THE PEOPLE v BRIGHT MWAPE FRED MMEMBE (1995) S.J.

HIGH COURT
CHITENGI, P.J.
17TH MARCH, 1995
HPR/36/94

Flynote

Criminal defamation - Section 69 of the Penal Code - Whether in conflict with Articles 20 and 23 of the Constitution

Headnote

The appellants, who were journalists in an independent weekly newspaper, were charged with criminal defamation against the President arising from an article referring to him in a derogatory term.The appellants did not plead to the charge but raised a preliminary issue as to the constitutionality of Section 69 of the Penal Code.

Held:

(i) Section 69 does not deprive any citizen the right to legitimately criticise the President or the Government.

(ii) Section 69 of the Penal Code Cap 146 of the Laws of Zambia is not in conflict with Articles 20 or 23 of the Constitution of Zambia.

Authorities referred to:

1. Patel v Attorney-General 1968 Z.R. 99
2. The People v Kambarange Kaunda and Raffick Mulla 1990 High Court Judgment No. HPR/151/90 (unreported)
3. Aggrey Mukoboto Simataa and Regina Sanana Saada Simataa v The Attorney-General High Court Judgment No. 1986/HP/448 (unreported)
4. Feliya Kachusu v The Attorney-General 1967 Z.R. 145.
5. BO Nwabweze: Presidentialism in Commonwealth Africa: C Hurst and Company (Publishers) Ltd. London
6. Handyside v The United Kingdom (1986) European Human Rights Reports
7. Castells v Spain (1992) European Human Rights Reports
8. Derbyshire City Council v Times Newspapers (1993) A.C. 536
9. City of Chicago Tribune Co. (1923) 139 N.E. 86
10. Hector v Attorney-General of Antigua and Barbuda (1990) A.C. 312
11. Lingens v Austria 1986; 8 European Human Rights Report 407
12. Die Spoorbond v South Africa Railways 1946 A.D. 999
13. New York Times v Sulliran 376 US 254
14. Zundel v The Queen and Others 95 D.L.R. (4th) 202
15. Guzana v Council of State of the Republic of Ciskei (2) S.A. 437
16. S Versus Ggobo and others 1994 (2) S.A. 756
17. Arzika Vs Governor of Northern Region (1961) Ahh Nh R 379
18. Willougly: Constitution of the United States Volume 1 2nd Edition at page 42
19. Dartmouth College v Woodward (4 wb 625)
20. Dafamation Act Cap. 70 of the Laws of Zambia
21. Section 57 of the Penal Code Cap. 146 of the Laws of Zambia
22. Section 71 of Penal Code Cap. 146 of the Laws of Zambia
23. Section 191 of the Penal Code Cap. 146 of the Laws of Zambia

24. Section 60 of the Penal Code Cap. 146 of the Laws of Zambia
25. Cassel and Company Limited v Broome (1972) A.C. 1027 at P 1071
26. R. Versus Holbrook (1978) 4 O.B.D. 42
27. Goldsmith v Pressdam Limited (1927) Q.B. 83
28. Gleanes v Deakin (1979) 2 W.L.R. 665
29. Basu: Commentary on the Constitution of India 4th Edition Volume 1
30. (a) Fletcher v Peck (1806) 5 Cr 87
31. William L Prosser: Handbook of the Law of Torts 2nd Edition (St Paul: West Publishers Company (1955) P 584
32. R. v Wicks (1936) 1 All E.R. 384 C.C.A.
33. John Stuart mill . On liberty. Excepts from Chapters 1 and 11 and all of Chapter IV First published in 1859

For the People: Mr. Kinariwala - Principal State Advocate
For the accused: Mr Sangwa & Mr Simeza of Simeza Sangwa & Co.

Judgment

CHITENGI, P. J.: delivered the judgment of the court.

This case was referred to the High court by the Resident Magistrate Lusaka pursuant to Article 28 (2) (a) the Constitution for the High Court to rule on the Constitutionality of Section 69 of the Penal Code 146 of the Laws of Zambia which creates the offence of defamation of the President.

The criminal charge against the Applicants appears to have arisen from some article, which appeared in a Newspaper called Weekly Post, referring to the Republican President in a derogatory term which is not worth to repeat. The Applicants who are described in the charge sheet as journalists and who are alleged to have jointly and whilst acting together published the offending article did not plead to the charge but raised a preliminary issue as to the constitutionality of Section 69 of the Penal Code.

When referring the matter to the High Court the learned Resident Magistrate said:

> "I therefore rule and it is ordered that the question be and it is hereby referred to the High Court."

On the 17th November, 1994, a day before Counsel commenced to argue the case, Counsel for the Applicants filed what he termed Statement of Issues. In fact the statement apart from reciting what went on during the proceedings in the Subordinate Court only posed the question whether Section 69 of the Penal Code was not in conflict with Articles 20 and 223 of the Constitution. Apart from the allegation contained in the particulars of offence no facts or affidavit evidence was put before the court for the court to be in a clear picture as to how the publication of the offending article arose. The difficulty of how to go about an application under Article 28 the Constitution appears to stem from the fact that Article 28 of the Constitution does not itself prescribe the procedure by which the applications may be brought before the High Court. However, this does not mean that there is a lacuna in the procedural law because the situation is covered by Order 6 Rule 3 of the High Court Rules Cap. 50 of the Laws of Zambia. In constitutional issues arising out of proceedings before the Subordinate Court there is precedent that the application can be made by way of reference. *Patel v The Attorney-General* (1).

It will be noted that in the *Patel* case (1) there was some viva voce and affidavit and evidence upon which the court determined whether the provisions impugned were constitutional or not. In cases where there is no evidence, viva voce or affidavit, the reference recited the relevant

facts giving rise to the issues for determination by the High Court. In this regard I cite only the cases of the *People v Kambarange Kaunda and Raffick Mulla* (2) and *Aggrey Mukoboto Simataa* and *Regina Sanana Saasa Simataa v Attorney-General* (3). The applications in both cases were not brought by way of Reference or Originating Notice of Motion but the cases demonstrate how the issues for the consideration of the court should be framed. Notwithstanding the matters I have raised with regard to insufficiency of facts I am satisfied that the matter is properly before me. And to make up for the want of facts, I have reproduced the submissions in detail.

The Applicants' case was argued by Mr Sangwa and Mr Simeza. The case for the Applicants has two limbs. The first limb deals with the conflict of Section 69 of the Penal Code with Article 20 of the Constitution and is argued by Mr Sangwa. The second limb of the argument deals with the contravention of Article 23 of the Constitution by Section 69 of the Penal Code and is argued by Mr Simeza.

Mr Sangwa submitted that Section 69 of the Penal code is unconstitutional. It was Mr Sangwa's submission that since truth is not a defence under Section 69 of the Penal Code one can go to prison for speaking the truth as long as the truth has brought the President into contempt and ridicule. For that reason Section 69 of Penal Code cannot stand vis-à-vis Article 20 of the Constitution.

For one to establish his case under Article 20 of the Constitution, Mr Sangwa argued, one has first to show that his rights have been hindered. In this regard, Mr Sangwa cited the cases of *Feliya Kachasu v Attorney-General* (4) and *Patel v The Attorney-General* (1). Mr Sangwa referred a passage in Kachasu's case at page 162 where Blagden CJ held that in determining where there has been a breach of the rights any hindrance is enough and there need not be a prevention. It was Mr Sangwa's submission that the Applicants in this case have been hindered, are being hindered and will continue to be hindered in the enjoyment of their freedom of expression vis-à-vis the President. The fact that the Applicants now stand charged under Section 69 of the Penal Code is in itself proof of hindrance. Further Mr Sangwa submitted that Section 59 of the Penal Code puts prior restraint on the freedom of expression as any matter that is likely to bring the President into ridicule etc. is by law forbidden.

