REPORTABLE (23)

Judgment No. S.C. 36/2000
Civil Application No. 156/99

(1) MARK GOVA CHAVUNDUKA (2) RAYMOND MORGAN CHOTO

v (1) MINISTER OF HOME AFFAIRS (2) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA &
SANDURA JA
HARARE, MARCH 20 & MAY 22, 2000

A P de Bourbon SC, for the applicants

B Patel, with him *F Chatukuta*, for the respondents

GUBBAY CJ:

I. INTRODUCTION

On 10 January 1999 *The Standard*, a weekly newspaper printed in Harare, published its lead article entitled "Senior Army Officers Arrested". It concerned a coup attempt in which twenty-three members of the Zimbabwe National Army were alleged to have been arrested. Mismanagement of the economy and involvement in the war in the Democratic Republic of the Congo were given as reasons for the failed uprising. The article also noted general dissatisfaction within the Army over the war, claiming morale was low, and that in defiance of orders some soldiers had refused to participate in the Congo conflict.

Two days later the first applicant, the editor of *The Standard*, was arrested. On 19 January 1999 the second applicant, the newspaper's most senior reporter and the author of the article, surrendered himself to the police as his apprehension was being sought.

The two applicants were duly remanded in the magistrate's court on a charge of contravening s 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*] ("the Act"), it being alleged that in the issue of the newspaper in question they had published a false statement likely to cause fear, alarm or despondency among the public or a section of the public. Presently, the applicants remain on bail pending trial.

On 2 July 1999 the applicants applied to this Court in terms of s 24(1) of the Constitution of Zimbabwe for an order declaring s 50(2)(a) of the Act to be in contravention of ss 20(1) and 18(2) of the Constitution – which guarantee freedom of expression and the right to a fair trial – and, therefore, of no force and effect. The first respondent was cited as the Minister responsible for the administration of the Act and the second respondent, who is the Attorney-General, as required by s 24(6) of the Constitution.

At the inception of these proceedings the Court entertained some doubt as to whether it was proper for the applicants to seek this particular form of redress before it had been determined at their criminal trial whether –

(i) the State had proved (a), the falsity of the article in question, and (b), the likelihood of the publication causing fear, alarm or despondency among the public or a section thereof;

(ii) the applicants had failed to satisfy the trial court that before publishing the article they had taken reasonable measures to verify its accuracy.

Having been referred by counsel to the decisions in *In re Mlambo* 1991 (2) ZLR 339 (S), 1992 (4) SA 144 (25); *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S); and *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S), 1995 (2) BCLR 125 (ZS), the Court was persuaded that the application before it was indeed proper.

In any event, as the constitutionality of s 50(2)(a) is a matter of great public importance, with significant implications for the freedom of the press and the freedom of expression generally, it was clearly not appropriate for the Court to have recourse to the proviso to s 24(4) of the Constitution and decline to exercise its powers on the ground that the defences available under s 50(2) should first be exhausted and adjudicated upon. In the clear words of DICKSON CJ in *Regina v Big M Drug Mart* (1985) 13 CRR 64 (Can. SC) at 79-80;

> "Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such 'public interest litigation' it would have had to fulfil the status requirements laid down by this Court …, but that was not the reason for its appearance in Court.
>
> Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid."

II. THE RELEVANT ENACTMENTS

Section 50 of the Act provides:

"(1) In this section –

'statement' includes any writing, printing, picture, painting, drawing or other similar representation.

(2) Any person who makes, publishes or reproduces any false statement, rumour or report which –

(a) is likely to cause fear, alarm or despondency among the public or any section of the public; or

(b) is likely to disturb the public peace;

shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.

(3) …".

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

"(1) 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."

Subsections 18 (1) and (2) of the Constitution stipulate that:

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

(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

III. THE ORIGIN, HISTORY AND SCOPE OF SECTION 50(2)(a) OF THE ACT

The type of offence created by s 50(2)(a) is generally known as the false news offence and its provisions are referred to as false news provisions.

