001.

that the mere presence of the broadcast media inherently has an adverse effect on that [judicial] process.'[43]

[20] Thus, whilst the US Supreme Court refused to hold that television coverage is constitutionally prohibited, it also refused to hold that television coverage is constitutionally mandated.[44] In the combination of *Estes* and *Chandler*, so it has been observed, 'the Supreme Court struck with Solomon-type wisdom, holding that the Constitution neither prohibited nor mandated televised coverage of trial proceedings where there were safeguards in place to ensure the court could honour the defendant's right to a fair trial and there was no showing of specific prejudice.'[45] As a result of *Chandler*, the States that had already permitted television coverage or still photography in courtrooms were free to continue to do so, while a number of additional States opted for electronic and photographic courtroom coverage.[46] Further, some States that permitted cameras in the courtroom subject to the consent of defendants stopped requiring that consent.[47] All 50 States now have some form of televised court proceedings – 44 allow television coverage of both trials and appellate proceedings, while the rest restrict courtroom coverage to appellate arguments.[48] A number of State courts allow the broadcast of both civil and criminal trials at first instance, subject to the discretion of the judge.[49] However, the Supreme Court of the United States has never permitted cameras into its courtroom or live broadcast of its oral arguments.[50] The case against having television cameras recording hearings of the Supreme Court was articulated by Justices Kennedy and Breyer at a congressional hearing.[51] Recently,

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[43] *Chandler* fn 37 above. See also Youm fn 39 above, at 2001.
[44] Gardner fn 29 above, at 475.
[45] Lassiter fn 1 above, at 942.
[46] Youm fn 39 above, at 2001.
[47] Ibid, at 2001-2002.
[48] Ibid.
[49] For example, see: California: Rule 1.150. 'Photographing, Recording, and Broadcasting in Court', 2014 California Rules of Court; Massachusetts: Massachusetts Supreme Judicial Court Rule 1:19 'Electronic Access to the Courts'; Missouri: Missouri Supreme Court Operating Rule 16.02; New Jersey: Code of Judicial Conduct Canon 3A(9) and 'Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey'; Tennessee: Tennessee Supreme Court Rule 30; Utah: Judicial Council Rules of Judicial Administration, Rule 4-401.01; Virginia: Va. Code 19.2-266.
[50] Youm fn 39 above, at 1989.
[51] The judges were concerned about how televising proceedings might interfere with how they interact with each other and counsel in testing arguments and the fact that questions and statements may be taken out

Justices Kagan and Sotomayor also expressed concerns that allowing cameras might lead to grandstanding that could fundamentally change the nature of the court.[52] Regardless of the complete prohibition on visual footage in its courtroom, the Supreme Court does publish audio recordings of all oral argument on its website.[53] These recordings are generally released at the end of each sitting week.[54]

[21] In September 1990, the United States Federal Judicial Conference authorised the running of a three-year pilot programme allowing electronic media coverage – filming, recording and broadcasting – of civil proceedings in trial and appellate courts in six federal districts. At the end of the pilot project, those carrying out this programme recommended that it should continue and expand across all federal districts. This recommendation, however, was not followed by the Judicial Conference, which asserted that 'the intimidating effect of cameras on some witnesses and jurors was cause for concern'.[55] In 2011, a new three-year pilot programme was authorised to be carried out in 14 districts. In this programme, the cameras were to be operated by the courts, the consent of all parties was required and no filming of jurors was allowed. The programme was set to conclude in July 2015. However, it has been extended to continue under the same 'terms and conditions to provide longer term data and information to the Committee on Court Administration and Case Management.'[56]

[22] The general practice in Canada is precisely the opposite of that in the United States. As a general rule, both at the federal and provincial levels, trial courts in Canada

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of context for a 'sound bite' on network television news.

[52] Justice Kagan was wary that 'it might upset the dynamic of the institution and was reported as saying: 'If you look at different experiences, when cameras come into a place, the nature of a conversation often changes.' Associated Press, 'Two Justices Once Open to Cameras in Court Now Reconsider' *The New York Times* (2 February 2015, New York) *http://www.nytimes.com/aponline/2015/02/02/us/politics/ap-us-supreme-court-cameras.html? r=0.*

[53] See Electronic Publication of Court Proceedings. Issues Paper – June 2015 (2015) Supreme Court of Queensland at 20 available at: *http://www.jca.asn.au/wp-content/uploads/2013/10/P71_02_01-SC-Qld-Issues-Paper-June-2015.pdf*.

[54] See Supreme Court of the United States 'Argument Audio' available at: *https://www.supremecourt.gov/oral_arguments/argument_audio.aspx*

[55] Electronic Publication of Court Proceedings fn 53 above, at 21.

[56] See *http://www.uscourts.gov/about-federal-courts/cameras-courts*.

do not permit their hearings to be recorded or broadcast where witnesses are involved.[57] Before appellate courts in Canada, the practice has been more liberal. The Supreme Court of Canada has permitted television coverage of hearings since the mid-1990s and most hearings are now webcast live or live-streamed on the court's website. The Canadian Supreme Court first allowed the broadcasting of its decision in the *Patriation Reference* case[58] in 1981, but the court did not permit any further camera access for a number of years.[59] Between 1993 and 1995, the Supreme Court of Canada ran a trial programme allowing the recording and broadcasting of certain court proceedings.[60] Since 1995, the court has permitted television coverage of all its hearings. In the main, these hearings are broadcast by the Canadian Parliamentary Affairs Channel and since 2009, have been webcast live on the court's website.[61]

[23] England and Wales have a Statute, the Criminal Justice Act of 1925, which bans certain coverage of court proceedings, except for proceedings in the relatively new United Kingdom Supreme Court. More recently, in terms of the Crime and Courts Act 2013, the Lord Chancellor and Lord Chief Justice can exempt specific instances of coverage from the operation of the Criminal Justice Act.[62] The Supreme Court has adopted a more open approach to media coverage and has allowed its hearings to be broadcast since its opening in October 2009, when it replaced the House of Lords. In a

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[57] In 2016, Justice Denny Thomas granted the media permission to have his verdict in the Travis Vader double-murder trial to be broadcast via a live-streaming TV camera in the courtroom. As part of his order, one camera was allowed in the courtroom but it was only permitted to show Justice Thomas reading his judgment and it was not allowed to show the accused or any person in the public gallery. (See: *http://edmontonjournal.com/news/local-news/judge-allows-camera-in-courtroom-for-accused-killer-travis-vader-verdict-later-this-week*).

[58] T McFeat 'Cameras in the Courts' *Canadian Broadcasting Corporation* 12 March 2010 available at: *http://www.cbc.ca/news/canada/cameras-in-the-courts-1.869497*; See also Youm fn 39 above, at 2012.

[59] Youm fn 39 above, at 2006.

[60] Those cases included, inter alia, the following: whether an individual has the right to assisted suicide (See *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519); the tax deductibility of nanny expenses (See *Symes v Canada*, [1993] 4 SCR 695) and spousal support payments for a homosexual couple (See *Egan v Canada* [1995] 2 SCR 513).

[61] N S Marder 'The Conundrum of Cameras in the Courtroom' (2012) *Chicago-Kent College of Law Research Paper* 44 at 63.

[62] Section 32 of the Crime and Courts Act, as read with s 41 of the Criminal Justice Act of 1925 and s 9 of the Contempt of Court Act of 1981. See further Court of New Zealand Media Review Panel, 'Report to Chief Justice on In-Court Media Coverage' (Report to Chief Justice) para 56 available at: https://www.courtsofnz.govt.nz/In-Court-Media-Review/In-Court-Media-Review/ReporttoChiefJusticeonincourtmediacoverageF6_7_15_20150720.pdf.

history making moment for UK law, the Criminal Division of the Court of Appeal allowed television cameras to film the 'Speechley Appeal' in November 2004.[63] The UK Supreme Court has entered into an arrangement with British television broadcasters to allow for live, free streaming of proceedings on the internet. At present, the proceedings are broadcast live by Sky News and all court hearings are accessible online through the live stream.[64] The operational rules that govern the filming and broadcasting of the Supreme Court proceedings were formulated by national broadcasters in the UK such as the BBC, ITN and Sky News.