Mr Sangwa submitted that while the freedom of expression and indeed any other freedom is not absolute Section 69 of the Penal Code does not meet the standards set in and justifiably under the derogations under Article 20 (3) of the Constitution and the burden of proof is on the state. In this connection Mr Sangwa referred to the case of *Patel v The Attorney-General* (1) at page 119.

It was Mr Sangwa's submission that the provision of Section 69 of the Penal code are not reasonably required. Citing the case of *Patel v The Attorney-General* (1) at page 126 Mr Sangwa argued that "reasonably required" means "genuine present need; something more than desire, although something less that absolute necessity." It was Mr Sangwa's submission that there was no need to protect the President in the manner Section 69 of the Penal Code does because as stated in Professor Nwabweze's Presidentialism in Commonwealth Africa (5) at page 121:

> "The immunity of the President from suit or legal process is, however, a different thing from saying that he should also be protected by law from insult or abuse beyond the protection afforded by the ordinary law of libel and sedition. Such a protection was conferred by an amendment to the Criminal code in Ghana and Zambia in 1961 and 1965 respectively. It was made an offence to publish by written, word of mouth or in any other manner any defamatory or insulting matter concerning the President with intent to bring him into hatred, ridicule or contempt. Justification for this questionable.

> The Ghanaian Minister of Justice, Mr Cfori Atta, had defended the provision on the ground that the "Head of State of Ghana is a sacred person, irrespective of the party to which he belongs. Ideally, a Head of State should be above politics in order that his embodiment of the State and its majesty should attract maximum respect. But an apolitical Head of State is possible, if at all, only if he is a titular head. Such a head of state can be above partisan politics because he exercises no public functions and belongs to no political party. Any executive Head of State is in a different position. The exercise of executive powers necessarily invites criticism. One should not accept the office and refuse its price. That would be like eating ones case and having it. Moreover, an executive President is not just the Chief functionary of the government; he is the government itself. And to ban criticism of him is unduly to inhibit criticism of government. Where the executive President is a partisan leading a political party in a two or more multi party system ---------- the protection becomes even more objectionable. Such a system necessarily implies political competition. ----------. Verbal attacks, sometimes of a very derogatory kind are inseparable from political competition. Within reason it is legitimate for politicians to try to discredit each other as part of the effort to enhance ones standing and undermine that of opponents. The leader of the opposition in Kenya, Mr Ngala, put the point aptly when he said that, as a political head, the President is "a person who throws mud at other fellow politicians and mud can be thrown at him and he can have political fights with other leaders."

Mr Sangwa submitted that the President we have is not above politics. He represents a party and has a political interest to serve. It was Mr Sangwa's submission the criticism even of the worst kind is indispensable in our political system and constitutional frame work. Criticism, Mr Sangwa argued, is an occupational hazard for any one who takes up the office of the President. Section 69 of the Penal code is not required vis-à-vis the objectives stated in Article 30(3).

Mr Sangwa argued further that should the court find that Section 69 of the Penal Code is reasonably required then society. He submitted that the issue of being reasonably required then it should find that it is not reasonably justified in a democratic society. He submitted that the issue of being reasonably justified in a democratic society was considered in the Patel case 91) at pages 128 and 129 and in the *Kachasu* case (4) at page 167. It was Mr Sangwa's submission that Zambia is a democratic society and that in the Patel case (1) it was stated that the test is an objective one.

Mr Sangwa submitted that freedom of expression is the life blood of any democratic society and any law like Section 69 of the Penal Code which attempts to derogate it cannot be said to be reasonably justifiable in a democratic society. In support of his submissions on the importance of freedom of expression in a democratic society, Mr Sangwa refers the court to a passage in the judgment of the European Court of Human Rights in the case of *Handyside v The United Kingdom* (6) at page 754. The import of the passage is to emphasise the importance of freedom of expression in a democratic society. Then Mr Sangwa refers to the case of *Castells v Spain*, again a decision of the European Court of Human Rights at paragraphs 68, 69 and 70 (7). The sum and substance of these paragraphs is that freedom of expression is an essential element in the formulation of political opinion in a democratic society; that to counteract criticisms government should not resort to criminal from the opposition or the media that is to say statements by the appropriate Minister before Parliament, Press conferences, etc. It was Mr Sangwa's submission that in the event of the President being attacked there are many ways in which he could respond. Mr Sangwa also cited the cases of *Derbyshire City Council v Times Newspapers* (8) at 540 *City* and *Chicago Tribune* Co. (9), *Hector v Attorney-General of Antigua and Barbuda* (10) *Lingens v Austria* (11) which emphasise the importance of freedom of expression in both the criminal and civil sphere and the importance of criticism of the government in a democratic society. People who hold public office, such as the President should be subject to criticism because the President commands great powers the exercise of which may have serious consequences on the citizens. It is,

therefore, Mr Sangwa argued that those likely to be affected should be at liberty to criticise the President. Further Mr Sangwa submitted that the President more than anybody else should be open to the severest criticisms even those that may appear to the authorities to be offending. Mr Sangwa then cited the case of *Die Spoorbond v South African Railways* (12) which decides that the State cannot use the resources of the tax payers to try and punish those very people providing those resources in a libel suit. Citing the case of *New York Times Co. v Sullivan* (13) Mr Sangwa submitted that for a public officer to succeed in a libel action he should prove not only that the statement made is defamatory but also that the statement is malicious or recklessly made.

Towards the end of his submissions Mr Sangwa referred the court to the case of *Zundel v The Queen and Others* (14) which he contends deals with provisions similar to those in Section 69 of the Penal Code. In that case it was held that the publication was protected by Section 2 of the Charter. (The provisions dealt with restrictions on certain publications which I will deal in detail later in my judgment). Mr Sangwa ended by saying the Section 69 of the Penal Code defies all criteria of limitations which can be imposed on freedom of expression and, consequently unconstitutional and should be struck down in that it contravenes Article 20 of the constitution.

Mr Simeza argued the second limb of the Applicants case which deals with the contention that Section 69 of the Penal Code contravenes Article 23 of the Constitution of Zambia in that is discriminatory in its effect. It was Mr. Simeza's submission that the derogatory permissible under clauses (4) (5) and (7) of Article 23 of the Constitution are not applicable to this case. Mr Simeza submitted that the mere fact that Section 69 of the Penal Code refers to libel committed against the President only is contravention of Article 23 (1) of the Constitution which prohibits the existence or enactment of any legislations or a particular section in a particular legislation which if enforced or observed will have the effect of discriminating against citizens or individuals in the country. Mr Simeza then cited South African cases of *Guzona v Council of State of the Republic of Ciskei* (15) and *S v Ggobo and Others* (16) to support the proposition that it is unconstitutional for the President or the equivalent of the President to be given special position as compared to the other citizens. It was Mr Simeza's submission that the effect of Section 69 of the Penal Code is to elevate the President above the law and therefore creates for the citizens in equality of treatment before the law. This, Mr Simeza submitted contravenes Article 23 (1) of the Constitution. Further Mr Simeza argues that there is absolutely no reason why the President of the Republic of Zambia should be afforded greater protection than that possessed by other citizens of Zambia when in fact all human beings are born free and equal in dignity and rights. Furthermore Mr Simeza submitted that it is unconstitutionally for the President to be given a privilege status in the criminal justice process when other citizens have only recourse to the Defamation Act. This, Mr Simeza submitted, goes counter to the notion of a democratic society. Further Mr Simeza submitted that a law such as that contained in Section 69 of the Penal Code cannot be reasonably justified in Zambia. Mr Simeza ended by urging the court to strike down Section 69 of the Penal Code for unconstitutionality. The test of reasonable justification is objective regardless of the society developed or developing.