In 1275 the Statute of Westminster introduced the offence *De Scandalis Magnatum* or *Scandalum Magnatum*. It recited "that from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm". The offence was enforced by the King's Council, and later by the Court of Star Chamber. In the seventeenth century the common law courts took over its enforcement. The prevention of false statements, which in a society dominated by extremely powerful landowners could threaten the security of the state, was its primary objective. Yet it proved to be an ineffective measure and at the time of its repeal in 1887 had long been obsolete. Nor did it survive in the United States of America. See the historical survey in *R v Keegstra* (1991) 3 CRR (2d) 193 (Can. SC) at 209-210.

The precursor of s 50(2) in this country was s 10 of the Public Order Act 31 of 1955. It read:

> "Any person who publishes or reproduces any statement, rumour or report which is calculated to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement, rumour or report is false, shall be guilty of an offence and liable to imprisonment for a period not exceeding one year."

In the Legislative Assembly of Southern Rhodesia s 10 of the Bill was subject to fierce criticism as being an objectionable fetter upon the freedom of expression, and especially of the press. It was, however, justified by the Government of the day on the basis that it would provide a safeguard against the attempts of irresponsible journalists and rumour-mongers "to create chaos out of order"; no instance of any such occurrence was mentioned – only a rumour circulating in the then Northern Rhodesia that cigarettes had been poisoned.

On 12 January 1961 the Public Order Act was repealed and replaced by the present Act. The scope of s 43, which was the counterpart to the old s 10, was extended. It substituted the word "likely" for "calculated" and placed a burden on the accused person to establish that reasonable measures had been taken to verify the accuracy of the false statement.

The extant s 50 is little different from s 43, except that it separates the provision into subsections. The substantive elements of the offence have not changed. Insofar as subs (2)(a) is concerned, the *onus* is on the State to prove:

(i) the falsity of the statement, rumour or report in question;

(ii) its publication to one or more persons;

(iii) the likelihood of the publication causing fear, alarm or despondency.

In assessing the likely consequences of the publication it is necessary to consider the actual circumstances and the actual persons concerned, rather than the hypothetical reasonable man. It must be shown that the publication was not merely

theoretically but in practical effect likely to cause fear, alarm or despondency among the public. The accused person may raise as a defence that the circumstances giving rise to the likelihood were unknown to him and could not reasonably have been anticipated. See *R v Brind* 1966 RLR 565 (A) at 577 D-E, 578 A-B and 579 E-G, 1967 (1) SA 616 (ZAD) at 625D, 625 *in fine* – 626A, and 627 B-C.

IV. IS A PUBLICATION SUCH AS THAT AT ISSUE, EXPRESSION PROTECTED BY SECTION 20(1) OF THE CONSTITUTION? IF SO, IS THE PURPOSE OR EFFECT OF SECTION 50(2)(a) OF THE ACT TO RESTRICT SUCH EXPRESSION?

I did not understand counsel for the respondents to dispute that the answer to each question should be in the affirmative.

This Court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that of *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 235 I-J. Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See, to the same effect, *Thomson Newspapers Co v Canada* (1998) 51 CRR (2d) 189 (Can. SC) at 237.

Plainly embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered JUSTICE HOLMES so wisely observed in *United States v Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for the thought of that we hate". 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. See *Libman v Quebec (Attorney General)* (1997) 46 CRR (2d) 234 (Can. SC) at 250; *R v Lucas* (1998) 50 CRR (2d) 69 (Can. SC) at 82.

Sixty years later in *R v Zundel* (1992) 10 CRR (2d) 193 (Can. SC) MADAM JUSTICE McLACHLIN (now CHIEF JUSTICE) voiced much the same sentiment as HOLMES J. The matter under consideration involved the publication by the appellant, a Holocaust denier, of a booklet entitled "Did six million really die?", which previously had been published by others in the United States and England. The booklet reviewed certain publications in a critical fashion and suggested, *inter alia*, that it had not been established that six million Jews were killed before and during World War II; and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

At the time it was an offence under s 181 of the Canadian Criminal Code for a person to wilfully publish a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest. The learned JUDGE, writing for the majority, in a valuable and forward-looking judgment, stated at 206:

> "(The) guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression."

And continued at 209:

> "Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criteria of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by s 2(*b*) hitherto adhered to by this court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech."

