REPORTABLE (62)

Judgment No. S.C. 113/2000
Civil Application No. 310/99

IN RE: PATRICK ANTHONY CHINAMASA

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, OCTOBER 9 & NOVEMBER 6, 2000

P Nherere, with him *S Moyo*, for the applicant

GUBBAY CJ:

I. INTRODUCTION

In August 1999 three nationals of the United States of America, Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon, were jointly indicted with the commission of two offences. The first was a contravention of s 7(1)(a) of the Aircraft (Offences) Act [*Chapter 9:01*], as read with s 360(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], in that on 7 March 1999 they had attempted to place aboard an aircraft dangerous goods, namely, various revolvers, pistols, rifles, knives and ammunition; the second was a contravention of s 37(2) of the Law and Order (Maintenance) Act [*Chapter 11:07*], in that on the same day they were in unlawful possession of arms of war and offensive materials, consisting of a variety of pistols, revolvers, rifles, firearms, ammunition, knives, teargas and electric shock devices.

The trial, which was protracted, was presided over by ADAM J and assessors, in the High Court, at Harare. Judgment was delivered on 10 September 1999. The three accused were convicted on both counts. On 13 September 1999 the learned judge sentenced them to six months' imprisonment with labour on the first count; and on the second, to twenty-one months' imprisonment with labour, of which period nine months were conditionally suspended for five years, and six months were to run concurrently with the sentence imposed on count one. The effective punishment of six months' imprisonment with labour was then back-dated to 7 March 1999, being the day when the incarceration of the accused as remand prisoners began. The judgment on both conviction and sentence is now reported, *sub. nom. S v Blanchard & Ors*, in 1999 (2) ZLR 168 (H).

On 15 September 1999 a statement made by the applicant, then the Attorney-General for Zimbabwe and presently the Minister of Justice, Legal and Parliamentary Affairs, was published in *The Herald* newspaper under the headings:

> "US gunmen's sentence causes outrage
> Attorney-General's office expresses shock at court's trivialisation of offence".

The article that followed reported that:

> "The Attorney-General's Office is shocked and outraged by the effective six-month jail term imposed on the three Americans, convicted for illegal possession of weapons and attempting to take them on board an aircraft.
>
> It intends to appeal to the Supreme Court against the sentence which it said had trivialised the seriousness of the crime.
>
> In a statement yesterday, the Attorney-General, Mr Patrick Chinamasa, said the sentence handed down by High Court Judge Justice Adam 'induces a sense of shock and outrage in the minds of all right-thinking people'.

He said Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon were convicted of offences which were treated as serious by all civilised countries worldwide, including America, which was in the forefront of fighting terrorism and gun-running.

By imposing sentences which do not match the seriousness of the offences, Justice Adam has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so.

'The Attorney-General's Office is left bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests'.

Mere unlawful transiting of firearms through the territory of Zimbabwe is in itself a serious and gross violation of the sovereign and security interests of Zimbabwe.

Mr Chinamasa said the attitude taken by the court in meting out sentences which did not match the severity of the crimes committed came against the backdrop of repeated complaints made to him by his law officers of hostility and verbal abuse directed at them and their submissions by the bench during proceedings.

All these developments erode the office's confidence in the administration of criminal justice."

Reaction to the article led to the issuance of a citation for contempt of court. It was served on the applicant on 28 September 1999. In its amended form the citation reads:

"TAKE NOTICE THAT on the 28th day of September 1999 The Honourable Mr Justice Adam caused a citation to be issued against you whereby YOU ARE TO APPEAR in person before the High Court of Zimbabwe in Harare on the 1st day of October 1999 at 10.00 am or soon thereafter to show cause why an Order of Contempt should not be made for the wilful and intentional contemptuous **statement issued by you, which statement you caused to be published or alternatively was published** in the issue of the 15th September 1999 of THE HERALD, **as appears more fully from the** attached copy entitled 'US gunmen's sentences causes outrage'."

II. THE PROCEDURE ADOPTED BY THE HIGH COURT

The hearing of the proceedings initiated by the citation was assigned to BLACKIE J. He immediately appointed a legal practitioner in private practice to appear as *amicus curiae* to present the complaint against the applicant. On 1 October 1999 the learned judge held a pre-hearing conference at which the parties agreed to a time-frame for the filing of a defence outline by the applicant and written heads of argument by both him and the *amicus curiae*. The matter was then postponed for a week.

At the commencement of the proceedings on 8 October 1999 the *amicus curiae* particularised the passages in the reported words of the applicant which were considered to contain the contempt alleged against him. These were:

(a) The statement that the sentence handed down "induces a sense of shock and outrage in the minds of all right-thinking people".

(b) The statement that:

> "By imposing sentences which do not match the seriousness of the offences, Justice Adam has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so.
>
> 'The Attorney-General's Office is left bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests'.";

(c) The statement that:

> "All these developments erode the office's confidence in the administration of criminal justice."

Thereafter, counsel for the applicant, acting in terms of s 24(2) of the Constitution of Zimbabwe, requested the court to refer to the Supreme Court for determination a number of questions in respect of which it was contended that the proceedings were in contravention of the Declaration of Rights. The questions, subsequently re-drafted and re-presented to the Court, were these:

"1. Whether the High Court, and/or counsel appearing *amicus curiae*, can before the High Court present allegations of contempt of court in the light of the provisions of section 76 and section 18(2) of the Constitution.

2. Whether the choice and assignment to deal with this matter by the Judge, who passed the sentence which was commented upon in the alleged contemptuous statement of the presiding judge and the selection of counsel to appear *amicus curiae* by the assigned judge violates the Attorney-General's right to appear before an independent and impartial court established by law as provided in section 18 of the Constitution.