In reply the learned Principal State Advocate Mr Kinariwala submitted that it is accepted law that there is a presumption that Parliament acts constitutionally and that the laws it passes are necessary and reasonably justified. In this respect Mr Kinariwala cited the case of *Arzika v The Governor of Northern Region* (17) which was quoted with approval in *Feliya Kachasu v Attorney-General* (4) at page 162 lines 40 to 442. Further Mr Kinariwala citing the case of *Feliya Kachasu v Attorney-General* (4) submitted that the burden to prove the unconstitutionality of the provisions. It was Mr Kinariwala's submission that this appears to be the same position in the United States of America and in this regard he quotes a passage from Willoughly (18) where the learned author says at page 42:

> "American courts have reiterated the doctrine that an Act of a co-ordinating legislative body is not to be held unconstitutional if by reasonable interpretation of the constitution or the statute itself the two can be harmonised."

On the same page the learned author quotes a passage from the case of *Dartmouth College v Woodward* (19) which justifies the presumption of constitutionality on the ground of giving decent respect due to the wisdom, integrity and patriotism of the legislature and places on anyone who challenges the validity of a provision a burden to prove such unconstitutionality beyond all reasonable doubt.

It was Mr Kinariwala's submission that in determining the inconsistency of a law with a fundamental right the court must have regard to the real effect and impact thereof upon the fundamental right in question. In this respect Mr Kinariwala cited the case of Re Kerala Education Bill (20) then dealt with the issue of constitutionality as contended by the accused persons. On the submission that under Section 69 of the Penal Code truth is no defence and therefore a person can be jailed for telling the truth as long as that truth brings the President into contempt and ridicule, Mr Kinariwala argued that only a person who publishes a defamatory matter with intent to bring the President into hatred ridicule or contemp (sic) can be found guilty and the burden of proof is on the prosecution. It was Mr Kinariwala's submission that the arguments advanced on behalf of the accused persons shows failure to appreciate the definition of defamation. After reciting one of traditional definitions of defamation, Mr Kinariwala submitted that where one is charged with defamation of the President truth of the words complained of is a defence. In this respect, Mr Kinariwala referred to Archbold - Criminal Pleading Evidence and Practice 40th Edition at paragraphs 3640 and 3646.

On the existence of Section 69 of the Penal Code on the statute book, Mr Kinariwala submitted that the section is not a hindrance to the accused persons in the enjoyment of their freedom guaranteed by Article 20 of the Constitution. The accused persons are free to hold opinions, to receive ideas and information, to impart and communicate ideas and information save that that freedom is not a licence to abuse, to insult and to play with other people's reputation and to ridicule. It was Mr Kinariwala's submission that the accused persons can enjoy their freedom of expression without defaming the President with intent to bring him into hatred, ridicule or contempt (sic). It was Mr Kinariwala's submission that the accused persons have not been hindered, are not being hindered and will not be hindered in the enjoyment of their freedom of expression by reason of section 69 of the Penal Code being on statute books. Further Mr Kinariwala argued that there is no material before the court upon which the court can find that the accused persons' freedom of expression has been hindered, is being hindered and will continue to be hindered. The trial has not began in the lower court and no evidencehas been adduced to she how the accused persons freedom of expression has been hindered, is being hindered and will continue to be hindered.

Furthermore Mr Kinariwala submitted that defence concede that freedom of expression is not absolute but limited by the provisions of Article 20(3). It was Mr Kinariwala's submission that although the defence argument that the burden of proving the derogations in Article 20(3) lies on the State is supported by the judgment in *Patel v Attorney-General* (1) in *Feliya Kachasu v Attorney-General* (4) the High Court has taken a different view. Referring to page 162 lines 45 and 46 and page 163 lines 1 to 24 in Feliya Kachasu that the burden of proving the derogation lies on the accused persons and not the State.

In reply to the submissions by the defence that the President does not require protection under our constitutional set up where the President is a leader of a political party with an interest to serve and not above politics and therefore criticism of him of the worst kind is indispensable

because it is an occupational hazard for anybody who takes up the office of the President, Mr Kinariwala, citing the definition of criticism in the Oxford English Dictionary, submitted that one has to restrict himself to the limits of acceptable criticism and not to enter the arena of defamation of the President. He argued that the freedom of expression envisaged by Article 20 is not a licence to abuse, insult and ridicule others. Mr Kinariwala went on to argue that by keeping Section 69 of the Penal Code on the statute books Parliament in its wisdom had decided that the President should not be defamed and that those who defame the President commit an offence.

Mr Kinariwala argued that by placing Section 69 of the Penal Code under the chapter dealing with offences against public order Parliament had decided that to allow people defame the President will lead to disturbing the maintenances of public order. Further the mere fact that parliament has allowed Section 69 of the Penal Code to remain on the statute books up to now is proof that it is reasonably required in the interests of public order and for the purpose of protecting the reputations, rights and freedom of other persons. Article 20(3) is clear on this. It was Mr Kinariwala's submission that if the reputation of the President is not protected but destroyed by defamtory statements, verbal or written, public order will be adversely affected.

Further Mr Kinariwala submitted that Article 11 of the Constitution makes it clear that the limits placed on the various fundamental rights and freedoms are designed to ensure that the enjoyment of the said rights and freedoms of others or public interest. From this promise Mr Kinariwala argued that by his very position, it is in the interest of the public that the President enjoys the highest reputation and if so he should be protected from defamation.

While conceding that when determining whether a particular legislation is reasonable required the test is an objective one Mr Kinariwala submitted that the court should apply the test to the specific conditions obtaining in the democratic society concerned. Therefore, in determining whether Section 69 of the Penal Code is reasonably required in Zambian democratic society the court should take into consideration specific conditions operating in Zambia viz:

1. Prior to November, 1991 Zambia was a One Party State for continuous period of 27 years (sic)
2. During the period of 27 years democratic institutions gradually disappeared
3. Multi-party politics were re-introduced after a period of 27 years (sic)
4. Zambia is an under developed country
5. It will take quite some time to build up democratic institutions
6. The standard of journalism is undoubtedly poor and needs very much to be improved

Having regard to these conditions, Mr Kinariwala submitted, that it can be said that Section 69 of the Penal Code is not reasonably justified in a democratic Zambian society. Removal of Section 69 of the Penal Code from the statute books, Mr Kinariwala argued, will lead to indiscriminate defamation of the President bearing in mind the standard of journalism in this country and this will not be in the interests of public order and public interest. It was Mr Kinariwala's submission that once the reputation of the President is destroyed the reputation of the country will be adversely affected.

As regards the foreign cases cited on behalf of the accused persons Mr Kinariwala dismissed them summarily as being irrelevant to the Zambian situation and to the issue before court. In respect of the case of New York Times Vs Sullivan Mr Kinariwala further argued that while in the First Amendment there is no limit there are limiting provisions in our Constitution.

In conclusion on this issue Mr Kinariwala submitted that the accused persons bear the burden to prove the unconstitutionality of Section 69 of the Penal Code but have failed to do so. He, therefore, invited the court to find that Section 69 of the Penal Code does not conflict with

Article 20 of the Constitution and therefore constitutional.

As regards the issue of Section 69 of the Penal Code being in conflict with Article 23 on ground of being discriminatory Mr Kinariwala submitted that the discrimination envisaged by Article 23(1) and (2) is that referred to in Article 23(3) which is based on race, tribe, sex, place of origin, marital status, political opinion, colour or creed. Mr Kinariwala argued that the alleged discrimination that the accused persons are complaining of is not covered by Articles 23(3) of the Constitution. Mr Kinariwala then drew comparison with provisions from Caps 17 and 49 of the Laws of Zambia which confer special privileges on certain persons but which provisions cannot be said to be in conflict with the constitution by reason of being discriminatory. Likewise the legislature has conferred privileges upon the President under Section 69 of the Penal Code. It was Mr Kinariwala's submission that Section 69 of the Penal Code is not discriminatory in its effect and does not contravene Article 23 of the Constitution.

As regards the South African cases referred to by the accused persons Mr Kinariwala's reply was that the issue dealt with there are different from the issue before the court. In any case, he argued, the situation in Zambia is quite different. Having recourse to Section 7 of the Constitution of Zambia Act 1991 Mr Kinawiwala argued that the protection given to the President under Section 69 of the Penal Code is a privilege conferred by the legislature under that section.