[24] Northern Ireland also has a Statute that bans electronic media coverage of court proceedings.[65] Scotland, which does not have a statutory prohibition like England, Wales and Northern Ireland, allowed a pilot programme with numerous restrictions, but the media found it difficult to gain the consent of all of the participants and so it did not provide a workable model.[66] However, Scotland does allow filmed witness testimony to be used for educational purposes, such as in documentaries.[67] In October 2012, in response to the 'development of social media, the use of instant text-based communication and the broadcasting of proceedings before the UK Supreme Court',[68] the Lord President commissioned a review of the Scottish policy on recording and broadcasting proceedings in court and the use of live text based communication from court. A report on the findings of this review was published in January 2015. This report recommended that:

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[63] S Bucks 'Court on Camera: Appeals in Action' *The Observer* 5 March 2005 available at: *http://www.guardian.co.uk/media/2005/mar/06/business.broadcasting2*. The 'Speechley Appeal' involved former Lincolnshire County Council Leader, Jim Speechley, who had been convicted of misconduct as a public official and sentenced to eighteen months in jail. See also: 'Cameras Record High Court Appeal' *BBC News* 16 November 2004 available at: *http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/england/lincolnshire/4015977.stm*.

[64] Youm fn 39 above, at 2006.

[65] Marder fn 61 above, at 1560.

[66] Ibid, at 1560.

[67] The conditions governing the broadcast of proceedings in Scottish courts are set out in Lord Hope's Practice Direction (1992), which is quoted in *X v British Broadcasting Corporation and Lion Television Limited* [2005] CSOH 80 para 4.

[68] Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text-Based Communications from Court (Scottish Report) 15 January 2015 available at: *http://www.scotland-judiciary.org.uk/25/1369/Report-of-the-Review-of-Policy-on-Recording-and-Broadcasting-of-Proceedings-in-Court--and-Use-of-Live-Text-Based*-Communications.

'(a) the filming of civil and criminal appeals and legal debates in civil first instance proceedings should be allowed for live transmission and subsequent news broadcasting and documentary film-making subject to clear and comprehensive guidelines;

(b) criminal and civil trials could only be filmed for documentary purposes, subject to restrictions where parties were particularly vulnerable; and

(c) filming of the delivery of sentencing remarks of the judge should be allowed, however the filming should focus on the judge.'[69]

[25] In Australia, all jurisdictions have admitted television cameras into their courtrooms on an ad hoc basis, but in many jurisdictions this has only been for ceremonial proceedings. Specific guidelines dealing with electronic media coverage have been developed and implemented in Western Australia. They allow for the recording and broadcasting of court proceedings upon application to the presiding judge. Despite making provision for this, its use has been, at best, sporadic.[70] Since October 2013, the High Court of Australia has published audio-visual recordings of full court hearings online via an archive on the court's website. These recordings are generally published a few business days after the hearing.[71] In addition to these recordings and as part of its commitment to open justice, the court also provides access, again via its website, to detailed case-specific information, including the submissions of the parties and transcripts of oral argument.[72] Filming is permitted in special circumstances during proceedings in the Supreme Courts of New South Wales, Northern Territory, Western Australia and Tasmania, on application to either the judge or registrar.[73] Recently, the New South Wales Parliament enacted the Courts Legislation Amendment (Broadcasting Judgments) Act 2014 No 44, which amended the Supreme Court Act 1970 No 52 (NSW), to allow for the recording and broadcasting of court proceedings. This enactment creates a presumption in favour of granting applications by the media to record and broadcast 'judgment remarks' delivered in open court.[74] Despite this apparently liberal approach, the substance of what can be recorded and broadcast is very limited. Judgment remarks

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[69] Scottish Report fn 68 above, at 29–30.
[70] Electronic Publication of Court Proceedings fn 54 above, at 18.
[71] Ibid.
[72] Ibid.
[73] Report to Chief Justice para 58.
[74] Electronic Publication of Court Proceedings fn 53 above, at 18.

in relation to a criminal trial, are defined as – 'the delivery of the verdict, and any remarks made by the court when sentencing the accused person, that are delivered or made in open court, and … in relation to any other proceedings – any remarks made by the court in open court when announcing the judgment determining the proceedings'.[75]

[26] With New Zealand, until the 1990s, there were no guidelines that related to the coverage of court proceedings by the media. There were no cameras allowed in court and as a matter of general practice recording in court was not permitted (as distinct from taking shorthand notes) even by reporters. New Zealand established a pilot programme that ran from 1995 until 1998, which permitted the filming of high court cases. An evaluation of the pilot project[76] revealed that most judges were distracted by the cameras though lawyers were not and that 58 per cent of the public thought that they would be less willing to appear as a witness if there were cameras, but the evaluation did not find any witnesses unwilling to appear. While public support for cameras rose from 25 per cent in 1996 to 38 per cent in 1998, 67 per cent of those polled in 1998 did not think that the experiment had educational value.[77] In spite of the mixed results and findings that arose from the evaluation, the programme has been extended. Following the pilot programme, New Zealand has permitted the recording and broadcasting of court proceedings since 1999. Under that system, should a media outlet wish to record proceedings in court for broadcast either on radio or television, it must apply to the court. The application is then forwarded to the parties involved and, following the receipt of submissions, is determined by the trial judge. Any permission is regulated by extensive guidelines, which outline both how the footage is to be recorded and how it is to be distributed. Criminal trials at first instance may be filmed and broadcast provided that certain conditions are met, including that any witness who objects must be made 'not recognisable' in the broadcast.[78] New Zealand courts do not, however, publish or provide this footage on their own website or via a public broadcaster. The Chief Justice of New

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[75] Section 127 of the Supreme Court Act 1970 No 52 (NSW).
[76] Marder fn 61 above, at 1561.
[77] Ibid.
[78] New Zealand Ministry of Justice 'In-Court Media Coverage Guidelines' (2016) available at: *https://www.courtsofnz.govt.nz/going-to-court/media/rules-and resources/INCOURTMEDIACOVERAGEGUIDELINES2016T.pdf.*

Zealand recently commissioned and has received a draft report on 'In-Court Media Coverage'. The report reviews the existing guidelines and practices relating to cameras and recording in court. It concludes that the presence of film recording, cameras and audio recording has 'facilita[ted] a more open and accessible court system', but also has given rise to some procedural challenges. Ultimately, it was considered that the present level of coverage was to be preferred over none at all and no fundamental changes to the 1995 reforms or the guidelines were recommended.[79]

[27] In Germany, s 169 of the Court Constitution Act 1975 (Gerichtsverfassungsgesetz (GVG)) provides:

> 'The hearing before the adjudicating court, including the pronouncement of judgments and rulings, shall be public. Audio and television or radio recordings as well as audio and film recordings intended for public presentation or for publication of their content shall be inadmissible.'

In 1995 and 1999 respectively, the news channel N-TV instituted action on constitutional grounds for permission to broadcast the trials of former members of the East German Politburo and to film a hearing concerning the legality of hanging a crucifix in a public school classroom.[80] Both cases reached the Federal Constitutional Court (FCC) in 2001, which ruled against the broadcaster. However, as these cases were making their way through the justice system, the FCC decided to allow the filming of its reasons for judgment, which began in 1998.[81] In 2016, the Federal Ministry of Justice put forward a proposal that would allow TV cameras into the highest courts of the five branches of the judiciary in Germany. The TV cameras would be allowed to roll only when the presiding judge delivers judgment, but not during the hearing.[82]

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[79] Electronic Publication of Court Proceedings fn 53 above, at 19.
[80] Blueprints for Transparency 'How High Courts Everywhere but the US Have Limited Judicial Tenure and Allowed Broadcast Access' 22 September 2016 available at *http://fixthecourt.com/wp-content/uploads/2016/09/Foreign-courts-on-broadcast-tenure-FTC-FINAL-1.pdf*.
[81] Ibid.
[82] P Bert 'TV Cameras to be allowed in German Courtrooms?' 8 April 2016 *Dispute Resolution in Germany* available at: *http://www.disputeresolutiongermany.com/2016/04/tv-cameras-to-be-allowed-in-german-courtrooms/*.