3. Whether the order issued by the High Court on 1 October 1999, which order was issued in the presence of the Attorney-General and, in respect of which the Attorney-General, when invited, elected to make no submissions.:

    (a) violates the Attorney-General's right not to be compelled to give evidence as provided for in section 18(8) of the Constitution, given that he was ordered to file a defence outline;

    (b) violates the Attorney-General's right to be given adequate time to prepare his defence as provided for in section 18(3) of the Constitution, in circumstances where the Attorney-General, at no stage, applied for or requested an extension of time, nor did he, at any time object to the time limits set out in the said order, and in circumstances where the Attorney-General requested a postponement to 6 October 1999 and then 8 October 1999, to enable him to travel to Zambia on Government business, both requests being granted;

    (c) violates the Attorney-General's rights to examine witnesses as provided for in section 18(3)(e) of the Constitution, in circumstances where he was ordered to file argument relating to the facts and the law before the hearing.

4. Whether the procedure in terms of which the registrar can issue a court application, which is not supported by any affidavit as to facts, as is provided in Order 43 Rule 389, violates the Attorney-General's right to a fair trial as is provided for in section 18 of the Constitution.

5. Whether the citation issued on 28 September 1999, which calls upon the Attorney-General to show cause why an order of contempt should not be made, violates the presumption of innocence of the Attorney-General and unfairly places the *onus* to prove innocence on the Attorney-General in contravention of section 18 of the Constitution.

6. Whether the contempt proceedings, as particularised, violate the Attorney-General's freedom of expression, that is to say, his right to hold opinions and to express such opinions without interference as is provided for in section 20 of the Constitution."

After reserving his decision on the questions raised, BLACKIE J ruled that it had not been shown to his satisfaction that question 1 concerned a breach of the Declaration of Rights; and that questions 3 and 4 were frivolous and vexatious within the meaning attributed to the phrase in *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157 C-F. He therefore declined to refer these three questions. His Lordship's detailed reasons for so concluding are to be found at 297B-298A and 299E-300D of the judgment, which is reported in 1999 (2) ZLR 291 (H). However, the request to refer questions 2 and 6 (as modified in the judgment), as well as question 5, was acceded to. Added thereto was the further question of whether a person charged with contempt of court falls under the protections provided to a person charged with a criminal offence under s 18 of the Constitution. The learned judge recast the questions in the following manner:

"1. Whether a charge of contempt of court is a charge of a criminal offence entitling the person charged to the protections afforded by the provisions of section 18 of the Constitution.

2. If the answer to question 1 is in the affirmative:

(a) Whether the procedure whereby a person charged with contempt of court is tried by the court which complains about the contempt violates the right of a person, in terms of section 18 of the Constitution, to be tried by an independent and impartial tribunal.

(b) Whether the citation issued on 28 September 1999, which called upon the accused person to show cause why an order of contempt should not be made against him, violates the presumption of innocence on the part of an accused person in contravention of section 18 of the Constitution.

3. Whether the law of contempt of court, as contained in the common law of Zimbabwe, is such as cannot be shown 'to be reasonably justifiable in a democratic society' and, therefore, is incompatible with the provisions of section 20 of the Constitution."

III. THE REACTION OF THE APPLICANT

The applicant felt aggrieved by the refusal of BLACKIE J to refer questions 1, 3 and 4 to this Court. He lodged a notice of appeal against that part of the judgment, setting out several grounds in which it was claimed the learned judge had erred.

In seeking to appeal against the refusal of the High Court to refer the aforementioned questions to the Supreme Court, the applicant obviously overlooked the limitation expressed in s 24(3) of the Constitution. It is there provided:

> "Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1)."

The purport of s 24(3) was considered by this Court in *S v Mbire* 1997 (1) ZLR 579 (S) where, at 581G-582D, it was stated:

> "It is clear from the wording of this provision that where a referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered. See *R v Mhosva* 1980 ZLR 74 (G) at 75C; *S v Morrisby* 1995 (2) ZLR 270 (S) at 271C. Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible.
>
> Quite apart from there being no provision in the Constitution permitting an appeal to the Supreme Court against a refusal to refer to it a question raised under s 24(2) thereof, there is no right of appeal given in either the Magistrates Court Act [*Chapter 7:10*] or the Supreme Court Act [*Chapter 7:13*] against such a ruling. To repeat the self-evident words of KENNEDY LJ in *National Telephone Co Ltd v His Majesty's Postmaster-General* [1913] 2 KB 614 (CA) at 621:
>
> > 'The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right, it being essentially one of the limitation and of the extension of jurisdiction'."

See also *Muchero & Anor v Attorney-General* S-107-00 (not yet reported).

It follows that any determination of the three questions which were not referred may only be made by this Court in the event of an appeal brought before it against a finding by the High Court that the applicant was guilty of contempt.

IV. WHETHER THE LAW OF CONTEMPT OF COURT UNDER THE COMMON LAW OF ZIMBABWE IS SUCH AS CANNOT BE SHOWN "TO BE REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY" AND, THEREFORE, IS INCOMPATIBLE WITH THE PROVISIONS OF SECTION 2O OF THE CONSTITUTION

It is convenient at the outset to consider what I regard as the main question. In doing so a preliminary matter must be made clear. In the context of the applicant's statements, the reference in the question to the law of contempt must be taken to mean that species of the common law of contempt which has been given the colourful nomenclature of "scandalising the court"; and not any of the other different ways in which the offence may be committed.

A consideration of the following issues is, I believe, essential to the resolution of the question posed.

(1) Does the form of contempt known as scandalising the court continue to exist as an offence under the common law of Zimbabwe?