Mr Kinariwala concluded by submitting that there is no merit in the two issues raised by the accused persons and invited the court to find against the accused persons on both issues.

Mr Sangwa arguing the first issue on behalf of the accused persons replied to Mr Kinariwala's submission. Mr Sangwa's reply mainly covered matters he had raised earlier on in his submissions. Here I highlight only the new points he raised.

Mr Sangwa challenges the Principle in *Dartmouth college v Woodward* (19) that the standard of proof where on alleges unconstitutionality of a stature is proof beyond all reasonable doubt. Mr Sangwa contends that this constitutional matter is a civil matter which falls within the civil jurisdiction of the court and in this country it is trite that in civil matters and standard of proof is on a balance of probabilities. In any case Mr Sangwa argued the principle in *Dartmouth* Case (19) is only persuasive to this court. As regards the interpretation of Section 69 of the Penal Code is justified. The issue whether Section 69 of the Penal Code is justified in a democratice state which it is not. In reply to Mr Kinariwala's submission that there is no evidence to prove hindrance. Mr Sangwa submitted the fact that the accused persons are before court is sufficient proof. On the submission that it is the duty of the accused persons to prove that they come under the ambit of Article 20(3) Mr Sangwa argued that the proposition at page 163 in *Feliya Kachasu v Attorney-General* (4) lines 5 to 15 apply only to *Kachasu* case and is not a principle applicable to other cases. Consequently the burden of proof is on the State to prove that Section 69 of the Constitution is justifiable under Article 20(3). It was Mr Sangwa's submission that no evidence has been adduced to prove that Section 69 of the Penal Code is justifiable under Article 20(3). Mr Sangwa then referred the court to the cases of *Patel v Attorney-General* (4) where affidavit evidence was led.

To the submission that Section 69 of the Penal Code is still on statute books because parliament in its wisdom had decided that the President should not be defamed, Mr Sangwa argued that the court in this case is not bound by the wisdom of the legislature. He argued that the legislature like any other organ of the Government is bound by the constitution. There is no evidence that if the President is not protected by Section 69 of the Penal code there will be a disturbance of public order or anarchy in this country. The fact that the Section 69 of the Penal code is still on the statute books is not proof, as contented by Mr. Kinariwala, that it is reasonably required in the interests of public order and in the interest of the rights and

interests of other persons. It was Mr. Sangwa's submission that Section 69 of the Penal Code is still on the statute books because it has never been challenged before and largely because of the presumption of constitutionally which they are now challenging and on which the court is asked to rule.

While conceding that democratic instructions were destroyed during the One Party State era and that it will Take a long time to rebuild them, Mr. Sangwa argued that steps in that direction should be made by the repeal of Section 69 of the Penal Code and such other laws.

On the foreign authorities cited Mr. Sangwa submitted that though the facts are different the authorities are relevant as the laid down principles of la and specific areas of the judgments have been pointed out.

Mr Sangwa concluded by saying that the accused persons have been hindered in the enjoyment of their freedom of expression as guaranteed by Article 20. The *Kachasu* case (4) is clear on what hindrance is. Mr Sangwa argued that the State has proved that Section 69 of the Penal Code is justifiable under Article 20 (3) and urged the court to find that Section 69 of the Penal Code is reasonably justifiable in a democratic society and, therefore, unconstitutional.

Mr. Simeza who argued the second limb of the accused persons case, namely that Section 69 of the Penal Code is in conflict with Article 23 on ground of being discriminatory submitted that Article 23 (3) is merely illustrature of the discrimination provided for but is not conclusive especially when Article 23 (3) is read with Article 23 (1) which confers the right. Section 69 of the Penal Code, Mr. Simeza argued, must therefore be in conflict with Article 23 (1).

As to the comparison Mr. Kinariwala draw between Section 69 of the Penal Code and provisions in other statutes in Zambia, Mr Simeza submitted it is of no assistance to this court because we are not dealing with all statutes in Zambia to see if there are statutes which are discriminatory or not.

As regards the reference of Section 7 of the Constitution of Zambia Act which Mr. Kinariwala referred to Mr. Simeza argued that these provisions are transitional provisions and there is no dispute about them. It was Mr. Simeza's submission that Article one of the constitution makes the constitution itself the supreme law of Zambia and any law such as Section 69 which is inconsistent with the provision of the constitution should be declared void. He argued that the President like any other in Zambia is well protected from being defamed by the defamation Act Cap. 70 of the Laws of Zambia (21). It was Mr Sangwa's submission that there was no reasonable requirement to have been special provisions specifically for the President. That is the position at common law. Section 69 of the Penal Code does not cover the President. Therefore, the argument that the President must enjoy the highest protection to enhance public order fails because this protection should also have been extended to the Vice President. It was Mr. Simeza's argument that it is unconstitutional to give the President a privileged status which is not accorded to other individuals or citizens because it makes the President more equal than the others.

When considering this case I have borne in mind the seriousness of the issues involved. This is not an ordinary case of a dispute between citizens per se or a case where the accused is being prosecuted for having stolen some other persons property or having assaulted somebody. It is a case where two citizens of this country, who are now the accused are pitted against the might of the State for having allegedly committed an offence during the exercise of what the accused persons themselves perceive as their fundamental freedom enshrined in, and conferred upon, them by the Constitution of Zambia itself (therein referred to as the Constitution). Moreover the fundamental freedom of expression which the two Accused persons (hereafter to as the Applicant's) thought they were pursuing is central to human

activity at whatever level of civilisation or development. Without freedom of expression some of the other freedoms will be rendered nugatory. To cite but a few examples, the freedoms of assembly and association and freedom of conscious will be impracticable to exercise without people expressing themselves either by word of mouth or by writing. It would be difficult for instance for churches to conduct services and for politicians to propagate their political ideas to other person and the electorate.

I, therefore, carry a grave responsibility when deciding this case because the issues before me are graves ones.

The Applicants published some allegedly offering article in a news paper called "The Post" (which I will hereinafter refer to as the news paper) subsequent to this publication the Applicants were arrested and later appeared before the Magistrate at Lusaka. It was this arrest and appearance in court which stimulated the application now before me.

In their application the Applicants posed two questions for the determination of the High Court viz:

1. "Whether Section 69 of the Penal Code is or is not conflict with Article 20 of the Constitution of Zambia.
2. Whether Section 69 of the penal Code is or is not in conflict with Article 23 of the Constitution of Zambia."

Consideration of whether Section 69 of Penal Code Cap. 146 of the Laws of Zambia (hereinafter referred to simply as Section 69) is in conflict with the constitution by reason of limiting freedom of expression of necessity requires the consideration of the law of defamation generally and in particular the other provisions in the Penal Code which criminalise and punish certain publications. This is so because both civil and criminal sanctions against defamation have what is called a chilling effect on the freedom of expression.

The other provisions in the Penal Code which I have in mind are Section 57 (21) dealing with sedition, Section 71 (22) dealing with defamation of foreign princes and Section 191 (23) dealing with what is called criminal libel. It will be noted from the definition of "seditions Intention" in Section 60 (24) that Section 57 prescribes publications which may be criticisms of the government and Government Institutions in Zambia if that criticism goes beyond the acceptable exceptions.

Libel is a crime as well as an actionable wrong. "An action for libel ," it was said in *Cassell and Company Limited v Broome* (25), "in a private legal remedy, the object of which is to vindicate the Plaintiffs reputation and to make reparation for private injury done by the wrongful publication to a third person or persons of the defamatory statement concerning the plaintiff" Per Lord Hailsham LC.

Historically libel was also treated as crime on the ground that it had a tendency to arouse angry passions, provoke revenge and thus endanger public peace: *R v Helbrook* (26). But the current view seems to indicate that criminal prosecution for libel is justified on ground of public interest and the libel itself being serious. Indeed it has been said in *Goldsmith v Pressdam Limited* (27) that an indictment shall lie;

> "where it is in the public interest that criminal proceedings should be brought, taking into account the importance of the person defamed and the gravity of the libel."