[28] There is a legal presumption against audio-visual coverage of courts in Israel. Permits to record and broadcast hearings have been granted in only five cases over a period of more than sixty years.[83] One of the first televised courtroom trials was that of Nazi SS Lieutenant Colonel, Adolf Eichmann, before a Jerusalem court in 1961. Israel's Prime Minister, David Ben Gurion, wanted the trial broadcast to educate a generation that had come of age after World War II about the atrocities of the Holocaust. The event was emotionally explosive and revealed for the first time to a shocked world audience the Nazi campaign to exterminate European Jewry. It has been said that one of the extraordinary aspects of the Eichmann trial was that no one knew very much about the Holocaust when the trial began.[84] To many, the Holocaust was an unspeakable remembrance and survivors did not readily speak about their ordeal. But the trial was a cathartic experience. Over 100 witnesses testified and after a trial lasting 16-weeks, Eichmann was found guilty on all 15 counts of the criminal indictment against him.[85] The second instance was in the 1970s, when an Israeli district court allowed the recording and broadcast of the decision in the Mizrachi case - a defamation lawsuit filed against one of the leading Israeli newspapers, *Ha'aretz*.[86] The next instance was at the end of the 1980s, this time for the broadcasting live on TV and radio of another trial related to the Holocaust – the trial of John Demjanjuk, who had been accused of having committed war crimes while serving as a guard at the Nazi extermination camp in occupied Poland. The fourth occasion was in 1996, when the verdict in relation to Yigal Amir, charged with the assassination of the Israeli Prime Minister, Yitzhak Rabin, was rendered. It was discovered after the fact that permission had actually been granted only to film the judges entering the courtroom, but due to a mistake the recording and broadcasting were extended to the complete reading of the verdict.[87] The fifth and final instance was in 1999 when the Jerusalem District Court allowed the decision given in the criminal case of Arye

[83] I Ravid 'Tweeting #Justice Audio-Visual of Court Proceedings in a World of Shifting Technology' (2017) 41 at 93 available at: *http://www.cardozoaelj.com/wp-content/uploads/2017/02/35.1-Ravid.pdf*.
[84] 'Introduction: The Trial of Adolf Eichmann' available at: *http://remember.org/eichmann/intro*.
[85] Ibid.
[86] Ravid fn 83 above, at 94.
[87] Ibid.

Deri, a former Israeli Minister, who had recently returned to the public life, to be broadcast.[88]

[29] Of the countries that permit cameras, one of the most unusual is Brazil, which allows cameras not only within the Brazilian Supreme Court, but also, the chambers where the Justices deliberate.[89] There are thus no private deliberations by the Justices. The court allows the filming of oral argument as well as the judicial deliberations, which commence as soon as the hearing comes to an end. In 2012, the court established its own broadcast networks, TV Justica and Radio Justica. The sessions are also accessible on the internet and the court maintains its own Twitter Feed and YouTube channel.[90]

[30] As can be seen, none of the foreign jurisdictions examined above appear to have recognized an explicit constitutional right to allow cameras in courtrooms. Moreover, some jurisdictions, like the US, have refused to expressly acknowledge such a right. That notwithstanding, 'all of these jurisdictions experienced - and are still experiencing - a massive growth in the presence of cameras within their courtrooms. The process by which such expansion occurred in these jurisdictions also bears similarities - it is characterized by patterns which allow courts to control the implementation of policies pertaining to constitutional matters that directly affect them, thus preserving their institutional strength'.[91]

[31] The first reported instance of a South African court having to engage with the issue arose in 2000 in the *Dotcom Trading* matter. On 7 April of that year, Indian police revealed that they had a recording of a conversation between the then South African cricket captain, Hansie Cronje, and a representative of an Indian betting syndicate that implicated him in match-fixing allegations.[92] Three other South African players were also implicated. After initial denials, Cronje admitted that he took money from an international

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[88] Ibid.
[89] Youm fn 39 above, at 1990.
[90] Blueprints for Transparency fn 80 above, at 4.
[91] Ravid fn 83 above, at 85.
[92] ESPNcricinfo Staff 'The Cronje chronicles' 22 July 2013 available at: *http://www.espncricinfo.com/ci/content/story/654219.html*.

bookmaker for supplying information regarding an international cricket match. The President of the Republic, in consultation with the Minister of Justice then set up a Commission of Enquiry into 'Cricket Match-Fixing and Related Matters'.[93] When the chairperson of the Commission, Justice Edwin King, ruled that he would not allow television or radio broadcasts of the proceedings of the Commission, an application was launched as a matter of urgency before the Cape Provincial Division, Cape Town on 14 June 2000. A full court was convened to hear the application. Brand J (with whom Hlophe JP and Traverso J concurred) held that the 'blanket exclusion of broadcasting and recording equipment from the sittings of the Commission is inconsistent with the Constitution and therefore invalid'[94] and to the extent that the Chairperson of the Commission had excluded all electronic media and not considered a less restrictive means (such as allowing radio broadcasting, which is what was sought) his decision was flawed. The court considered that the matters being enquired into by the Commission were matters of widespread national and international interest. The rulings by the Chairperson, which were held to constitute an infringement of the broadcasters' rights guaranteed by s 16 of the Constitution, were accordingly set aside. The Commission was directed to allow the media to operate their radio broadcasting and recording equipment during sittings of the Commission in such manner as to be determined by the Chairperson.[95]

[32] Some four years later, in 2004, the high court had occasion to once again consider the issue – this time in the context of a criminal trial. During October of that year, Midi TV (Pty) Ltd, t/a e-TV (eTV), the holder of a private free-to-air television broadcast licence, applied for permission to the KwaZulu-Natal Local Division, Durban (per Squires J) to broadcast the criminal trial of Mr Schabir Shaik and 10 companies, which Mr Shaik controlled or in which he had a major interest.[96] Mr Shaik was indicted on several counts relating to corruption, in relation to payments he had made to the then Deputy President

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[93] The Honourable Mr. TM Mbeki, President of the Republic of South Africa 'Commission of Inquiry into Cricket Match Fixing and Related Matters' (2000) available at: *http://www.gov.za/sites/www.gov.za/files/kingfinal_0.pdf*.
[94] *Dotcom Trading* fn 30 above, para 63.
[95] Ibid.
[96] *Midi Television (Pty) Ltd* fn 10 above, at 2.

of the Republic of South Africa, Mr Jacob Zuma. It was alleged that Mr Shaik had bribed Mr Zuma to protect a French armaments company from exposure to official investigation.[97] The application was opposed by both the State and the accused. Squires J approached the application thus:

> '. . . weighing and balancing the competing claims against each other as best I can, I am eventually of the view that the individual rights of the witnesses and the objections of the accused should be accepted as prevailing and such right as the applicant may have . . . should yield'.[98]

[33] Squires J took the view that the *Dotcom Trading* judgment was no 'authority for holding that criminal trial proceedings should also be televised in the public interest'.[99] The right to privacy of individual witnesses was, in his view, the overriding factor in refusing the application. Infringement thereof by televised proceedings could lead to an unfair trial and conflict with 'the public interest in a democratic criminal justice system' which brings wrongdoers to book while ensuring that justice is done to them. Although he refused the application, Squires J did give the applicant leave to approach him 'later if a stage is reached in the trial where the instant objections are not present, to see if some accommodation can be achieved'.[100]

[34] Mr Shaik was convicted and sentenced to 15 years' imprisonment. The companies were also convicted and required to pay fines.[101] They sought and obtained leave to appeal to the Supreme Court of Appeal (SCA). Shortly before the appeal was due to be heard by the SCA, the national broadcaster, the South African Broadcasting Corporation (*SABC*) applied for permission 'to be present at and record for the purposes of live broadcast on television, with both visuals and sound . . .'[102] The SCA held that in balancing the right of free expression and fair trial, the proper test was one that favoured the right to a fair trial. It concluded that television and radio broadcasts would violate fair

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[97] *S v Shaik & others* 2007 (1) SACR 142 (D) at 143–144.
[98] *Midi Television (Pty) Ltd* fn 10 above, at 9.
[99] Ibid, at 13.
[100] Ibid, at 14.
[101] *S v Shaik* fn 97 above, *at* 147–148.
[102] *SABC* CC fn 9 above, para 5.