There are two modes of conduct which fall within the scope of criminal contempt. First, there is contempt *in facie curiae*, which encompasses any word spoken or act done within the precinct of the court that obstructs or interferes with the due administration of justice, or is calculated to do so.

Secondly, the offence may be committed *ex facie curiae* by words spoken or published or acts done which are intended to interfere with, or are likely to interfere with, the fair administration of justice. An example of this type of contempt is that described as "scandalising the court". It is committed by the publication, either in writing or verbally, of words calculated to bring a court, a judge of a court, or the administration of justice through the courts generally, into contempt. It need not be an attack directed at any specific case, either past or pending, or at any specific judge. It is sufficient if it is a scurrilous attack on the judiciary as a whole, calculated

to undermine the authority of the courts and endanger public confidence, thereby obstructing and interfering with the administration of justice. See *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 All ER 244 (PC) at 248f per LORD DIPLOCK. See also, Borrie & Lowe's *Law of Contempt* 2 ed at 226-227; Snyman, *Criminal Law* 3 ed at 316; Milton, *South African Criminal Law and Procedure* 3 ed vol II at 184.

At one stage in England the continued existence of this branch of contempt law was called into doubt by LORD MORRIS in *McLeod v St. Aubyn* 1899 AC 549. After pointing out that committals for contempt are ordinarily in cases where (i) some contempt has been committed in the face of the court, and (ii) comments have been made on cases pending in the courts, LORD MORRIS dealt with a third form of contempt. Of this, he said at 561:

> "Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them."

The observation proved to be premature. Nine months later an application was made in *R v Gray* [1900] 2 QB 36 to the Queens Bench Division to commit the editor of a Birmingham newspaper for writing and publishing a scurrilous personal attack on MR JUSTICE DARLING. It described him as an "impudent little man in horse-hair - a microcosm of conceit and empty-headedness", adding:

> "No newspaper can exist except upon its merits, a condition from which the Bench, happily for MR JUSTICE DARLING, is exempt. … MR JUSTICE DARLING would do well to master the duties of his own profession before undertaking the regulation of another."

The article did not deal with pending litigation; it was about the conduct of a judge in a case in which a conviction had been recorded and sentence passed. After defining the offence, LORD RUSSELL OF KILLOWEN CJ went on to say at 40:

> "That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism, I repeat that it is personal scurrilous abuse of a judge as a judge."

Although LORD RUSSELL did not mention *McLeod v St. Aubyn supra*, it was referred to by the reporter of *R v Gray* in a footnote at the end of the judgment. In the course of his note the reporter accurately summed up the effect of *R v Gray* as follows:

> "The present case is reported as showing that in this country the Court will still, where the circumstances demand its action, exercise its jurisdiction to punish, on summary process, the contempt of 'scandalising the Court', although no contempt has been committed *ex facie* of the Court, or in respect of a case pending."

At the present time prosecutions in England for scandalising the court have once again become a rarity. However, there can be little doubt as to the continued application of this branch of the law of contempt. LORD HAILSHAM OF ST. MARYLEBONE made this clear in *Badry v Director of Public Prosecutions of Mauritius* [1982] 3 All ER 973 (PC) at 979 b-c in stating:

> "(Whilst) nothing really encourages courts or Attorneys-General to prosecute cases of this kind in all but the most serious examples, or courts to take notice

> of any but the most intolerable instances, nothing has happened in the intervening eighty years to invalidate the analysis by the first LORD RUSSELL OF KILLOWEN CJ in *R v Gray*."

Yet in *Secretary of State for Defence & Anor v Guardian Newspapers Ltd* [1984] 3 All ER 601 (HL) at 605b, LORD DIPLOCK ventured the opinion that contempt for publishing material that scandalises the court was "virtually obsolescent".

It is well established that this form of contempt continues to exist in other jurisdictions:

The principle enunciated in *R v Gray supra* was adopted by the Supreme Court of Canada in *Re Duncan* (1958) 11 DLR (2d) 616 (SC) at 618; see also *R v Kopyto* (1988) 47 DLR (4th) 213 (Ont. CA) at 222 and 246-247. In New Zealand, reservations expressed by some judges were dispelled by the Court of Appeal in *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 237-238. In Australia, a number of prosecutions illustrate that this species of contempt continues to be recognised. See *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 (HC); though the scope for its use seems more limited following *Attorney-General for New South Wales v Mundey* [1972] 2 NSWLR 887. Under Hong Kong law scandalising contempt is accepted as an offence. See *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293 (CA) at 307 B-C.

This is not the law in the United States of America. In *Bridges v State of California* 314 US 252 (1941) all the members of the Supreme Court were agreed that there is no such offence in the United States (see at 273 and 287). JUSTICE FRANKFURTER referred to the scandalising of the court as an offence as

"English foolishness". He considered criticism of the courts, no matter how unrestrained, made after a decision has been rendered, to be an exercise of the right of free discussion and free speech.

Nearer to home, in South Africa the authority to punish scandalisation contempt, summarily or otherwise, was given in 1874 by the Cape Supreme Court in *In re Neethling* (1874) 5 Buch 133. Three years later KOTZE CJ in *In re Phelan* (1877) Kotze 5 at 7 explained the nature of this form of contempt thus:

> "No principle of law is better established than this: that any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to contempt of court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open court."

Anything spoken or written imputing corrupt or dishonest motives or conduct to a judicial officer in the discharge of official duties, or reflecting in an improper or scandalous manner on the administration of justice, has been held to fall within the ambit of this species of contempt. See *R v Torch Printing & Publishing Co (Pty) Ltd & Ors* 1956 (1) SA 815 (C) at 819G-820B; *S v Oliver* 1964 (3) SA 660 (N) at 664A; *S v Tobias* 1966 (1) SA 656 (N) at 660 G-H. In *S v van Niekerk* 1972 (3) SA 711 (A) it was held that this type of contempt is even committed by exhorting the judiciary to embark on a course of action which is in clear conflict with its duties, for example, by asking that it refuse to give credit to a certain class of evidence irrespective of its intrinsic merit (see at 721 *in fine* – 722G).