And in *Gleances v Dakin* (28) it was held that the libel should be sufficiently serious to justify, in

the public interest, the institution of criminal proceedings. Again in *Goldsmith v Pressdam* (27) at page 485 Lord Denning Mr said:

> "A criminal libel is so serious that the offender should be punished by the state itself."

And in the same case Lord Dilhone said at page 670 that:

> "The libel must involve the public interest."

So criminal prosecutions for libel are generally justified on ground of public interest because the injury it causes is of public concern while actions for libel are justified on the ground that they vindicate the plaintiff's reputation because the injury caused is of private concern but both have the effect of limiting freedom of expression. What are called gagging charges and writs can have a chilling effect on the freedom of expression. As I understand the Applicant's case they are prepared to suffer the hindrance of their freedom of expression by libel actions but they find themselves averse to criminal prosecutions.

Of course I am not here concerned with the civil aspect of libel but only with the criminal aspect of it is so far as it is a fetter on the freedom of expression. Accordingly I part company with libel action here.

I propose to deal with the first issue which was argued by Mr Sangwa, namely whether Section 69 is in conflict with Article 20 of the Constitution.

It is common cause that freedom of expression is not absolute and that it is subject to the derogations in Sub Article 3 of Article 20 of the Constitution. The controversy is as to whether the provisions of Section 69 fall under Sub Article 3 of Article 20 of the Constitution or not and who bears the burden to prove that the provisions of Section 69 are covered by Sub Article 3 of Article 20 of the Constitution.

A lot of learned submissions were placed before me. Numerous cases from Zambia and other jurisdictions were also cited. I have carefully considered all the submissions and the cases cited to me.

It is appropriate to start with the submissions dealing with the question of who bears the burden of proof. It is not in dispute that the Applicants bear the burden to prove that their fundamental freedom has been contravened and that the provisions which are alleged to have hindered the Applicants in the enjoyment of their fundamental freedom are not reasonably justifiable in a democratic society.

However, the Applicants join issue with the State on who bears the burden of proving that the provisions concerned come within the permitted derogations under Sub Article 3 of Article 20 of the Constitution and the standard of proof required.

As to who bears the burden of proof Mr Sangwa for the Applicants submitted that the State bears the burden of proof and heavily relied on the case of Patel Vs Attorney-General (1). Mr Kinariwala for the State submitted otherwise. He argued that the burden is on the Applicants to prove that the provisions concerned are not covered by the permitted derogations. In this respect he cited the case of *Feliya Kachasu and Attorney-General* (4).

In *Feliya Kachasu v Attorney-General*, Bladgen CJ decided the issue of who bears the onus of proving that the law concerned fell within the permitted derogations by having recourse to the presumption of constitutionality. Following that line of reasoning the conclusion that he who

challenges a presumption bears the burden of proof is inevitable because

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From unconstitutionality, have openly strained the language of the statute or narrowed down its meaning. At page 201 Basu concludes by saying that when the court strained the language of a statute when the statute is plainly capable of a different meaning or wider meaning, the court is leaving the citizen, as to his subsequent conduct to the vageries of statutory interpretation rather than constitutionality and the position of the citizen is more and more hazardous according to the degree of perversion which the language suffers at the hands of the court in its attempt to serve the statute. I respectfully agree with the learned author's observations.

I make no apologies for having extensively quoted from Basu because I think that his observations bring to the fore the dangers of religiously following the presumption of constitutionality. Sub Article 3 of Article 20 stipulate conditions precedent for the derogations to be valid and these conditions are peculiarly within the knowledge of the State. I do not, therefore, see the justification for shifting the burden to prove them on the Applicants simply because of the presumption of constitutionality. I for my part would wish to have nothing to do wit this presumption of constitutionality as it tends to put the citizen beyond the pale of the constitution.

Mr Kinariwala citing a passage from the case of *Dartmouth College v Woodward* (19) quoted in Villoughly on the Constitution of the United States of America Volume 1 referred to the presumption of constitutionality which I have already dealt with. The passage ends with the sentence that he who challenges the validity of a law passed by the legislature must prove its violation of the constitution beyond all reasonable doubt.

Mr Sangwa's reply to this was that the constitutional matter before the court is basically a civil matter and in this country the standard of proof in civil matters is proof on a balance of probabilities. In any case Mr Sangwa argued the decision in *Dartmouth College v Woodward* (19) is only of persuasive effect to this court. I am inclined to accept that on any issue where the applicants in a case of this nature bear the onus of proof, they are required to satisfy the court only on a balance of probabilities. The proof beyond all reasonable doubt referred to in the American case of *Dartmouth College v Woodward* (19) appears to me to be part of the judges zeal which Basu referred to and is intended to buttress the presumption of constitutionality.

I find it rather odd and a contradiction in terms to suggest that in a case where a citizen is embroiled in a legal battled with the State for his fundamental freedoms and rights enshrined the Constitution the citizen should bear a very high standard to prove beyond all reasonable doubt that in fact his rights have been infringed while the State bears no burden at all.

After disposing of the issue of burden of proof I must deal with the test to be applied when considering whether the provisions impugned are reasonably required. There is no dispute on this issue. It is common cause that the test is an objective one. Related to the issue of the test to be applied is the fact that in determining the inconsistency of a law with a fundamental right the court must have regard to the real effect and impact that law has on the fundamental right in question. On this issue the parties are also in agreement.

Mr Sangwa in his submissions had challenged the constitutionality of Section 69 on many grounds which I now deal with.

Mr Sangwa put in the forefront of his submissions the argument that Section 69 is unconstitutional because under Section 69 truth is not a defence so that one can be sent to jail for speaking the truth provided that, that truth has brought the President into contempt and ridicule. For this reason Mr Sangwa submitted that Section 69 cannot stand vis-à-vis Article 20 of the Constitution.

But when Mr Kinariwala in his submissions in reply pointed out that in fact the offence created by Section 69 is defamation and that in defamation truth, inter alia, can be a defence. Mr Sangwa abandoned his earlier position and argued that the interpretation of Section 69 and the possible defence which can be raised under it is not the issue. The issue is whether Section 69 is reasonably justified under Article 20(3) of the Constitution. Further Mr Sangwa submitted that the defences Mr Kinariwala referred to pertain to the law as it exists in English under Section 6 of the Libel Act 1843. This submission takes me aback because it is in the teeth of English Law (Extention of Application) Act Cap. 4 of the Laws of Zambia Section 2(b) of which states that Acts passed in Britain before the 17th August, 1911 are applicable to Zambia. However, as Mr Sangwa later submitted, after shifting from his earlier argument, I am of the opinion that whatever defence there may be or may not be under Section 69 is not the real issue. That raises the issue of the constitutionality or otherwise of Section 69 is not that there are defences or no defences available to a person charged under it but its limiting effect on the freedom of expression. I do not therefore intend t engage in interpreting the provisions of Section 69.

Mr Sangwa citing the case of *Feliya Kachasu v Attorney-General* (4) submitted that for one to prove that his rights under Article 20 of the Constitution, one has only to prove that he had been hindered in the enjoyment of his rights and not that he has been prevented. He argued that in this case the Applicants have been hindered, are being hindered and will continue to be hindered in the enjoyment of their freedom of expression vis-à-vis the President. As proof Mr Sangwa pointed to the charge which the Applicants now face under Section 69. Further Mr Sangwa argued that Section 69 places a prior restraint on freedom of expression because it forbids publication of any matter that is likely to bring the President into ridicule etc. In this regard Mr Sangwa invited the court to find that if Section 69 remains on the statute books, the Applicants freedom of expression will continue to be hindered.