See also the earlier remarks of DICKSON CJ in *R v Keegstra supra* at 241-242; *Hector v Attorney General of Antigua and Barbuda & Ors* [1990] 2 All ER 103 (PC) at 106 c-e and g; *Rangarajan v Jagjivan Ram & Ors* [1990] LRC (Const) 412 (Ind. SC) at 426 a-b; *Kauesa v Minister of Home Affairs & Ors* 1995 (11) BLCR 1540 (NmS) at 1553I-1554D; *Reynolds v Times Newspapers Ltd & Anor* (2000) 7 BHRC 289 (HL) at 294 f-g.

In the majority judgment of the European Court of Human Rights in *Handyside v The United Kingdom* (1979-80) 1 EHRR 737 at 754 (para 49) it was said that freedom of expression constitutes one of the essential foundations of a democratic society and it 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, S D Smith *Skepticism, Tolerance and Truth in the Theory of Free Expression* (1987) 60 So. Cal. L. Rev. 649 at 712, where the author argues that even patently false statements communicate particular truths and have a place in the marketplace of ideas because they help the marketplace to reject false ideas by revealing them for what they are.

Convinced as I am that the publication in this matter is protected by s 20(1) of the Constitution, I turn to consider whether the purpose or effect of s 50(2)(a) of the Act is to restrict this form of expression.

It is not open to doubt that both the State's purpose in, and the effect of, s 50(2)(a) is to restrict expressive activity. Both the facial purpose of the legislative technique and the particular consequence of the proscribed activity offend. The reality of being liable to criminal conviction and imprisonment for a period not exceeding seven years results very definitely in a curtailment of free expression. All this was accepted to be so by counsel for the respondents.

V. IS THE LIMITATION WHICH SECTION 50(2)(a) OF THE ACT IMPOSES ON THE RIGHT OF FREE EXPRESSION SAVED BY SECTION 20(2)(a) OF THE CONSTITUTION?

Section 20(2)(a), in relevant part, reads:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –
>
> (a) in the interests of … public safety, public order …
>
> except so far as that provision … is shown not to be reasonably justifiable in a democratic society".

The underlined parts of the subsection give rise to three specific questions. They are -

(a) Is the limitation authorised by law?

The phrase "under the authority of any law" is worded differently from such equivalent phrases as "provided by law", "prescribed by law" or "in terms of law", used in other constitutional and human rights instruments. See, for instance, article 19(3) of the International Covenant on Civil and Political Rights, article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, s 36(1) of the Constitution of the Republic of South Africa and s 1 of the Canadian Charter of Rights and Freedoms. Yet the meaning of these phrases is substantially the same.

In *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245, the European Court of Human Rights was required to consider what was meant by the

expression "prescribed by law" in article 10(2) of the Convention on Human Rights. The majority of the court held at 271 (para 49):

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances."

It is crucial, therefore, that the law must be adequately accessible and formulated with sufficient precision to enable a person to regulate his conduct. He or she must know, with reasonable certainty, what the law is and what actions are in danger of breaching the law. See *Barthold v Germany* (1985) 7 EHRR 383 at 399 (para 47). It is the guidance of conduct, and not the absolute direction of conduct, which is the appropriate objective of legislation. A provision will be too vague if it fails to provide a foundation for legal debate and discussion. An inadequate demarcation of an area of risk affords neither notice to a person of conduct which is potentially criminal, nor an appropriate limitation upon the discretion of the authorities seeking to enforce the provision. It offers no basis for the court to define limits of conduct. See *R v Butler* (1992) 8 CRR (2d) 1 (Can. SC) at 28-29; *R v Nova Scotia Pharmaceutical Society* (1992) 10 CRR (2d) 34 (Can. SC) at 58-59.

Expectedly, it was the submission of counsel for the applicants that when dealing with the permissible limitation upon constitutionally protected rights, a court must ensure that if human conduct is to be subjected to the authority of any

criminal law, the terms of such law must not be vague; for otherwise there will be a denial of due process. In this context useful reference may be made to three opinions of the United States Supreme Court –

In *Connolly v General Construction Co* 269 US 385 (1925) at 391 it was pointed out that:

> "… a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (emphasis added).

Then, in *Cline v Frank Dairy Co* 274 US 445 (1927) at 465 the first essential of due process of law was identified as being that:

> "… it will not do to hold an average man to the peril of an indictment for the unwise exercise of his … knowledge involving so many factors of varying effect that neither the person to decide in advance, nor the jury to try him after the fact, can safely and certainly judge the result."