The issue of whether scandalising the court is an offence in Zimbabwe has not been addressed directly by the courts. Nonetheless the general case law on the law of contempt in this country, the weight of the authorities referred to and the principles they enunciate, satisfy me that a refusal to recognise scandalising as a species of the offence of contempt of court is not warranted. Indeed Mr *Nherere*, who appeared for the applicant, did not seek to argue the contrary. Consequently it is unnecessary that the conduct complained of does not relate to pending legal proceedings.

Having said that, it is plain that the line between scandalising comment and fair and legitimate criticism is not always easy to draw. As a general rule, as alluded to by OGILVIE THOMPSON CJ in *S v van Niekerk supra* at 720H:

> "genuine criticism, even though it be somewhat emphatically or unhappily expressed, should, in my opinion … preferably be regarded as an exercise of the right of free speech rather than as 'scandalous comment' falling within the ambit of the crime of contempt of court."

Much the same thought, though in slightly stronger language, was expressed earlier by LORD DENNING MR in *R v Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)* [1968] 2 All ER 319 (CA) at 320 F-G:

> "Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms."

In the same case SALMON LJ stated the position even more succinctly at 321 A-B:

> "… no criticism of a judgment, however vigorous, can amount to contempt of court, provided it keeps within the limits of reasonable courtesy and good faith."

It should not be overlooked that some legal writers, and a few judges, have been vehement in their criticism of the recognition of scandalising the court as an offence. They argue that the basic assumption embodied in the offence of scandalising the court, namely, that public confidence in the administration of justice would be undermined by comments that tend to lower the authority of the court, is highly speculative. They contend that an intelligent and sophisticated public should evaluate the merits of the comments rather than the judiciary which, in effect, acts as both prosecutor and judge. They take the position that the courts, like other public institutions, should be open to lively and constructive criticism and do not need, and should not have, specific rules for their protection. See for instance Borrie & Lowe's *Law of Contempt op. cit.* at 244; Walker, *Scandalising in the Eighties* (1985) 101 LQR 359 at 378. In the Australian case of *Attorney-General for New South Wales v Mundey supra* at 908, HOPE JA said:

> "There is no more reason why the acts of courts should not be trenchantly criticised than the acts of public institutions, including parliaments. The truth is of course that public institutions in a free society must stand upon their own merits: they cannot be propped up if their conduct does not command respect and confidence of a community; if their conduct justifies the respect and confidence of a community they do not need the protection of special rules to shield them from criticism."

Despite the strong objection levelled at scandalising contempt, I reiterate that it remains an offence according to the common law of Zimbabwe.

Whether the statements of the applicant fall within or outside the limits of reasonable courtesy; whether they represented the expression of a genuinely held belief; and whether, emanating as they did from the country's chief law officer, being a person of high standing in the community, they were intended or likely to bring MR JUSTICE ADAM into disrepute, as reflecting upon his capacity as a judge, and to shake public confidence in the manner in which justice had been administered by the High Court in the case in question, are issues of fact, the resolution of which is of no relevance to these proceedings.

The advent of the Constitution makes it necessary for this Court to review the offence of scandalising the court in order to ensure that it meets the requisite constitutional standards. The statements of the applicant touched on a matter of public interest – the high profile and much publicised trial of the three Americans and the punishment meted out to them. They concerned the functioning and operations of a public institution. It is necessary therefore to consider whether they attract the protection of s 20(1) of the Constitution.

(2) Are the words of the applicant protected by the freedom of expression provision set out in section 20(1) of the constitution?

Section 20(1) of the Constitution protects the freedom of expression in the following terms:

> "Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

This Court has held that the provision is to be given a benevolent and purposive interpretation. It has repeatedly declared the vital and fundamental importance of freedom of expression to the Zimbabwean democracy - one of the most recent judgments being that in *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) at 268 C-F, 1998 (2) BCLR 224 (ZS) at 235I-236C. What has been emphasised is that freedom of expression has four broad special objectives to serve. The most significant, in the present context, is the second, namely, "it assists in the discovery of the truth". The search for truth rationale has been articulated in terms of the famous "marketplace of ideas" concept. This holds that truth will emerge out of the competition of ideas. In his classic dissent in *Abrams v United States* 250 US 616 (1919) at 630, the redoubtable JUSTICE HOLMES said that:

> "… when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

It is indeed difficult to imagine a more crucial protection to a democratic society than that of freedom of expression. Without the freedom to express, interchange and communicate new ideas and advance critical opinions about public affairs or the functioning of public institutions, a democracy cannot survive. The use of colourful, forceful and even disrespectful language may be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence. People should not have to worry about the manner in which they impart their ideas and information. They must not be

stifled in making such exchanges. The point is well made in the majority judgment of the European Court of Human Rights in *Handyside v UK* (1979-80) 1 EHRR 737 at 754 (para 49) that freedom of expression is applicable:

> "… not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."

See also *Garrison v State of Louisana* 379 US 64 (1964) at 75 per JUSTICE BRENNAN.

A similar observation was made recently in *Chavanduka & Anor v Minister of Home Affairs & Anor* (2000) 8 BHRC 390 (ZS) where, after citing a *dictum* of MR JUSTICE HOLMES in *US v Schwimmer* 279 US 644 (1929) at 654, this Court said at 396a:

> "Mere content, no matter how offensive (save where the expression is communicated in a physically violent form), cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression."