Mr Kinariwala's reply to those submissions is that the existence of Section 69 on statute books does not hinder the Applicants in the enjoyment of their freedom guaranteed under Article 20 of the Constitution. It was Mr Kinariwala's submission that the Applicants are free to hold opinions, to receive ideas and information and communicate ideas and information as long as the Applicants do not take their freedom to mean a licence to abuse, insult play with other people's reputations and to ridicule. Further Mr Kinariwala submitted that the Applicants are free to enjoy freedom of expression without defaming the President. Furthermore, Mr Kinariwala said that there is no material before the court upon the basis of which the court can be invited to find as a fact that the Applicants freedom of expression has been, is being and will continue to be hindered.

In considering this issue I think it is convenient first to deal with that part of Mr Kinariwala's submissions that there is no material before the court upon which the court can find as a fact that the Applicants' freedom of expression has been infringed. In the view I take, I do not think this can be a serious issue for discussion and I find myself with no difficulty in resolving it. On the material available before the court, it is common ground that the accused were arrested for having published some article in the newspaper about the President. Of course by the time the Applicants were arrested, they had already exercised their freedom of expression. What is there now, is threat of likely hindrance in their enjoyment of the freedom of expression vis-à-vis the President (as they put it). As it was said in *Feliya Kachasu v Attorney-General* (4) hindrance need not amount to prevention. The mere threat of a criminal prosecution can amount to

hindrance and the Applicants can be entitled to redress unless Section 69 which authorises such interference and under which Applicants area charged is covered by the provisions of sub Article 3 Article 20 of the Constitution.

While conceding that freedom of expression is not absolute Mr Sangwa submitted that Section 69 is not reasonably justifiably in a democratic state. Mr Sangwa referred the court to the cases of *Patel v Attorney-General* (1) and *Feliya Kachasu v Attorney-General* (4) on the definition of a democratic state. It was Mr Sangwa's submission that as freedom of expression is the life blood of any democratic society, any law which attempts to derogate freedom of expression as Section 69 does is not justifiable in a democratic society. Mr Sangwa referred to the cases of *Handyside v The United Kingdom* (6) at page 754 paragraph 49, *Castells v Spain* (7) page 263 paragraphs 68, 69 and 70, *Derbyshire County Council v Times Newspapers Limited and Others* (8) at page 50 and other case on the theme of the importance of the freedom of speech and free press in a democratic society and the need and importance of criticising public officials and the government in a democratic society. On these premises Mr Sangwa submitted that the President more than anybody else should be open to the severest criticism even though that criticism seems to the authorities to be offending. Relying on the case of *Die Spoorbond v South Africa Railways* (12) Mr Sangwa made the proposition that the state cannot use the resources of the tax payers to punish the very people providing the resources in a libel suit. It was Mr Sangwa's submission that where mentioned in *Castells* case (7) for instance press conference a suitable statements in parliament by the appropriate minister etc. Mr Sangwa submitted that the case of *Zundel v The Queen and Others* (14) dealt with a provision similar to our Section 69.

Before I refer to Mr Kinariwala's reply I must say here that the case of Zundel properly read would not seem to support the proposition Mr Sangwa has canvassed for. That case was dealing with a law which when originally passed was intended to deal with a certain mischief prevalent at that time but the offence Zundel allegedly committed was a difference mischief from the one for which the law was enacted. In fact there was a shift in purpose. That case can, therefore, not be compared with the matter now before me.

Mr Kinariwala's reply was that the Applicants have laid emphisis on criticism. Referring to the definition of the word "criticism" in Oxford English Dictionary Volume Two at letter "c" page 1181 Mr Kinariwala argued that acceptable criticism of the President is perfectly in order. But Mr Kinariwala submitted that the freedom of expression envisaged and guaranteed by Article 20 is not a licence to abuse, insult and ridicule others. By keeping Section 69 on the statute books the legislature in its wisdom has decided that the President shall not be defamed and that those who defame the President should be punished.

It cannot be denied that freedom of expression, press and criticism of the government and public officials including the President himself is very essential in a democratic society. Indeed the Zambian Constitution underscores the importance of freedom of expression and freedom of the press by enshrining it in Article 20 of the Constitution. And the provisions in the Penal Code which limit freedom of expression and freedom of the press appear to me to admit of criticism. Section 69 does not anywhere say that nobody will speak or publish anything of the President. The sections dealing with sedition and criminal libel also admit of criticism. And the provisions in the Defamation Act Cap 70 of the Laws of Zambia provide immunity against libel suits in certain circumstances. The crisp issue is therefore what kind of criticism is allowed. Mr Kinariwala submits that criticism must be acceptable criticism. On the other hand Mr Sangwa's position appears to be that any type of criticism should be allowed and any law which restricts such kind of criticism is unjustifiable in a democratic state.

I have carefully read and considered all the authorities cited to me and those I have come across in my own research but I have not been able to find any authority in Zambia or other

jurisdictions including those with jurisdictions similar to ours and International Courts for the proposition that in a democratic state one can criticise the head of state or the government in any manner however, scurrilous, malicious and destructive of the President or Government Institutions as Mr Sangwa's submissions takento their logical conclusions would suggest. Mr Sangwa heavily relied in his submissions, the European Commission of Human Rights expressed its opinion on free debate in these terms:

> "67. The Commission considers that the free debate that Article 10 of the Convention is designed to guarantee is not - no matter how fundamental it may be in a democratic society - unlimited in nature. It is obvious that it does not cover the public expression of facts that are not backed by any prime expression of facts that are allegations made against persons or institutions''.

And the International Convention on Civil and Political Rights Article 19 provides:

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"2. Every one shall have the right to freedom of expression; this right shall include freedom to seek, receive, and import information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carried with it special responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or public order, (order public), or public health or morals

I have no doubt that the matters in paragraph 2(b) above are what is compendiously referred to as public interest, and I am clear in my mind that the two International Conventions I have referred to above are in consonance with our own constitutional provisions as provided for in Article 20. Further the opinions expressed by the *European Commission of Human Rights in Castells v Spain* (7) fortify the view that there can be no unbridled freedom of expression in any democratic society. What there can be, I think, are different degrees of tolerance depending upon the maturity of the various democratic societies and the conditions obtaining in them.

There is, therefore, no basis, both at international and municipal level, upon which an opinion that in a democratic society one can say whatever he pleases can be predicted upon. To hold the view contended for by Mr Sangwa would be making freedom of expression an end itself when in fact freedom of expression is only a means to the end of a free society. And a free society does not mean one where there is no regard for public interests and rights and reputation of other persons.

I, therefore, accept Mr Kinariwala's submission that the criticism required in a democratic society is acceptable criticism. In other words legitimate criticism motivated by desire to ensure that government affairs are properly run for the public good or criticism by a politician in the opposition to expose the shortcomings of the President and Government in power so that he can wrestle political power from them at the next election and use it to the benefit of the country.

Bearing in mind that when considering whether the provisions impugned are reasonably

justifiable in a democratic society the test is objective, I find that the Applicants have failed to satisfy me on a balance of probabilities that Section 69 is not reasonably justifiable in a democratic state. Section 69 does not deprive any citizen the right to legitimately criticise the President or the Government.

The last issue Mr Sangwa argued was whether Section 69 was reasonably required within the ambit of Sub Article 3 of Article 20 of the Constitution. Mr Sangwa started by submitting what "reasonably required," as defined in *Patel v Attorney General* (1) at page 126 meant a "genuine present need; something more than desire although something less than absolute necessity." Springing from this premise Mr Sangwa submitted that there was no need to protect the President in the manner that Section 69 does. Quoting a passage from Professor Nwabweze "Presidentialism in Commonwealth Africa" at page 121 and 122, a passage I have already reproduced above Mr Sangwa submitted that since our President is not above politics and has political interest to serve criticism of him even of the worst kind if indispensable in our political system and constitutional frame work. It was Mr Sangwa's submission that criticism is an occupational hazard, for any one taking up the office of the President. Further Mr Sangwa argued that Section 69 is not reasonably required vis-à-vis the objectives stated in Sub Article 3 of Article 20 of the Constitution.