trial rights and accordingly dismissed the application.[103] In dismissing the further appeal to it by the *SABC*, the majority of the Constitutional Court (CC) approached the matter thus:

'The narrow issue, accordingly, is not whether cameras should be allowed into courts; it is whether this court should interfere with the discretion of the Supreme Court of Appeal and order that radio and television coverage be permitted in this particular appeal before that court, as this particular time, in the particular circumstances of this case'.[104]

On that issue, the CC was satisfied that the SCA had not committed a 'demonstrable blunder'.[105]

[35] The issue arose once again before the Cape Provincial Division, Cape Town in August 2005. Earlier that year, Mark Thatcher, the son of the former British Prime Minister, was arrested and arraigned in South Africa on charges relating to funding a coup in Equatorial Guinea.[106] His plea of guilty to a lesser charge was accepted by the South African prosecuting authorities and he was duly sentenced. Two days after his arrest, the government of Equatorial Guinea requested the South African government in writing to allow it to question Mr Thatcher on a number of matters relating to the alleged coup. The South African Minister of Justice approved the request and thereupon a subpoena was issued, which required Mr Thatcher to attend the Wynberg Magistrates' Court in Cape Town for the purposes of responding to certain questions contained in two lists annexed to the subpoena. His failure to comply therewith would constitute a criminal offence and, if convicted of such offence, he would be exposed to a penal sanction in the form of a fine or imprisonment not exceeding three months. Mr Thatcher brought an urgent application to review[107] and set aside the various decisions taken by the South African authorities that gave rise to him having to appear in court to answer the questions and to declare their conduct, in coming to such decisions, unconstitutional.[108]

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[103] *South African Broadcasting Corporation Ltd. v Downer NO and Shaik* [2006] ZASCA 90; [2007] 1 All SA 384 (SCA) (*SABC* SCA) para 30.
[104] Ibid, para 34.
[105] Ibid, para 55.
[106] *Thatcher v Minister of Justice and Constitutional Development & others* 2005 (4) SA 543 (C); 2005 (1) SACR 238 paras 1 – 6.
[107] Ibid.
[108] Ibid.

[36] The *SABC* applied to televise the review proceedings.[109] Van Zyl J (with whom Moosa J and Dlodlo J concurred) granted permission to the *SABC* to record the proceedings.[110] The court, however, directed that 'the recording may be used only in the form of an edited daily highlights package for the purposes of delayed broadcasting in television news bulletin and in programmes relating to current affairs or matters of public interest'.[111] After a consideration of the position in comparable foreign jurisdictions, Van Zyl J presciently observed 'in considering the development of electronic media coverage of court proceedings in South Africa, as compared with the similar developments, or lack thereof, in a number of other countries, it seems clear that the electronic media, and their associated issues, are here to stay'.[112]

[37] In June of that same year, four men gained access to the home of Ms Norton in Cape Town, snatched her six month old baby from the arms of her housekeeper and stabbed the baby to death. eTV decided to make a television programme about the murder which had attracted a great deal of public attention.[113] It recorded interviews with various people. A decision was taken not to broadcast the documentary until arrests were made by the police. By 9 July 2005 four men and a woman had been arrested and charged and eTV proceeded to schedule the broadcast. Representatives of the Director of Public Prosecutions (DPP) asked to see the television programme so as to satisfy themselves that it would not prejudice the pending murder trial, but eTV refused. The DPP then successfully applied to the Cape Provincial Division, Cape Town for an interdict to prohibit the broadcast, until he had been furnished with a copy and had been afforded 24 hours to consider whether further proceedings should be instituted. In upholding eTV's appeal, the SCA laid down the test to be applied when a court is asked

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[109] *South African Broadcasting Corporation Limited v Thatcher & others* [2005] ZAWCHC 63; [2005] 4 All SA 353 (C).
[110] Ibid, para 1.
[111] Ibid.
[112] Ibid, para 119.
[113] *Midi Television (Pty) Ltd* fn 10 above, paras 1–2.

to restrict freedom of expression in order to protect the administration of justice or to protect some other right. Nugent JA held:[114]

'In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.'

He observed that it is 'not merely the interests of those associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.'[115] The learned judge further emphasised the broad reach of these principles thus:

'Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by a ban on publication or otherwise. They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.'[116]

[38] Our courts next had occasion to consider the issue in 2010. On diverse occasions during March of that year Mr Julius Malema, the then President of the African National Congress Youth League (ANCYL), had reportedly sung 'Kill the Boer'. Kill the Farmer'. Those utterances, which were understood by many to have been an attack on the Afrikaans speaking sector of the community, attracted much negative media attention. And, in consequence, a complaint that those remarks constituted hate speech came to be lodged with the Equality Court.[117] In response to an application to broadcast the proceedings, the Equality Court held:[118]

'On the day of the hearing I granted leave to eTV (Pty) Ltd and eSAT (Pty) Ltd to record and broadcast the proceedings. The ruling followed the principles and procedures set out in the Practice Direction in the Supreme Court of Appeal concerning cameras. Live transmission was

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[114] Ibid, para 19.
[115] Ibid.
[116] *Midi Television (Pty) Ltd* fn 10 above, para 20.
[117] *Afri-Forum & another v Malema & others* [2011] ZAEQC 2; 2011 (6) SA 240 (EqC).
[118] Ibid, para 47.

permitted. The witnesses who would testify were, in the main, accustomed to speaking in public and to the presence of the Press. The public was entitled to see the events transpiring in court so as not only be able to form its own judgment but also to re-live events as part of a process of healing. I directed that any party including a witness could at any time request the process to be stopped; that it was then to stop immediately pending further orders. This never happened during the trial. In addition a big screen was attached to the railings at the outside entrance to court. This enabled the public, the supporters of parties and passersby access to the proceedings without the need for them to physically be in my court.'

[39] Undoubtedly, the most significant case of the use of cameras in the South African courtroom was the *Pistorius* matter. Approximately one decade after Squires J had ruled against the media in *Shaik*, the high court was required once again to confront squarely whether the media should be allowed to broadcast criminal proceedings.[119] On Valentine's Day 2013, model Reeva Steenkamp was killed by her Paralympian boyfriend, Oscar Pistorius, who claimed that he believed that she was an intruder hiding in his bathroom.[120] Pistorius was found guilty of culpable homicide at his trial the following year and sentenced to a term of five years imprisonment.[121] On 3 December 2015, the SCA substituted his conviction for one of murder.[122] From the time that reports of the incident first began to filter through, it captured the public attention. The killing of Ms Steenkamp and Mr Pistorius' subsequent trial inspired articles, informed television programming and clogged social media for months on end. The *Pistorius* trial was of great interest, both at home and abroad (international journalists flocked to the country to cover the trial). In response to an application brought by several major South African media outlets, Mlambo JP allowed the media to broadcast audio recordings of the full trial, and to televise parts of it.[123]

[40] The learned Judge President reasoned:

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[119] *Multichoice (Proprietary) Limited & others v National Prosecuting Authority & another, In Re; S v Pistorius, In Re; Media 24 Limited & others v Director of Public Prosecutions North Gauteng & others* [2014] ZAGPPHC 37; 2014 (1) SACR 589.
[120] *S v Pistorius* [2014] ZAGPPHC 793 at 2-3
[121] Ibid.
[122] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317 (SCA) para 55.
[123] *Multichoice* fn 119 above, para 30.

'I have found merit in the argument on behalf of the applicants [broadcasters], that acceding to an objection by Pistorius [to the extent of the broadcast] fully will perpetuate the situation that only a small segment of the community is able to be kept informed about what happens in courtrooms, because of this minority's access to tools such as Twitter. Acceding to that argument will also perpetuate the reality that the community at large remains dependent, for news on what happens in the courtroom, on the summarised versions of the journalists and reporters who follow these proceedings. These summarised versions or accounts have, in my view, been correctly categorised as second-hand, liable to be inaccurate, as they also depend on the understanding and views of the reporter or journalist covering the proceedings.'[124]

He issued a detailed order, the relevant part of which reads:[125]

'3. MultiChoice and Primedia are permitted to broadcast the audio recording of the entire trial in live transmissions, delayed broadcasts and/or extracts of the proceedings.