With particular regard to criticisms levelled at the courts, I can find no more eloquent and pertinent exposé than that of CORY JA in *R v Kopyto supra* at 227:

> "The courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens but also for the resolution of disputes between the citizen and the state in all its manifestations. The more complex society becomes the greater is the resultant frustration imposed on citizens by that complexity and the more important becomes the function of the courts. As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is

> rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy. Rules of evidence, methods of procedure and means of review and appeal exist that go far to establishing a fair and equitable rule of law. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions."

I am thus firmly of the view that statements made on a matter of public interest, even if intemperately or offensively worded, or in fact false, so long as they are not obscene or criminally defamatory, come within the protection of s 20(1) of the Constitution.

Undoubtedly the comments of the applicant come within the parameters of that protection.

It remains to be determined whether the common law offence of contempt by scandalising the court is a constitutionally permissible restriction on the protection afforded the applicant's statements.

(3) Is the limitation which the common law offence of scandalising the court imposes on the right of freedom of expression saved by section 20(2)(b)(iii) of the Constitution?

Section 20(2)(b)(iii), in relevant part, reads:

> "Nothing contained in … any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
>
> …
>
> (b) for the purpose of –

…

(iii) maintaining the authority and independence of the courts …

except so far as that provision … is shown not to be reasonably justifiable in a democratic society."

The underlined portions of the subsection give rise to three specific questions:

(a) *Is the limitation upon freedom of expression contained in any law?*

The term "law" is defined in s 113(1) of the Constitution to include "any unwritten law in force in Zimbabwe, including African customary law". The common law in force in Zimbabwe falls within the definition. And, as I have endeavoured to show, the common law of scandalising the court does limit the freedom of expression.

(b) *Is the limitation upon freedom of expression employed for the purpose of maintaining the authority and independence of the courts?*

Unquestionably, the offence of scandalising the court exists in principle to protect the administration of justice. It is thus a permissible derogation from the freedom of expression.

(c) *Has the offence of scandalising the court been shown to be reasonably justifiable in a democratic society?*

This is the crucial inquiry. From a procedural aspect, the burden of proof is on the challenger to establish that the impugned law goes further than is reasonably justifiable in a democratic society; and not, as is common with the

Constitutions of other countries, upon the State to show that it does not. See *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S) at 382 *in fine* – 383A, 1984 (2) SA 778 (ZS) at 783H.

In *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S) at 13 D-F, 1995 (9) BCLR 1221 (ZS) at 1231 H-J, and *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation & Anor* 1995 (2) ZLR 199 (S) at 220 A-C, 1995 (9) BCLR 1262 (ZS) at 1277 G-I, this Court, following Canadian jurisprudence, set out the three criteria to be looked to in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. To be answered are whether –

(i) the objective which the limitation in the law is designed to promote is sufficiently important to warrant overriding a fundamental right;

(ii) the measures designed to meet the objective are rationally connected with it and are not arbitrary, unfair or based on irrational considerations;

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

In *Ahnee & Ors v Director of Public Prosecutions* [1999] 2 WLR 1305 (PC) – an appeal from the Supreme Court of Mauritius – the question arose as to whether the offence of scandalising the court had been shown by the appellants not to be reasonably justifiable in a democratic society (s 12(2) of the Constitution of Mauritius). Holding that it had not, LORD STEYN, in delivering the opinion of

their Lordships, offered two main reasons for that view. He said at 1313 *in fine* – 1314F:

> "In England such proceedings are rare and none has been successfully brought for more than sixty years. But it is permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence of scandalising the court on a small island is greater: see Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) pp 746-747; Barendt *Freedom of Speech* (1985) pp 218-219. Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the 'right of criticising, in good faith, in private or public, the public act done in the seat of justice' …. The classic illustration of such an offence is the imputation of improper motives to a judge. … Given the narrow scope of the offence of scandalising the court, their Lordships are satisfied that the constitutional criterion that it must be necessary in a democratic society is in principle made out. The contrary argument is rejected."

With regard to the first reason, I must respectfully disagree with the sweeping observation that in small islands the need to retain the offence of scandalising the court is greater than in the United Kingdom because the administration of justice is more vulnerable. By alluding to "small islands", I assume that the learned LORD OF APPEAL IN ORDINARY was including comparatively small jurisdictions. In supporting the proposition by reference to academic writings it may well be that the Board wished to be spared the embarrassment of citing LORD MORRIS'S racist comment in *McLeod v St. Aubyn supra* at 561 that:

> "in small colonies, consisting principally of coloured populations, the enforcement in proper courts of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court";

yet, like LORD ATKIN in *Ambard v Attorney-General for Trinidad and Tobago supra* at 708 *in fine*, believed it necessary to pronounce, somewhat condescendingly, a modern non-racist justification of *McLeod* to small countries.

Whether the administration of justice in Mauritius was correctly perceived to be more vulnerable than in the United Kingdom appears to me to be a contentious proposition.

But one thing is certain; the same epithet does not fit the situation in Zimbabwe. I am confident that our courts are strong enough to withstand criticism after a case has been decided no matter how scurrilous that criticism may be. Communication with a fair proportion of the population is easily achieved. Court proceedings are widely publicised in the media. Most, if not all, judges are known by name. Trust in the legal system and the authority of the courts are matters of importance to the ordinary citizen. The courts are looked upon as the ultimate refuge from injustice.

The second reason, that the narrow scope of the offence of scandalising the court makes its retention "necessary" in a democratic society, is much more persuasive. Criticism which imputes improper or corrupt motives or conduct to those taking part in the administration of justice, which "excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office", does create a real or substantial risk of impairing public confidence in the administration of justice.