Mr Kinariwala's reply to these submissions was that fact that parliament in its wisdom has created the provisions in Section 69 and places this offence under the chapter dealing with public order indicates that parliament is aware that if people are allowed to defame the President it will lead to a disturbance of public order. Further Mr Kinariwala submitted that the very fact that parliament has allowed Section 69 to remain on the statute books up to now is proof that it is reasonably required in the interest of public order and for the purposes of protecting the reputations rights and freedom of other persons. Furthermore by allowing Section 69 to remain on the statute books, parliament wants to protect them reputation of the President from indiscriminate defamation which will consequently affect public order adversely. It was Mr Kinariwala's submission that Article 11 of the Constitution clearly states that the limitations placed on various fundamental rights and freedoms are designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or public interest. Mr Kinariwala submitted that it is in the public interest that the head of state and government in whose hands vests the executive powers if the republic should enjoy the highest reputation and, therefore, he should be protected from defamatory statements verbal or written. Mr Kinariwala argued that in applying the objective test whether provisions challenged is reasonably required in a democratic society, the court should take into consideration the specific conditions obtaining in that country. In respect of Zambia Mr Kinariwala cited the following obtaining conditions:

1. Prior to November, 1991 Zambia was a One Party State for continuous period of 27 years (sic)
2. During the period of 27 years democratic institutions gradually disappeared
3. Multi-party politics were re-introduced after a period of 27 years (sic)
4. Zambia is an under developed country.
5. It will take quite some time to build up democratic institutions.
6. The standard of journalism is undoubtedly poor and needs very much to be improved.

Having regard to these circumstances Mr Kinariwala submitted that Section 69 is reasonably required in Zambia democratic society. It will not be in the interest of the public and public order to remove Section 69. Destruction of the President will also destroy the reputation of the country. As regarding the may foreign cases which Mr Sangwa and Mr Simeza quoted Mr Kinariwala was content to dismiss them as irrelevant.

Finally on this issue Mr Kinariwala submitted that the Applicants have failed to prove that

Section 69 is in conflict with Article 20 of the Constitution.

Mr Sangwa countered these submissions by saying that there is not evidence adduced to prove that Section 69 is reasonably required under Sub Article 3 of Article 20 of the Constitution. Mr Sangwa then referred to the case of *Feliya Kachasu v Attorney-General* (4) *and Patel v Attorney-General* (1) where affidavit evidence was led by the state. Furthermore Mr Sangwa argued that the court in not bound by the wisdom of the legislature. The legislature like any other organ of the government is bound by the constitution. Further Mr that there is no evidence before court to prove connection between failure to protect the President by Section 69 and disturbance of public order and that removal of Section 69 will lead to anarchy in this country. Section 69 is still on the statute books not because it is required in the interest of public order and to protect interests of other persons etc. but is has never been challenged before and because of the presumption of constitutionality which they now challenge.

While agreeing with the factors Mr Kinariwala enumerated, Mr Sangwa submitted that the starting point in building democratic institutions now is the repeal of Section 69 and many other such laws. On the authorities he cited he argued that they are relevant. Finally Mr Sangwa urged the court to find that Section 69 if not reasonably required in a democratic society and therefore unconstitutional.

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I have again recounted these submissions in detail because I consider that of all the issues raised, the issue whether the provisions made under Section 69 are reasonably required in a democratic state was the most critical. Mr Sangwa referred me to the definitions of democratic society in *Patel v Attorney-General* (1). It is not my wish to go into the definition of what a democratic society is. I content myself by saying that Zambia is a democratic society.

Let me first deal with certain of Mr Kinariwala's submissions which I think are patently untenable and should be got out of the way before dealing with serious issues. I mean the issues of wisdom of the legislature, and continued existence of Section 69 on the statute books and the foreign authorities cited by Mr Sangwa and Mr Simeza.

As Mr Sangwa, in my view, quite properly argued the court is not bound by the wisdom of the legislature. One can not rely on the wisdom of the legislature to justify the validity of a law passed by the legislature. It is common knowledge that in Zambia, Parliament while exercising its wisdom has in the past passed legislations which the court has ruled unconstitutional. Here I only cite the Corrupt Practices Act, Act No. 14 of 1980. When passed by our Parliament that Act contained some provisions which conflicted with the constitution and which provisions appear to me to have been forced down the throat of the parliamentary draftsman. In the case of *Aggrey Mukoboto Simataa and Regina Sanana Saasa Simataa v The Attorney-General* (3) where Mr Kinariwala appeared for the State, Muzyamba J as he then was had the occasion to sever the provisions impugned for being unconstitutional. Indeed article one of the constitution which he declares lows which conflict with the constitution to be void envisages a situation where Parliament may pass a law which is unconstitutional. Again as Mr Sangwa argued and as I said earlier on in my judgment the wisdom of the legislature appears to be an extension or part of the principle of presumption of constitutionality.

About the length of the time Parliament has allowed a law to be on the statute books. Here again I agree with Mr Sangwa. I find this argument untenable. Non repeal of a provision does not validate it. The reason is simply that its validity is not challenged. For a provision to be valid, it must trace its validity from the constitution, in this case from Article 20 of the Constitution.

About the foreign authorities cited by Mr Sangwa and Mr Simeza, I must confess that I have

failed to understand how Mr Kinariwala finds all these authorities irrelevant. It is true that the facts are different but most of the principles of law propounded in these cases appear to me relevant to cases of this nature and illustrate how courts in other jurisdictions have dealt with similar cases. I am grateful to Mr Sangwa and Mr Simeza for their resourcefulness and I commend them.

I now come to the critical issue whether the law contained in Section 69 is reasonably required in a democratic state.

I have said earlier on in my judgment the from the authorities I have cited defamation law (criminal and civil) and sedition etc. is justified on the ground that it protects public interest and individual rights and freedoms. Clearly punishing people who allegedly defame the President can only be justified in public interest otherwise as it has been suggested by Mr Sangwa, it would have been left to the President to personally sue those who defame him in circumstances like the case now under inquiry.

Two diametrically opposed perceptions of the President have been canvassed for by counsel. To the Applicants the President is just like any other citizen except that he is a leader of a political party with political interests of his own to serve and he is Head of State because he was elected Head of State on his party ticket and his party is in power. He requires no more protection against defamatory attacks than that afforded to the other citizens by a libel action. Public funds, it was argued, should not be used to prosecute people who allegedly defame the President. In this regard Section 69 is, therefore, not reasonably required in a democratic state. On the other hand, the state perceives the President as the personification of the majesty of, and the, state itself. Consequently all necessary efforts should be made to protect his reputation from unwarranted attacks because not doing so could lead to a disturbance of public order.

I must say that I find it difficult, very difficult indeed, to accept Mr Sangwa's submissions that it is not in the public interest to protect the President in the manner Section 69 does. In fact these submissions beg the question whether it is in fact in the public interest to allow people to say anything they wish of the President, however, scurrilous, malicious or destructive of him. Mr Sangwa in an effort to buttress his submissions referred me to a passage in Professor Nwabweze's Presidentialism in Commonwealth Africa. But on page 122 of the same book the learned author, subject to some qualification, cautions that what he said did not mean that criticism should be turned into a licence for vulgar insults against the Head of State. This statement in my view again fortifies my earlier holding that criticism should be legitimate criticism motivated by desire to see that the affairs of the government are properly run for the benefit of general public. And I have borne in mind that I should not fall into error by assuming that the interests of a person who publishes matters of other persons are necessarily synonymous with those of the public itself. Indeed Professor Prosser talking about freedom of the press in his book Handbook of the Law of Torts (30) says at page 584 and I quote;

> "Freedom of Press justifies the publication of news and all other matters of legitimate public interest and concern."