4. MultiChoice and Primedia are permitted to broadcast the audio-visual recording of the following portions of the trial only, in live transmissions, delayed broadcasts and/or extracts from the proceedings:

4.1 Opening argument of the state and accused;

4.2 Any interlocutory applications during the trial;

4.3 The evidence of all experts called to give evidence for the state, excluding evidence of the accused and his witnesses;

4.4 The evidence of any police officer or former police officer in relation to the crime scene;

4.5 The evidence of all other witnesses for the state unless such a witness does not consent to such recording and broadcasting and the presiding judge rules that no such recording and broadcasting can take place;

4.6 Closing argument of the state and the accused;

4.7 Delivery of the judgment on the merits; and

4.8 Delivery of the judgment on sentence, if applicable.'

[41] The coverage of the trial was extensive. Following the judgment, an entire 24-hour television channel was created for the sole purpose of televising and then analysing the proceedings. That was made possible because Mlambo JP did 'what no South African court had before dared to do: media organisations were given permission to broadcast,

[124] Ibid, para 21.
[125] Ibid, 30.

live and in full Technicolor, a criminal trial'.[126] Thus with *Pistorius*, the Rubicon had been crossed. The *Pistorius* trial, or more accurately the outcome of the pre-trial application to broadcast the proceedings, changed irreversibly the manner in which the media and the justice system of our country converge.[127]

[42] The question whether, and under what circumstances, cameras should be permitted in South African courtrooms provokes tension between the rights of the press, on the one hand and the fair trial rights of an accused person, on the other. The right to a fair trial has been interpreted as including the foundational values of dignity, freedom and equality which lie 'at the heart of a fair trial in the field of criminal justice'.[128] When two constitutional rights (such as the right to freedom of expression and the right to a fair trial) butt heads it is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser.[129] Instead, as *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* made plain 'where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them'.[130] Accordingly, freedom of expression and the fair administration of justice, which are both essential to the proper functioning of any true democracy, should as far as possible be harmonised with one another.

[43] It is difficult to accept that a total bar on the broadcasting of judicial proceedings does not at least limit the s 16 right. As the Constitutional Court has explained, even where expression is regulated this limits the right concerned: 'Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless. . . .'[131]

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[126] Moseneke fn 14 above, at 9.
[127] Ibid, at 2.
[128] *S v Dzukuda & others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) para 11.
[129] Moseneke fn 14 above, at 9.
[130] *Midi Television (Pty) Ltd* fn 10 above, para 9.
[131] *Print Media South Africa & another v Minister of Home Affairs & another* 2012 (6) SA 443 (CC) para 51.

[44] Conventional media reporting will inevitably be limited and incomplete. And, despite their importance, newspapers (and even television) are yesterday's technology.[132] Pencils and sketch pads are now considered anachronistic. There is no restriction regarding filming outside the court. Nor is there any restriction regarding attending in court and taking notes, drawing pictures or upon accessing exhibits. The restriction relates to the means of gathering the information and the place where it may be gathered. There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage will be more accurate than a reporter's after-the-fact summary'.[133]

[45] The right to freedom of expression confers on the media the discretion to determine what means of communication would be most effective in relation to engaging the public and communicating and relaying information and events to it. As the European Court of Human Rights explains, albeit in a different context:

> 'The court recalls that it is not for the court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed.'[134]

This is especially so when the restriction on the means of communication would undermine the quality or timeliness of the communication, because 'delayed information is as good as denied information'.[135]

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[132] Live streaming is increasingly becoming commonplace. 'Streaming media is a method by which data is delivered by an internet provider in a continuous stream to an end-user's device, such as a computer, iPad or web-enabled television'. (See *Carol Ann Matthews v SPI Electricity (Pty) Ltd (CAN) 064 651 118 & Ors* [2013] VCS 37 para 15.)

[133] Moseneke fn 14 above, at 12.

[134] *News Verlags GmbH & CoKG v Austria* [2000] ECHR 5, 31457/96, (2001) 31 EHRR 8 para 39 (emphasis added).

[135] Moseneke fn 14 above, at 12.

[46] It is thus important to emphasise that giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. Broadcasting of court proceedings enables this to occur. Television presents the complete picture instantaneously. Television cameras do so by creating a comprehensive and instantaneous feedback loop between the trial participants and the television audience.[136] In contrast, the print media simply does not operate with the same kind of interactive speed or attract so wide and responsive an audience.

[47] The media plays a vital watchdog role in respect of the court process. One of the aspirational goals of the media is to make governmental conduct in all of its many facets (including courts) transparent. Cameras in the courtroom aid that process, so too microphones. Televised proceedings thus aid in the public oversight of the judiciary. According to Justice Potter Stewart 'the primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside Government as an additional check on the three official branches'[137] This oversight role was recognised in *Sheppard v Maxwell*,[138] where the court observed that: 'the press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and the judicial process to extensive public scrutiny and criticism.'[139] At its core therefore, a bar on cameras and microphones means that one sector of the media is precluded from taking their particular tools of trade into the courtroom. And, it has been pointed out that there has been a failure to articulate reasons for treating electronic media differently to print media in the courtroom context.[140] In the light of the fact that members of the public acquire most of their news through the electronic media, it has to be somewhat counter-intuitive that they are not able to 'utilize the principle of

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[136] Lassiter fn 1 above, at 935.
[137] Address by Justice Stewart, Yale Law School (Nov 2, 1974) c/f Gardner fn 29 above, at 492-493.
[138] *Sheppard v Maxwell* 384 US 333 (1966).
[139] Ibid, at 350. See also Gardner fn 29 above, at 493.
[140] Ibid, at 479.

open justice to their advantage to the same extent as the print media.'[141] In that, the section 16(1) rights of both the media and the public are self-evidently limited.

[48] As this Court explained in *Primedia* regarding the right to an open Parliament:

'The Constitution thus affords all South Africans the right to see and hear what happens in Parliament. . . . Of course not all members of the public are able to attend sittings of Parliament. But the media is able to bring to their attention what happens in sittings by virtue of radio and television broadcasts, through newspapers and now also through social media such as Twitter. . . .'[142]

Lewis JA there pointed out:

'The public has a right to witness [incidents in Parliament]. And the public has a right to know not only what the Speaker or the Chairperson says during moments of disorderly behaviour, but also to see how MPs are treated by security staff who forcibly evicts them from the Chamber. The public has a right to know how the legislative arm of government operates.'[143]

That accords with the Constitution's general endorsement of openness and transparency in all public affairs. While *Primedia* concerned the right to an open Parliament, rather than the right to open justice, the same logic must apply in both contexts. After all, the judiciary as a branch of government should be accountable in the same way as the executive and legislative branches. Moreover, courts can hardly prescribe to other arms of government that they should be open, whilst endorsing a judicial system that is 'shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone'.[144]

[49] Television allows viewers to feel that they are present in the courtroom. And, there are many articulate arguments put forward to support cameras in the courtroom based on almost two decades of experience with cameras in some US States. Advocates in favour of coverage argue that it provides education about the workings of the court to those who themselves cannot be present in the courtroom. Proponents urge that cameras make

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[141] Rodrick fn 12 above, at 156.
[142] *Primedia Broadcasting (a division of Primedia (Pty) Ltd) & others v Speaker of the National Assembly & others* [2016] ZASCA 142; [2016] 4 All SA 793 (SCA); 2017 (1) SA 572 (SCA) para 1.
[143] Ibid, para 38.
[144] Moseneke fn 14 above, at 8.

lawyers and judges more accountable for their behaviour. Five decades ago, one of the principle reasons against unrestricted media coverage was that flashbulbs and microphones were inconsistent with the dignity and decorum of the courtroom.[145] Today, the decorum argument has largely dissipated as modern technology has advanced significantly, with the result that cameras are now neither obtrusive, nor disruptive.