Unlike other public figures, judges have no other proper forum in which to reply to criticisms. They cannot debate the issue in public without jeopardizing their impartiality. This is why protection should be given to judges when it is not given to other important members of society such as politicians, administrators and public servants.

The other case to which reference must be made is that of *R v Kopyto supra*, where, save for unanimity in the setting aside of the conviction, the Ontario Court of Appeal was split three ways. CORY and GOODMAN JJA were of the view that in order to accord with the fundamental freedoms in the Canadian Charter of Rights and Freedoms, the contempt must be shown to involve a real, substantial and present or immediate danger to the administration of justice. Their view that such a contempt could not be committed unless it interferes with the fair trial of present or pending proceedings, was influenced by American jurisprudence and its test of "clear and present danger" to the administration of justice. HOULDEN JA went even further. He was of the opinion that no offence of scandalising the court, however framed, would be consistent with the Charter; therefore there could be no such contempt.

DUBIN JA (with whom BROOKE JA concurred), on the other hand, considered the offence to be a necessary exemption, provided that the statement complained of is calculated to bring the administration of justice into disrepute; and it is shown that there is a "serious risk that the administration of justice would be interfered with". Rejecting the approach of the majority, he said at 285:

> "In other words, as I understand it, if the words complained of are stated in court while the judge is still sitting in court, my colleagues would hold the offence to be constitutional, but if the words were stated after the judge had delivered his judgment and withdrawn from the court-room, and the statement was made to the press or to the public in his absence, the offence becomes unconstitutional. The result of the majority ruling is that in this jurisdiction there is, at present, no limit on what is permissible with respect to comments made which are intended to interfere seriously with the administration of justice and the rule of law unless the comment is made in the face of the court, or would interfere with the fair trial of pending proceedings. With respect, I see no basis for such a distinction."

The learned JUDGE OF APPEAL then pointed out that the distinction had been rejected by RICHMOND P in *Solicitor General v Radio Avon Ltd supra* at 232-233 where LORD DIPLOCK'S analysis in *Attorney-General v Times Newspaper Ltd* [1973] 3 All ER 54 (HL) at 72 e-g, was cited with approval.

In dismissing the relevance of the American jurisprudence, DUBIN JA at 287 approved of another passage of the judgment in the *Radio Avon* case at 234, namely:

> "The American courts appear to have directed their attention to the existence of a clear and present danger of a court being influenced, intimidated, impeded, embarrassed or obstructed in the administration of justice. English law, on the other hand, has also attached great importance to the need to preserve public confidence in the administration of justice generally. This court should not depart from that attitude subject, of course, in the type of contempt now under consideration, to the public right of fair comment and criticism, and to the possible defence of justification earlier referred to in this judgment."

Turning to the merits of the appeal, DUBIN JA was satisfied that the conviction could not stand as the requisite elements of the offence had not been made out.

In my respectful view the minority judgment is impressive. The serious risk test - preferred to the one adopted in American case law in which the administration of justice must be imperiled immediately - conforms with that applied in this country. See *S v Hartmann & Anor* 1983 (2) ZLR 186 (S) at 195F, 1984 (1) SA 305 (ZS) at 312 E-F; *Banana v Attorney-General* 1998 (1) ZLR 309 (S) at 318 F-H, 1999 (1) BCLR 27 (ZS) at 36I-37A. Furthermore, the danger in adopting the American approach is that it is predicated upon the conception that scandalising contempt is to "preserve the dignity of the bench". This is wrong.

The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed.

I pass now to the application of the three criteria, but would repeat that the *onus* is upon the applicant of showing that the law of contempt by scandalising the court is not a limitation that is reasonably justifiable in a democratic society.

First, the primary objective of the impugned law of scandalising the court must relate to concerns which are pressing and substantial and of sufficient importance to override the constitutionally protected freedom. See *Chavanduka v Minister of Home Affairs supra* at 402f.

The objective of the law of contempt is well captured in the following passage in Borrie & Lowe's *Law of Contempt op. cit.* at 226:

> "The necessity for this branch of contempt lies in the idea that without well-regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute."

The same sentiment was neatly put by RICHMOND P in *Solicitor General v Radio Avon Ltd supra* at 230, in these words:

> "The justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined."

I do not therefore consider that this objective, which the limitation in the law is designed to promote, can be said not to be of sufficient importance to warrant overriding the fundamental right of freedom of expression.

It was conceded by counsel for the applicant, and correctly so in my opinion, that the second criterion is satisfied, in that the measures designed to meet the objective are rationally connected to it.

With regard to the third criterion which the applicant must meet, two points must be made. First, as emphasised in *Ahnee & Ors v Director of Public Prosecutions supra*, the offence of scandalising the court does not extend to hostile criticism on the behaviour of a judicial officer unrelated to his performance on the Bench. Any personal attack upon him unconnected with the office he holds must be dealt with under the laws of defamation. See *McLeod v St. Albyn supra* at 561; *R v*

Fuleza 1951 (1) SA 519 (A) at 533 A-B; *R v Robberts* 1959 (4) SA 554 (A) at 557 *in fine*. The offence is narrowly defined.

Secondly, prompt action to preserve the authority of the court and the due carrying out of its function, which are subject to being undermined by scandalising contempt, is required. The institution of criminal proceedings at the instance of the Attorney-General, with all the attendant delays, would be too dilatory and too inconvenient to offer a satisfactory remedy. Once a matter has been referred to the Attorney-General it is removed from the court's control, and the Attorney-General might well be reluctant to prosecute. Moreover, criminal defamation is concerned with personal reputations. And, in any event, it would not be applicable to an attack upon an unspecified group of judges or upon the court system in general.