Finally, in *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162 it was said:

> "This Ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute' … and because it encourages arbitrary and erratic arrests and convictions … . Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed of what the State commands or forbids'. *Langetta v New Jersey* 306 US 451 at 453."

More particularly, it has been emphasised that even stricter standards of permissible statutory vagueness must be applied where freedom of expression is at issue; for at jeopardy are not just the rights of those who may wish to communicate and impart ideas and information but also those who may wish to receive them. See

Smith v California 361 US 147 (1959) at 151; *Perera v Attorney General & Ors* [1992] 1 Sri. LR 199 at 215 and 228 (Sri Lanka SC).

Does s 50(2)(a) of the Act overcome this threshold test? It is obvious that the provision does not just criminalise false statements; nor false statements which actually cause fear, alarm or despondency. It criminalises false statements which are likely to cause fear, alarm or despondency. There is no requirement of proof of any consequences – of damage to the State or impact upon the public. What the lawmaker has provided for is a speculative offence. An offence has been created out of a conjectural likelihood of fear, alarm or despondency which may arise out of the publication of any statement, rumour or report, even to a single person. It matters not that no fear, alarm or despondency actually eventuates.

Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result, it exerts an unacceptable "chilling effect" on freedom of expression, since people will tend to steer clear of the potential zone of application to avoid censure, and liability to serve a maximum period of seven years' imprisonment.

The expression "fear, alarm or despondency" is over-broad. Almost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or in a single person, one or other of these subjective emotions. A report

of a bus accident which mistakenly informs that fifty instead of forty-nine passengers were killed, might be considered to fall foul of s 50(2)(a).

The use of the word "false" is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability; negligence is criminalised. Failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate.

What is overlooked in the criminalisation of false statements is that language is used in a variety of complex and subtle ways. It is simply not possible to divide statements clearly into categories of fact and opinion. Rhetorical devices, figures of speech, comedy, metaphor and sarcasm are all examples of superficially false statements which either may be substantially correct or be expressions of opinion. As was so graphically put in *Letter Carriers v Austin* 418 US 264 (1974) at 284:

> "… to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies – like 'unfair' or fascist – is not to falsify facts … . Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expressions of such an opinion, even in the most perjorative terms, is protected under federal labour law. Here, too, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas."

Often the line between fact and opinion is blurred. There is a danger that the accepted view becomes confused with the right or correct view.

In *R v Zundel supra* this was said at 209:

> "A second problem arises in determining whether the particular meaning assigned to the statement is true or false. This may be easy in many cases; it may even be easy in this case. But in others, particularly where complex social and historical facts are involved, it may prove exceedingly difficult.
>
> … But the difficulties posed by this demand (to determine the truth of a statement) are arguably much less daunting in defamation than under s 181 of the *Criminal Code*. At issue in defamation is a statement made about a specific living individual. Direct evidence is usually available as to its truth or falsity. Complex social and historical facts are not at stake. And most important, the consequences of failure to prove truth are civil damages, not the rigorous sanction of criminal conviction and imprisonment."

Counsel for the applicants put his concluding submission on this aspect of the case thus:

> "Several key elements of a section 50 offence are unacceptably vague; cumulatively this is highly problematical. Section 50 is potentially applicable to a very wide range of published work and effectively allocates a wide discretion to authorities in deciding when and where to prosecute. It is also difficult for citizens to know with any degree of certainty whether they are conforming to its requirements. Were this provision to be actively applied, it would exert a significant chilling effect on freedom of expression."

I think these remarks represent a fair and realistic summation of the harsh impact of s 50(2)(a). I regard the provision as one uncertain in the generality of the discretion conferred upon the Attorney-General as to whether to prosecute or not (see s 63(1) of the Act, and the statement of the Ontario High Court in *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 31 OR (2d) 583 at 592); and in its use of language, insufficiently precise to demonstrate the area of risk and provide guidance of conduct to persons of average intelligence. On both

scores, taken cumulatively, it fails to meet the requirement of being "under the authority of any law".

This conclusion effectively disposes of the application against the respondents. Nonetheless in the event that it may be considered that s 50(2)(a) satisfies the test referred to and that any imprecision is more properly addressed under the "minimal impairment" inquiry, I shall proceed to an examination of the remaining questions which arise under s 20(2) of the Constitution.