[50] A court is a place where citizens can take their disputes in the knowledge that the rule of law will be applied. It is governed by rules of evidence and procedures designed to seek out the truth, not in a general way, but in the context of specific dispute resolution and administration of justice. These rules also endeavour to ensure the fairness of the trial process.[146] Moreover, a criminal trial follows a well-established order, with the prosecutor in a criminal case trying to establish, through the presentation of evidence, the guilt of the accused beyond a reasonable doubt.[147] With each witness, there is the opportunity for direct examination followed by cross-examination and re-examination. Objections are ruled on by the judge. The formality of the setting and the proceedings contributes to the dignity and decorum of the courtroom and serves as a constraint. A discreetly placed camera would capture the formality of the proceedings and enable people to observe from afar the dignity of the proceedings and imbibe the same lessons of respect for the judicial process as those who are physically present.

[51] Arguably, complete broadcast coverage of the trial is important to achieve the valuable ends served by increasing public access to judicial proceedings. In that regard, ‘gavel to gavel’ coverage, as it has sometimes been described, may be preferable to no (or limited) coverage. The way in which stories that have been told in court and re-told by the media, may make a difference as to how the law is appreciated and the functioning of the court understood. With gavel to gavel coverage the role of the media more closely approximates that of a conduit rather than a processor and interpreter of court proceedings.[148] By keeping cameras out of the courtroom, court reporters continue to be

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[145] McCall fn 4 above, at 1546.
[146] *R v Pilarinos and Clark* 2001 BCSC 1332 para 156.
[147] Marder fn 61 above, at 1519.
[148] Rodrick fn 12 above, at 155.

relegated to conveying information about judicial proceedings from the steps of the courtroom (as has traditionally been the case), despite the fact that the 'aural and visual nature of broadcasting would give the public a more direct sense of what has transpired than a verbal report in a highly summarised form.'[149]

[52] One of the most persuasive remaining objections is the possible effect that cameras, and the larger audience they represent, may have on the testimony of witnesses in criminal trials.[150] In considering this objection, it must be accepted that the courtroom is already a public place with a physical public presence – proceedings are transcribed and members of the press and public are free to be present. Television broadcasts provide members of the public with a virtual presence in the courtroom. If the physical presence of members of the public cannot be said to inhibit or distract counsel, the judges and witnesses, it has to be open to debate that a virtual presence will have that effect. 'Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice.'[151]

[53] Those in favour of cameras, point to the 50 US states that have allowed cameras in some courtrooms and report no discernible effect on participants.[152] In fact, most studies conducted on the effect of cameras on witnesses have found that allowing cameras into courtrooms had no effect, positive or negative, on the legal proceedings.[153] It is worth noting however, that these studies have been criticised for their methodological limitations.[154] However, the results from the US State studies were unanimous: the impact of electronic media coverage of courtroom proceedings, whether civil or criminal,

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[149] Rodrick fn 12 above, at 156.
[150] McCall fn 4 above, at 1546.
[151] *In Re S (a child) (Identification: Restriction on Publication):* HL 28 Oct 2004, [2004] UKHL 47, 17 BHRC 646, 4 All ER 683, [2005] Crim LR 310, [2004] 3 WLR 1129.
[152] Marder fn 61 above, at 1509-1510.
[153] This is, for example, the conclusion of the first Federal Judicial Centre FJC report, which evaluated a pilot program between 1991 and 1993, in which cameras in six district courts and two courts of appeal were allowed.
[154] Marder fn 61 above, at 1546–1547.

show minimal side effects on witnesses and the few studies that did lacked rigorous design.[155] Most importantly, all jurisdictions agreed that those effects could be addressed through appropriate policy design.[156]

[54] There is as well the argument that notwithstanding a witness taking the oath or affirmation, he or she may be affected either consciously or subconsciously by the evidence of the other witnesses given during the course of the trial. By viewing other evidence during the televised proceedings, so the argument goes, the memory and recollection of a prospective witness would be impermissibly refreshed, which might serve to enhance the credibility of that witness' testimony and corrupt the truth-seeking function of a trial. In *Shabalala v Attorney-General of the Transvaal,*[157] the Constitutional Court dealt with a similar contention in the context of docket privilege as follows:

> 'A recurrent theme which asserts itself in some of the cases is that the disclosure of witnesses' statements might enable an accused person to "tailor" evidence and to give perjured testimony because he or she becomes alive to the fact that the falseness of such evidence may not be detected by the prosecution on the information available to. This objection is conjectural and it must be balanced against other factors which have to be weighed in dealing with an accused's insistence that he or she has a right to a fair trial. An alert prosecutor and a competent court would be able to make adequate allowance for the fact . . .'[158]

To be sure, the risk of witness exposure does present a problem that cannot lightly be wished away. One way to address this concern would be for the judge to direct witnesses to base their answers solely on their personal knowledge. This can be achieved for example by precisely and cautiously instructing trial witnesses to testify based solely on their personal knowledge.[159] It goes without saying that the essential character of a court is that it is invested with the power to maintain its authority and to prevent its process being obstructed and abused.

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[155] Lassiter fn 1 above, at 964-965.
[156] Ravid fn 83 above, at 50.
[157] *Shabalala & others v Attorney-General of the Transvaal & another* [1995] ZACC 12; 1996 (1) SA 725.
[158] Ibid, para 46.
[159] A judicial admonition can be delivered individually to each witness, along the following lines: 'You are not to testify to any matter, except for matters you know of your own personal knowledge. You are not to testify to anything that you learned because you heard, read or listened to any portion of the proceedings thus far. See *United States v Oliver L North* 920 F 2d 940 (D C Cir 1990).

[55] Following on *Shabalala*, witness statements are now generally made available to the defence in advance of the commencement of the trial. The defence, equipped with such evidence, should be able to point to specific instances of tainted testimony. The adversarial nature of criminal proceedings and the pivotal role that cross-examination plays in it should enable the judge to safely make findings as to whether or not a witness' testimony has been tainted by the exposure. In any event, the reality of court reporting today is that even without any form of audio or audio-visual reportage, the media provide live text-based communications through various social media platforms such as Twitter and Facebook from inside the courtroom. In truth therefore the risk of 'tailoring' already exists. Thus, whether that risk will be materially exacerbated by audio-visual coverage remains moot.

[56] It has also been contended that commercial imperatives will likely impel the media to focus on the high-profile or cases concerning the unusual or gruesome. By focussing on the sensational, particularly in a country like ours with deep patterns of racial and economic inequality, so the contention goes, public confidence in the judicial system may actually suffer, because citizens are likely to feel that only cases involving the privileged receive due and proper consideration. As long ago as 1921, CP Scott, the editor of the Manchester Guardian, wrote:

> 'A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and it influences the life of the community . . . it has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces.'[160]

It needs to be underscored, however, that it cannot be for us to prescribe to the media which trials they should cover – that remains their call. Moreover, it may well be that in high profile cases, it is even more critical that the public receive the maximum amount of information about the process by which a particular result has been achieved. As it was put in *Richmond Newspapers*:[161]

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[160] Rodrick fn 12 above, at 150.
[161] *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 571-572.

'When a shocking crime occurs, a community reaction of outrage and public protest often follows .... Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.... It is not enough to say that results alone will satiate the natural community desire for "satisfaction." *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 process "satisfy the appearance of justice" ... and the appearance of justice can best be provided by allowing people to observe it.'(Italics for emphasis)

[57] Concerns of privacy and security may also justify limits on how the media go about gathering and transmitting information about judicial proceedings. However, in accordance with the public-centred perspective, when individuals appear in a courtroom, their privacy interests might have to give way because their disputes are being resolved in a public forum that must be open to public scrutiny. As held in *Cox Broadcasting Corp v Cohn*,[162] a judicial proceeding is a public event and information on the public record may be broadcast despite its highly sensitive nature. However, the court did acknowledge that there may be interests in need of protection.[163] Thus judges who have to balance the presence of cameras with privacy interests can do so by imposing appropriate restrictions. Deputy Chief Justice Moseneke pointed out that there are a myriad of measures available to protect witnesses:[164]

'These range from: anonymity orders to protect vulnerable witnesses identities and allowing witnesses to testify through intermediaries or with the help of a support person, to closing the courtroom so that only certain people are present, or even allowing witnesses to testify from a remote location via closed-circuit television. Other measures might include suppression orders such as that ordered in *Multichoice* when judge Mlambo prohibited the media

[162] *Cox Broadcasting Corp v Cohn* 420 US 469 (1975).
[163] Gardner fn 29 above, at 489.
[164] Moseneke fn 14 above, at 14.

from photographing or broadcasting the testimony of Mr Pistorius or his witnesses, or even, as the United States has started experimenting with, allowing witnesses to wear disguises in court.'