Thus the freedom is subject to legitimate public interest and concern. It can therefore be seen from what I have said above that freedom of expression or freedom of the press is not so valuable that it is a bargain at any cost. At certain cost it cannot sell.

In reply to Mr Kinariwala's submissions that if the law allowed people to defame the President indiscriminatory it would lead to a break down in public order which will not be in the public interest, Mr Sangwa submitted that there is no evidence to prove that there will be anarchy in the country if Section 69 were removed from the statute books. I find no authority either from

writings of publists or case law to support this proposition. As it was said in *Rex v Wicks* (31) at page 386 Due Parcq J:

> "There is ---------- no ground for the suggestion made at the Bar that it is incumbent upon the prosecution to prove that the libel in question would have unusually likely to prove the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character."

It appears to me that it is common cause that when determining whether Section 69 is reasonably required in the Zambian democratic society the obtaining conditions in Zambia should be taken into account. Mr Kinariwala enumerated some six factors which I have already recited and which factors Mr Kinariwala argued militated against the type of freedom of expression the Applicants are canvassing for. Mr Sangwa while largely agreeing with these argued that in fact a start can be made towards rebuilding democratic institutions by removing from the statute books Section 69 and such other similar laws. The such other similar laws would certainly be like the provisions I have referred to with respect to defamation of foreign princes, criminal libel sedition etc.

I appreciate the force of these arguments by Mr Sangwa but they are untenable. Democracy in Zambia and indeed other third world countries is still young and fragile. I do not think even for the moment that we have reached or would wish to reach a stage to do what the Applicants contend for without plunging the country into chaos. It is a notorious fact that since we got independence the prevailing situation in Zambia has, more often than not, been one of excitement and stress. Further it is common knowledge that some cross section of our people easily take to the streets when merely infelicitious remarks are made against their party and party leaders. The demonstrations can be quite serious when the subject of ridicule is the President himself. Our newspapers are full of stories on inter-party fights.

As I see it, the limitations that Section 69 places on our freedom of expression or freedom of the press is no more than the price we have to pay for belonging to our society, as John Stuart Mill put it:

> "..... everyone who receives the protection of the society owes a return for the benefit, and the fact of living in society, records it indispensable that each should be bound to observe certain line of conduct towards others." (32)

Mr Sangwa complained that the Applicants are in the newspaper business and with Section 69 in force they will find it difficult to operate. I think not. The quotation from John Stuart Mill applied to them and they must conform. In any case it is trite that the press has no greater or fewer rights than does the citizen for whom it is the surrogate.

Before I leave this issue I wish to say that in my view Section 69 does not in any way disadvantage the Applicants or indeed anybody else in their enjoyment of the freedom of expression in pursuant of legitimate criticism. When the executive through the police or other law enforcement agents arrest persons for defamation of the President or sedition they act within what is called in International Tribunals their margin of appreciation. In other words they decide whether what has been said, according to the prevailing local situation, is likely to inflame passions and therefore a criminal prosecution should follow. In such circumstance it is easy to imagine a case where the accused person would argue that he said what is attributed to him but that it was legitimate criticism protected by Sub Article 3 of Article 20 of the Constitution. Then the High Court, so to speak, supervise the exercise of the margin of appreciation by the executive by scrutinising the evidence to see if what the accused person said was legitimate criticism under Sub Article 3 of Article 20 of the Constitution. If the High Court so finds it will order that the accused person cannot be prosecuted or if he has already

been prosecuted and convicted acquit him on the ground that what the accused person is protected by the Constitution and therefore not covered by the provision of the law he is alleged to have infringed.

As Section 69 reads it is difficult to argue in the abstract and say in advance that anything that one may say about the President will be punished. If that were the case the High Court could easily pronounced it unconstitutional. An example of a provision which from the manner it was framed was obviously unconstitutional was Section 44 (1) (a) of the Corrupt Practices Act No. 14 of 1980 which required suspects to given sworn statements to the Director of Public Prosecutions explaining how they obtained certain properties in order to help the state in its investigations *Aggrey Mukoboto Simataa and Regina Sanana Saasa Simataa Vs Attorney-General* (3).

In view of what I have said above my answer to the first question whether Section 69 of the Penal Code is or is not in conflict with Article 20 of the Constitution of Zambia, is that Section 69 of the Penal Code Cap. 146 of the Laws of Zambia is not in conflict with Article 20 of the Constitution of Zambia.

I now come to the second issue which was argued by Mr Simeza that is, that Section 69 conflicts with Article 23 of the Constitution in that it is discriminatory in its effect.

In the view I take of this issue, I do not intend to recount the submissions in detail. The alleged discrimination, according to Mr Simeza, is that in addition to the civil action available to the President and other citizens he is also protected by the criminal law in Section 69. Mr Kinariwala, who made comparisons with other statutes conferring benefits and rights on gone officials, argued that the "discrimination" envisaged in Sub Article (1) of Article 23 is the one defined in Sub Article 3 of Articles 23 of the Constitution which refer to affording different treatment to different persons attributably wholly or mainly to their respective descriptions by race, tribe, sex, etc.

Mr Simeza's reply to this was that the comparison with other statutes in Zambia is irrelevant; the issue is Section 69 which is impugned. It was Mr. Simeza's submission that Sub Article 3 of Article 23 is not exhaustive it is merely illustrative of discrimination.

I would not rest my judgment on comparisons made by Mr Kinariwala or Section 7 of the Zambia Constitution Act of 1991 or the principles laid down in the cases which Mr Simeza cited to me because the Constitution itself and the Penal Code provides the answer to the problem at hand.

I have carefully read Sub Article 3 of Section 23 several time and I have found it difficult, very difficult indeed, for me to place the meaning Mr Simeza has placed on Sub Article 3 of Article 23 of the Constitution. I agree with Mr Kinariwala that the discrimination is only in relation to the matters enumerated therein. I find Sub Article 3 of Article 23 of the Constitution exhaustive and not illustrative as Mr Simeza submitted. I say this with confidence because if the position contended for by Mr Simeza were the case, I would expect to find expressions like "such as" or "any other form of discrimination." To accept Mr Simeza's interpretation would be introducing glosses and interpolations into a provision which is very clear. Even if what Mr Simeza contended for were the case, I would not rest my judgment on it for the reasons I give below.

The argument that the President is over protected against defamation is also untenable and it must fail. The fact is that everyone living in Zambia including the President is protected by criminal law against defamation as long as the authorities consider it serious enough. In both cases public funds are used to prosecute the accused person. Those who defame the President

are covered by Section 69. Those who defame foreign princes potentate ambassadors etc. are dealt by Section 71. Section 191 protects people other than those I have already referred above and I am sure in this category fall ordinary people from other countries on a visit to Zambia and who are defamed while in Zambia.

One can see that there is no person including the President who is less or more protected by the law in Zambia. Apart from the personal immunity against civil suit and criminal prosecution during the tenure of his office, the President stands equal before the law with other citizens of this country. The immunity enjoyed by the President is not an issue in this case. If the argument is that only one section in the Penal Code should be used to protect all persons in Zambia regardless of their status, the answer will be that there are different sections dealing with defamation of the President and the foreign princes because Parliament wants to emphasise the status of these categories of people and the seriousness of the matter. The repercussions that follow the defaming of the President or a foreign potentate are not the same with those that follow the defamation of an ordinary person. To put it graphically one could say that the President is a big rock in a small pond. On the other hand the ordinary person is a small stone in a lake. When dropped into the lake, it only causes ripples. Hence the emphasis that a separate section should deal with defamation of the President.

For the reasons I have given my answer to the second question whether Section 69 of the Penal Code is or is not in conflict with Article 23 of the Constitution of Zambia is that Section 69 of the Penal Code Cap 146 of the Laws of Zambia is not in conflict with Article 23 of the Constitution of Zambia.

Having answered both questions in the negative I remit the case to the Magistrate at Lusaka to deal with the Applicants as accused persons according to law.

Delivered in open court at Lusaka this 17th day of March, 1995.

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