(b) Is section 50(2)(a) a provision enacted in the interests of public safety or public order?

It is clear that limitations on freedom of expression which do not serve one of the legitimate six aims or exceptions listed in s 20(2) of the Constitution are not valid. See *The Sunday Times* case *supra* at 269 (para 45). *In casu* only public safety and public order might be posited as legitimate aims of false news provisions. However, it is not sufficient that the limitation on freedom of expression effects merely incidentally one of the specified legitimate aims. It must be primarily directed at that aim – an overriding objective, to use the language of *R v Oakes* (1986) 19 CRR 308 (Can. SC); and must correspond to a "compelling governmental interest". The Supreme Court of India similarly pronounced in *Thappar v State of Madras* [1950] SCR 594 (SC) at 603 that:

> "So long as the possibility (of a limitation) being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

The primary objective of the Legislature in enacting s 10 of the Public Order Act, 1955 and in continuing its existence, first in s 43 and then in s 50(2)(a) of the current Act, was to ensure that public safety and, especially, public order were not jeopardised by false news wilfully or negligently spread by irresponsible journalists and rumour-mongers.

In *Hector v Attorney General of Antigua and Barbuda supra* an editor of a newspaper had been charged under s 33B of the Public Order Act 1972, which prohibited the printing or distribution of any false statement "likely to cause fear or alarm in or to the public, or to disturb the public peace or to undermine public confidence in the conduct of public affairs". The Privy Council, through LORD BRIDGE OF HARWICH, was of the opinion that if a false statement likely to undermine public confidence in the conduct of public affairs (which was the allegation particularised in the charge) is also of such a character that it is likely to disturb public order, an offence under s 33B could be charged on the ground that it was likely to cause fear or alarm in or to the public or that it was likely to disturb public peace (see at 107e).

This dictum is supportive of the view I hold that the purveyance of false news which is likely to cause fear, alarm or despondency among the public, might also be of a nature that its prohibition is necessary in the interests of public safety or public order. In such a situation s 50(2)(a), assuming non-vagueness of terminology, would offer an appropriate vehicle with the legitimate aim of ensuring public safety or public order. Nonetheless, a charge could only be laid in terms of it if the stipulated limitation was reasonably justifiable in a democratic society.

(c) Is the limitation reasonably justifiable in a democratic society?

In *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) at 13 D-F, 1995 (9) BCLR 1221 (ZS) at 1231 H-J; and *Retrofit (Pvt) Ltd v PTC & 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 legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to 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 *R v Zundel supra*, having found that s 181 violated the right of free expression guaranteed by s 2(b) of the Charter, the court proceeded to consider whether the violation was saved as a reasonable limit under s 1 as being "demonstrably justified in a free and democratic society". Section 181 provided:

> "Every one who unlawfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

The majority held that the infringement of such right was not saved. McLACHLIN J summarised the reasons for so concluding at 222-223:

> "Section 181 catches not only deliberate falsehoods which promote hatred, but sanctions all false assertions which the prosecutor believes 'likely to cause injury or mischief to a public interest', regardless of whether they promote the values underlying s 2(*b*). At the same time, s 181's objective, insofar as an objective can be ascribed to the section, ranks much lower in importance than the legislative goal at stake in *Keegstra*. When the objective of s 181 is balanced against its invasive reach, there can in my opinion be only one conclusion: the limitation of freedom of expression is disproportionate to the objective envisaged."

I pass then to the application of the three criteria. First, what is the State's objective in prohibiting false news?

In determining the objective of a legislative measure the court must have regard to the intention of Parliament when the provision was enacted or amended. See *R v Zundel supra* at 211. Clearly, at both stages, in 1955 and in 1961 the primary objective was to preempt and counteract threats to the internal security of the country by the publication of statements, rumours or reports considered by the government of the day to be false and capable of instilling in the people, or some of them, feelings of fear, alarm or despondency as to the political, economic or social conditions in the country.

Since the advent of independence the need for recourse to s 50(2)(a) of the Act has not been felt. There has been no prosecution. If the trial of the applicants is to proceed it will be the first in twenty years. This, in itself, would seem to establish that there is no longer a primary objective, directed to a "substantial

concern which justifies restricting the otherwise full exercise of the freedom of expression", per SOPINKA J in *R v Butler supra* at 33.