[58] It is important to emphasise that whilst greater access by the public to the court system by means of televised proceedings would result in: (i) demystification of the judicial process; (ii) greater informed deliberation and critical assessment of the judiciary based on the public's ability to readily observe judicial proceedings; (iii) increased understanding of and respect for the judiciary based on the public's increased ability to observe the daily working of the courts; (iv) improved journalistic standards relative to court reporting resulting from greater coverage of court proceedings and the development of court reporters specialising in judicial matters; and (v) heightened public awareness of deep seated societal problems,[165] the right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances.

[59] Where there is a debate about whether given court proceedings should be broadcast, a court is vested with the power to limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it. The power of the court to do so is an inherent one flowing from s 173 of the Constitution[166] and must be exercised in the interests of justice. As it was put by the Constitutional Court in *SABC Ltd v National Director of Public Prosecutions and others*:[167]

'This is an important provision which recognises both the power of courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that courts in exercising this power *must take into account* the interests of justice.'

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[165] *R v Pilarinos and Clark* fn 146 above, para 159.
[166] Section 173 of the Constitution provides:
'The Constitutional Court, Supreme Court of Appeal and High Courts each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'
[167] *SABC* CC fn 9 above, paras 35-36.

Accordingly, a court has the inherent power to make any order in relation to the publicity of the proceedings. However, such order must be consistent with constitutional requirements.

[60] The NDPP impermissibly adopts a blanket one-size-fits-all approach. Not just for this matter, but, as I understood the argument, for all criminal proceedings. The NDPP claims that there should be no broadcast whatsoever – whether, visual or audio. Such an approach cannot amount to the proper exercise of the s 173 power to limit the nature and extent of the broadcast. This is made clear by the decision of this Court in *Primedia*. There, in the context of restrictions on the right to broadcast Parliamentary proceedings, this Court held:[168]

'The right to see and hear what happens in Parliament is not unlimited. . . . Any measure adopted by Parliament must be objectively reasonable. The test to be applied is not only whether the limitation is proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. This is the test in the limitations provision in the Constitution (less restrictive means to achieve the purpose – s 36(1)(*e*)). In *S v Manamela & another* (Director-General of Justice Intervening . . . O'Regan J and Cameron J said (para 66) in a dissenting judgment, but the particular passage was approved by the majority of the court):

"The approach to limitation is, therefore to determine the proportionality between the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose."

[61] *Manamela,*[169] I daresay, precludes a rigid one-size-fits-all approach. There will be cases, one imagines, that rest exclusively on circumstantial evidence. It may well be difficult in such a situation to justify excluding cameras from the courtroom. There may also be cases that rest on the evidence of a single eyewitness. In those cases the risk of witness exposure or tailoring of evidence would not arise. There too, it may well be difficult to justify excluding cameras. Moreover, the fact that witness X might be severely

[168] *Primedia Broadcasting* fn 142 above, paras 30-31.
[169] *S v Manamela & another (Director-General of Justice Intervening*) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491.

intimidated by having to testify on camera, does not justify prohibiting the broadcast of witness Y's testimony, who has not raised the same concern. Nor would it, without more, justify prohibiting the audio broadcasts of witness X's testimony. Such an approach, does afford appropriate appreciation for the different types of witnesses, who would testify in the course of criminal proceedings. What warrant, can there be, it must be asked, for treating expert witnesses, lay witnesses and professional witnesses (such as police officers) on the same footing? I venture that it may be fanciful to suggest that an audio broadcast can have the same distressing or embarrassing effects as an audio-visual broadcast.

[62] *MultiChoice*[170] endorsed a regime whereby:
(a) the evidence of all expert witnesses was to be broadcast using visual and sound broadcasts; (b) any lay witness who objected to having their evidence televised would have these wishes respected and no video coverage of that witness would be allowed; (c) however, a full audio of the evidence would be broadcast, as well as audio-visuals of the legal practitioners and the judge and assessors, even where objecting witnesses give evidence; and (d) even then, the presiding judge would from time to time have the power to make rulings in respect of a specific witness as and when required. Such an approach adequately balances the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial. A blanket ban on all broadcasting or adopting a one-size-fits-all approach, does not.

[63] The NDPP seeks to make much of the decisions of this Court and the Constitutional Court in the *SABC* matter. But it is necessary to view that case in its proper context if the s 173 power is to be properly exercised. The *SABC* cases were decided over a decade ago. Then, the live broadcasting of court proceedings, including appeals, was (with rare exceptions) virtually unknown in this country. While the majority of the Constitutional Court dismissed the appeal – on the basis that there was no warrant for interference with the exercise of this Court's discretion – it held tellingly that 'the time has

[170] *Multichoice* fn 119 above, at 17-19.

come for courts to embrace the principle of open justice and all it implies'.[171] It went on to explain that changes would likely be required in relation to the approach towards broadcasting of court proceedings.[172] The position has changed fundamentally since the *SABC* judgments. In 2009, three years after the *SABC* cases, this Court issued a practice directive allowing, as a default position, the full audio-visual broadcasting of all of its proceedings.[173] Other courts, including the Constitutional Court and the Gauteng Division, Pretoria, follow the same approach.

[64] The *SABC* judgments must therefore yield to a new reality. For, even as we grapple with television in the courtroom, there are many (particularly younger viewers) who are increasingly turning to the internet to keep up to date with news and current affairs. Many people now use social media as their main source of information, resulting in a shift in how information is disseminated and received. As McLachlin CJ observed:[174]

'The explosive growth of new media signals a shift in who reports on legal proceedings. Court decisions may no longer be the preserve of trained professional journalists. Anyone with a keyboard and access to a blog can now be a reporter. And who is to say they are not? Some bloggers will be professionals and academics providing thoughtful commentary and analysis. Others will fall short of basic journalistic standards. Will accuracy and fairness be casualties of the social media era? What will be the consequences for public understanding of the administration of justice and confidence in the judiciary? How can a medium such as Twitter inform the public accurately or adequately in 140 characters or less? If witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media accessed or received automatically via a hand-held device?'

[65] There is a growing trend of openness and permitting of the broadcast of evidence in international and foreign criminal tribunals. Since the International Military Tribunal at Nuremberg broadcast its trial of Nazi leaders in connection with World War II atrocities in

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[171] *SABC* CC fn 9 above, para 68.
[172] Ibid, paras 71-72.
[173] Supreme Court of Appeal Practice Directions available at: *http://www.justice.gov.za/sca/practice/Practice%20Directions%20-%2017%20August%202007.pdf*.
[174] Remarks of the Right Honourable B McLachlin fn 2 above.

1945, several regional human rights courts and international criminal courts have opened their proceedings to cameras not as the exception, but the rule.[175]

[66] The Inter-American Court of Human Rights (IACHR) is required to keep its hearings and deliberations 'on audio recordings' under its rule of procedure, as approved by the court in November 2009.[176] Some of the most extensively televised international court proceedings are those at the International Criminal Tribunal for the former Yugoslavia (ICTY), a United Nations Court in The Hague, which adjudicates the war crimes that occurred during the conflicts in the Balkans in the 1990s. Since it first heard cases in 1994, the ICTY has routinely recorded its proceedings and distributed them to the world's media[177]. The audio-visual recording of the ICTY proceedings was designed 'to make sure that justice would be seen to be done, to dispel any misunderstandings that might otherwise arise as to the role and the nature of the Tribunal proceedings and to fulfil the educational task of the Tribunal.' The ICTY proceedings, 'other than deliberations of the Chamber', are held in public, unless otherwise provided. Proceedings can be televised 'in a modified manner,' for example, with the witness's voice or image distorted if a witness is 'protected' under Rule 75 on 'Measures for the Protection of Victims and Witnesses' of the ICTY Rule of Procedure and Evidence. The ICTY thus has the discretion to close its proceedings to protect witnesses where necessary.[178] The full proceedings of the International Criminal Tribunal are recorded and broadcast using court equipment. Footage is made available to carriers like the BBC and CNN.[179]