In sum, the applicant has failed to meet the criteria laid down. He has not shown that the limitation placed on the right to freedom of expression for the purpose of maintaining the authority and independence of the courts is not one that is reasonably justifiable in a democratic society.

V. WHETHER A CHARGE OF CONTEMPT OF COURT (BY SCANDALISING THE COURT) IS A CHARGE OF A CRIMINAL OFFENCE ENTITLING THE PERSON CHARGED TO THE PROTECTIONS AFFORDED BY THE PROVISIONS OF SECTION 18 OF THE CONSTITUTION

Subsection (1) of s 18 of the Constitution recites that:

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

Subsections (2) to (9) spell out the fundamental protections which a person charged with, and tried for, any criminal offence must be afforded.

The nature of contempt of court was correctly described by the learned judge in the reported judgment *supra*, at 296F, as follows:

> "Contempt of court, although it may have a penalty attached to it similar to that which is imposed in criminal cases, has never been treated as crime *strictu sensu*. It is, and has always been, treated as *sui generis*."

Textbooks are replete with discussion of the peculiarities of contempt law and the extent to which proceedings for contempt defy classification *strictu sensu* as criminal or civil, but are to be regarded as *sui generis*. So far as contempt involving disobedience to the order or process of a court is concerned, the offence is often treated as "civil contempt". This is because such contempts are, in reality, a form of execution, pursuant to which the person of the defaulting party may be attached in order to coerce compliance with the order. See *Cape Times Ltd v Union Trades Directories (Pty) Ltd* 1956 (1) SA 105 (N) at 120F-121D; *Wiley NO v M* 1979 RLR 144 (GD) at 146 A-D; and because proceedings to punish the contempt are almost invariably initiated by the party in whose favour the civil order was made and who may waive punishment. Nonetheless, such contempt is a criminal offence for which the contemnor may be indicted at the instance of the Attorney-General. See Milton, *op cit.* at 189; and particularly, *S v Beyers* 1968 (3) SA 70 (A) at 81 C-E; *S v Benatar* 1984 (1) ZLR 296 (S) at 303A-304C, 1984 (3) SA 588 (ZS) at 592H-593H.

In its most recent consideration of the matter, the Privy Council in *Ahnee & Ors v Director of Public Prosecutions supra* at 1314G described scandalising the court as a form of contempt that is not part of the ordinary criminal law. As I understand it, that conclusion does not mean that such contempt is not an offence for particular purposes. It is an offence against the court rather than against the state. It is an injury committed against a person or body occupying a public judicial office, by which injury the dignity or respect which is due to such office, or its authority in the administration of justice, is intentionally violated. See *Attorney-General v Crockett* 1911 TPD 893 at 911; *Noel Lancaster Sands (Edms) (Bpk) v Theron* 1974 (3) SA 688 (T).

In *In re Muskwe* 1992 (1) ZLR 44 (H), 1993 (2) SA 514 (ZH) ADAM J held that the right of an accused person under s 18(2) of the Constitution to be tried by an independent and impartial court established by law, had been denied in a situation in which the magistrate at whom the contemptuous conduct had been directed, presided over the contempt proceedings which followed. For this involved the magistrate being arbiter in his own cause. The Canadian case of *R v Cohn* (1985) 10 CRR 142 (Ont. CA), cited by the learned judge, is to the same effect (see at 156 per GOODMAN JA). See also *Uncedo Taxi Service Association v Maninjwa & Ors* 1998 (6) BCLR 683 (E) at 694 E-F, 1998 (3) SA 417 (E) at 429 C-D; Milton, *op cit.* at 199.

I respectfully agree with these decisions.

It follows, in my view, that although contempt by scandalising the court is an offence *sui generis* and is not part of the ordinary criminal law, it is nonetheless the responsibility of the judicial officer hearing the matter to ensure that the procedure adopted complies with the constitutional protections afforded an accused person charged with an ordinary criminal offence. After all the contemnor, like the convicted accused, is liable to punishment in the discretion of the court.

VI (A) WHETHER THE PROCEDURE WHEREBY A PERSON CHARGED WITH CONTEMPT OF COURT IS TRIED BY THE COURT WHICH COMPLAINS ABOUT THE CONTEMPT VIOLATES THE RIGHT OF A PERSON, IN TERMS OF SECTION 18(2) OF THE CONSTITUTION, TO BE TRIED BY AN INDEPENDENT AND IMPARTIAL COURT

The contention advanced by the applicant is that the High Court which he is accused of having scandalised, is the very one which is to determine whether the statements he made were contemptuous of it; it will thus be acting as judge in its own cause. Expressed differently, the injured party is not, in the circumstances, an independent judicial body. It cannot impartially adjudicate when it itself has been offended against and has issued the citation. Consequently any proceedings brought before the High Court would amount to a contravention of the applicant's rights under s 18(2) of the Constitution. A fair hearing would be denied him.

The contention, which must be assessed against the factual situation and not hypothetically, raises the question of whether there is a real or substantial risk of BLACKIE J, or any judge of the High Court (other than ADAM J, for there was

never any prospect of him being chosen as the adjudicator) being unable to disabuse his or her mind of extraneous and prejudicial information or attitudes which they are not entitled to consider in reaching a decision.

I am satisfied that only the remotest possibility exists of a judge, imbued with basic impartiality, legal training and the capacity for objective and unemotional thought, being consciously or subconsciously influenced by extraneous matter. I would repeat what was said in *Banana v Attorney-General supra* at 321 D-E (ZLR) and 36I-37A (BCLR):

> "To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs merely to be stated to convince of its unsoundness."