[67] The approach to the recording of proceedings in the International Criminal Court (ICC) in the Hague is similar to the ICTY. Where necessary for the protection of a witness, the image or voice of the person is distorted and rendered unrecognizable in the audio-visual feed. In addition, the court retains the discretion to exclude certain testimony

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[175] Youm fn 39 above, at 2015.
[176] Ibid, at 2016.
[177] Youm fn 39 above, at 2015-2016.
[178] Ibid.
[179] International Criminal Tribunal for the Former Yugoslavia Rules of Court, Rule 81(d). See website announcements regarding broadcasts: 'Courtroom Broadcast' available at *http://www.icty.org/sid/252*; 'Courtroom Technology' available at *http://www.icty.org/sid/167*; 'Broadcast of Proceedings at the ICTY through the Internet' 15 February 2002, available at *http://www.icty.org/sid/81222*.

from broadcast. According to the Rome Statute for the International Criminal Tribunal, trials 'shall be held in public'.[180] Like the ICTY, the ICC Trial Chamber may find special circumstances that require that certain proceedings be closed for the purposes of the protection of the victims and witnesses and to protect confidential or sensitive information to be given in evidence.[181] The ICC Statute also provides for similar 'protective measures' for a victim, a witness, or another person at risk due to testimony given by a witness. In those instances, the trial chamber may hold an in camera hearing to decide whether to order preventive measures against releasing the information on the identity or the location of the victim, the witness, or the other person who is vulnerable to the consequences of the testimony provided.[182] The ICC Regulations provide for the recording and broadcast of proceedings, including witness testimony.[183] Videos of both ICTY and ICC trials are posted on the courts' websites and can be streamed in full, subject to a 30 minute delay.[184]

[68] The European Court of Human Rights (ECHR) uses a written procedure that allows it to make rulings primarily on the basis of 'written observations' submitted by the parties, although it holds oral hearings occasionally. When the ECHR holds public hearings, they are required to be public unless the Chamber of seven judges or the Grand Chamber of seventeen judges otherwise decides.[185] The ECHR states: 'All hearings are filmed and broadcast on the court's website on the day itself, from 14:30 (local time).'[186]

[69] The law evolves gradually. Often, technology is far ahead of both the legislature and the courts. However, institutions, courts included, are not fixed in stone. As society

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[180] UN General Assembly 'Rome Statute of the International Criminal Court' *A/CONF*. 183/9, art.68, (last amended 2010) 17 July 1998 ISBN No. 92-9227-227.
[181] Youm fn 39 above, at 2019.
[182] Ibid, at 2020.
[183] International Criminal Court Regulation 21 and ICC Regulations of the Registry, Regulation 94.
[184] For ICC broadcasts see ICC Regulation 21(2) and 'Video Streaming' at *http://www.icc-cpi.int/enmenus/icc/Pages/default.aspx* and 'Hearing Schedule' at *http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/hearing%20schedule/Pages/next%20week.aspx.*
For ICTY broadcasts see 'Courtroom Broadcast' available at *http://www.icty.org/sid/252*.
[185] In accordance with Rules 58 & 59 of the Rules of the European Court of Human Rights (1 September 2012).
[186] Youm fn 39 above, at 2015.

becomes more attuned to cameras in the courtroom, the novelty will dissipate and cameras will fade into the background. Although the arguments put forward in favour of allowing cameras in the court room are compelling, it needs to be accepted that South Africa is very much at the experimental stage of examining the possibilities brought about by new and improved media technology. There are a number of interests at stake in a matter such as this. These include:

(a) the interests of the NDPP, the appellant and the public in holding a trial that is fair and is seen to be fair;

(b) the interests of the media and the public in maintaining freedom of the press and in ensuring open justice;

(d) the interests of participants in the trial process; and

(e) the interests of the court and the public in maintaining the dignity and decorum in the administration of justice.

The goal has to be to achieve a balance of these competing interests.

[70] In permitting the televising of court proceedings this Court is doing no more than recognising the appropriate starting point. It will always remain open to a trial court to direct that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form. It remains for that court, in the exercise of its discretion under s 173 of the Constitution to do so. It shall be for the media to request access from the presiding judge on a case-by-case basis. In that regard it is undesirable for this Court to lay down any rigid rules as to how such requests should be considered. It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case.

[71] It remains the duty of the trial court to examine with care each application. That court should exercise a proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue. In acceding to the request, the judge may issue such directions as may be necessary to:

(a) control the conduct of proceedings before the court;

(b) ensure the decorum of the court and prevent distractions; and

(c) ensure the fair administration of justice in the pending case.

In making that decision, the judge may consider whether there is a reasonable likelihood that such coverage would: (i) interfere with the rights of the parties to a fair trial; or (ii) unduly detract from the solemnity, decorum and dignity of the court. There shall be no coverage of: (a) communications between counsel and client or co-counsel; (b) bench discussions; and (c) in camera hearings. A judge may terminate coverage at any time upon a finding that the rules imposed by the judge have been violated or the substantial rights of individual participants or the rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

[72] The default position has to be that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails a witness-by-witness determination and recognises as well that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses. Spurious objections can also be dealt with. It is for the court concerned to ensure that in balancing the public's interest in coverage of criminal proceedings against those of objecting participants, the trial process, already time consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial.

[73] If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might

assuage the witness' fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. If such techniques were used in covering trials, the public would have more complete access to the testimony via television, and yet the witness could maintain some degree of privacy and security.

[74] Whenever an accused person in a criminal trial objects to the presence of cameras in the courtroom, the objection should be carefully considered. If the court determines that the accused's objection to cameras is valid, that may require that cameras be excluded. By framing the inquiry in these terms, courts will be better able to strike a constitutionally appropriate balance between policies favouring public access to legal proceedings and the accused's right to a fair trial. The court would accordingly have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case is likely to be prejudiced.

[75] A decision on whether to restrict the broadcast of court proceedings raises the same set of rights as occupied the attention of this Court in *Midi Television*.[187] It follows that the same approach should apply; namely that courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough.[188]

[76] It follows from what I have said that not all of the reasoning of Desai J can be supported and, in consequence, paragraph 1.3 as framed by him, falls to be set aside. The matter will accordingly have to be remitted to the learned judge for reconsideration in accordance with the principles set out herein.

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[187] *Midi Television (Pty) Ltd* fn 10 above.
[188] See: *S v Mamabolo* fn 20 above, para 45 and *Laugh It Off Promotions CC* fn *27 above,* para 59.

[77] That leaves costs: The NDPP did not seek costs. Both the appellant and Media 24 did. The appellant has achieved a substantial measure of success in the appeal. What is more, Media 24 delayed launching its application before Desai J. This had the consequence that the matter had to be dealt with on an urgent basis before the high court and an expedited basis on appeal before this Court. Thus in circumstances where his criminal trial had already commenced and was ongoing before the high court, the appellant had to also contend with this appeal. He was forced at fairly short notice to cause counsel, other than counsel representing him in his criminal trial, to be briefed to argue the appeal before this Court. It follows that Media 24 should be held liable for the appellant's costs.

[78] In the result:

(a) The appeal succeeds to the extent that paragraph 1.3 of the order of the high court is set aside.

(b) The matter is remitted to the high court for reconsideration in accordance with the principles set out in this judgment.

(c) The costs of appeal of the appellant, Henri Christo Van Breda, shall be paid by the first respondent, Media 24.

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V M Ponnan

Judge of Appeal

APPEARANCES:

1. Case no: 425/2017

For Appellant:	F van Zyl SC
	Instructed by: Cluver Markotter Inc, Stellenbosch McIntyre & Van Der Post, Bloemfontein
For First Respondent:	J.C. Butler SC (with him M Maddison)
	Instructed by: Werksmans Attorneys, Stellenbosch Phatshoane Henney Attorneys, Bloemfontein.

2. Case no: 426/2017

For First Appellant:	H Epstein SC (with him L G Nkosi Thomas SC)
	Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For Amicus Curiae:	S Budlender SC (with him T Mosikili)
	Instructed by: Webber Wentzel, Johannesburg. Honey Attorneys, Bloemfontein.