I regard the decision to assign the matter to BLACKIE J as entirely proper. He was not the author of the judgment criticised by the applicant. He had not been involved at any stage of the proceedings brought against the three accused. It was not his personal dignity, respect and professional ability that had been injured. To suggest, therefore, that BLACKIE J (or any other judge for that matter) is incapable of dealing with the proceedings in an impartial and objective manner since the criticism levelled directly at a colleague affected the authority of the High Court in the administration of justice, is wholly unconvincing.

(B). WHETHER THE CITATION ISSUED ON 28 SEPTEMBER 1999, WHICH CALLED UPON THE APPLICANT TO SHOW CAUSE WHY AN ORDER SHOULD NOT BE MADE AGAINST HIM, VIOLATES

THE PRESUMPTION OF INNOCENCE ON THE PART OF AN ACCUSED PERSON IN CONTRAVENTION OF SECTION 18(3)(a) OF THE CONSTITUTION

The citation instructed the applicant to appear before the High Court on a certain day at a specified hour to indicate why he should not be subject to an order of contempt following upon the statement he caused to be published, or was published, in *The Herald*. A copy of the publication was annexed. Prior to the hearing the citation was amplified, by referring specifically to utterances in the publication which were relied upon. It informed the applicant, with sufficient clarity, of the contempt he had allegedly committed *ex facie curiae*. Procedure by way of citation is not uncommon. See *R v Keyser* 1951 (1) SA 512 (A) at 518 F-H; *S v Mabaso* 1990 (1) SACR 675 (T) at 678 a-c.

The submission advanced by the applicant's counsel was this: The adoption of the summary procedure, which called upon the applicant to show cause "why a contempt order should not be made", violated his constitutional right to be presumed innocent.

The same argument has been tried in other jurisdictions without success.

In *R v Cohn supra* GOODMAN JA said at 157:

> "It is not a matter of the presumption of innocence being made inapplicable in contempt proceedings. In a case such as this it is simply a matter that the facts known to the presiding judge which took place in his court and with respect to which there can be no doubt and no better proof adduced are such as

> to amount to *prima facie* proof unless the alleged contemnor calls evidence or gives evidence which affords to him a proper defence. In that regard he is in no different position than a person accused of an offence under the *Criminal Code* where the prosecution has established a *prima facie* case."

And further at 158:

> "At its highest, the application of a rule *nisi* by the presiding judge merely shifts the burden of adducing evidence as distinct from shifting the burden of persuasion to the accused. This court has already so held in *R v Pereira* (released September 22, 1983, as yet unreported), where MARTIN JA, speaking for the court, said:
>
> > 'Summary proceedings for contempt in the face of the Court do not infringe the right of an accused to be tried before an impartial tribunal and his right to be presumed innocent. The burden on the accused is an evidential one only and if at the end of the proceedings there exists a reasonable doubt as to guilt, he is entitled to be acquitted'."

These remarks apply *a fortiori* to summary proceedings for contempt *ex facie curiae*.

South African decisions share this view. Accepting, as I think one must, that for all practical purposes, the form of the citation is no different from that of a rule *nisi*, the words of CORBETT JA (as he then was) in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 676A as to its effect upon the *onus* of proof are apposite:

> "The objection that the issue of such a rule *nisi* places an unwarranted *onus* on the respondent is, in my view, unfounded. All that the rule does is to require the respondent to appear and to oppose should he wish to do so. The overall *onus* of establishing his case remains with the applicant and the rule does not cast an *onus* upon the respondent which he would not otherwise bear."

More directly in point are *S v Lavhengwa* 1996 (2) SACR 453 (W) and *Uncedo Taxi Service Association v Maninjwa & Ors supra*. The first case dealt with contempt of court committed *in facie curiae* under the summary procedure provided

in s 108(1) of the Magistrate's Court Act. The issue debated was whether the accused's constitutional right to be presumed innocent had been infringed. After a close examination CLAASSEN J found that it had not. He reasoned at 486 f-j:

> "I am also of the view that the summary contempt proceedings envisaged in s 108(1) do not offend the presumption of innocence in s 25(3)(c) of our Constitution. Firstly, this is so because the summary proceedings do not create a duty to prove a defence or excuse. Even if it had that effect, that in itself would not be relevant, for the reasons stated in *R v Whyte* ((1988) 51 DLR (4th) (SCC)). Secondly, the procedure triggered by s 108(1) does not mean that the accused is liable to be convicted despite the existence of a reasonable doubt. What is important is whether the summary procedure maintains the accused's right to be convicted only upon proof that he contravenes s 108(1) *beyond a reasonable doubt*. It is manifestly so that when these summary proceedings are implemented, the magistrate, after hearing the accused, is obliged to convict only if he has been satisfied beyond reasonable doubt that a contravention of s 108(1) is proved. The *onus* remains with 'the prosecution' to prove this fact".

In the second case PICKERING J held that the summary procedure of obtaining, by way of notice of motion, a rule *nisi* calling upon the respondents to show cause why they should not be committed to prison for contempt committed *ex facie curiae*, did not violate the fundamental right of the respondents to be presumed innocent. The learned judge supported his decision by reference to *R v Cohn supra* and *S v Lavhengwa supra* (see at 690 C-F). He went on to find, after an exhaustive review of the authorities, that the civil standard of proof was inapplicable; that as contempt of court is an offence of a criminal character, proof of its commission beyond reasonable doubt was required (see at 692C-693B).

I respectfully agree with these decisions, and would underline that at the moment of being cited for contempt, the applicant was presumed to be innocent. It follows that no valid complaint of prejudice lies against the procedure adopted in bringing the applicant before the High Court.

VI. DISPOSAL

In the result, save then for the first question referred (which is dealt with in section V above), the remaining questions are answered in the negative. The proceedings therefore remain alive. The hearing is to be resumed before BLACKIE J.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Scanlen & Holderness, applicant's legal practitioners