Nor is the retention of s 50(2)(a) necessary to fulfil any international obligation undertaken by the State.

In such circumstances, can it be said that the applicants have not discharged the burden of establishing that the objective of this piece of legislation is not of "pressing and substantial concern" in a democratic society; and is of insufficient importance to justify overriding the constitutional guarantee of freedom of expression? I think not.

Even though s 50(2)(a) is capable of serving a legitimate aim - equally with s 181 of the Canadian Criminal Code - no objective of pressing and substantial concern has been identified in support of its survival. Other provisions of the Law and Order (Maintenance) Act remain in force which restrict free expression for reasons of public safety or public order. The Act allows the President to prohibit publications relating to a variety of forms (s 18). Statements threatening or encouraging violence (s 30), inciting strikes in essential services (s 32), undermining the authority of police officers (s 39), exciting disaffection against the President in person or the Government or the Constitution (s 44), and undermining the authority of the President whether in person or in respect of his office (s 46), are condemned as offences. In addition, under common law and statute, treason, acts of terrorism and incitement to crime, are prohibited. There is as well the common law offence of

criminal defamation which has been charged in this country, albeit somewhat rarely. See *S v Modus Publications (Pvt) Ltd & Anor* 1996 (2) ZLR 553 (S).

All this apart, as the European Court of Human Rights was at pains to indicate in *Castells v Spain* (1992) 14 EHRR 445 at 477 (para 46):

> "(The) dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."

Political action is the other means available – the refutation of the false allegation by the provision of appropriate evidence to the contrary – and not litigation. See *Die Spoorbond & Anor v South African Railways* 1946 AD 999 at 1012-1013.

With regard to the second inquiry, the fact, before mentioned, that the net cast by s 50(2)(a) has not been employed by the State since this country attained majority rule in 1980, strongly suggests that it is not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and so to the securement of public safety or public order. The anticipated danger is remote and conjectural. Absent is a proximate and direct nexus with the prohibited expression, like the equivalent of "a spark in a powder keg" (per SHETTY J in *Rangarajan v Jagjivan Ram & Ors supra* at 427e). And there are other means of achieving the impugned provision's aim far less arbitrary, unfair and invasive to free expression.

It is of much significance that many other democratic countries either do not have, or do not apply, false news provisions. In *R v Zundel supra* at 215 the observation was made, albeit not entirely accurately, that:

> "the Crown could point to no other free and democratic country which finds it necessary to have a law such as s 181 on its criminal laws."

False news provisions are indeed non-existent in many jurisdictions, including Australia, France, the Netherlands, the United Kingdom, the United States and, now, Canada. (They have been upheld, however, in Malaysia (see *Public Prosecutor v Pung Chew Choon* [1994] 2 LRC 236 – but the constitutional test did not include a requirement of reasonable justification – and in St. Vincent and the Grenadines (see *Richards v Attorney General & Anor* [1991] LRC (Const) 311)).

In other jurisdictions they are very limited in scope. Section 171G of the Indian Penal Code, for example, makes it an offence to knowingly publish false news in relation to the character or conduct of a candidate with the intent of affecting the result of an election. Section 226(b) of the Danish Criminal Code prohibits false rumours, but only where these incite to racial hatred, as a species of hate speech. In Germany, there are no false news provisions relating directly to public order. Section 109d of the Criminal Code prohibits the wilful spreading of false statements of fact likely to disturb the functioning of the army; while s 100a prohibits spreading false facts that endanger relations with other states or the security of the country. The ambit of each is narrow. In addition, any such prohibitions are subject to the constitutional guarantee of freedom of opinion and the specific principles flowing therefrom. Article 656 of the Italian Criminal Code prohibits the publication of false news which disturbs public order. This provision has been upheld on three occasions

by the Constitutional Court. However, the extent of its application – far more finely tuned to a legitimate aim than is s 50(2) – has been progressively reduced. The last successful prosecution appears to have been in 1968. The Supreme Criminal Court held in 1955 that it is not applicable to cases of mistake and, in 1974, that the threshold for establishing a threat to public order is high. See the detailed survey of legislative responses in other jurisdiction in *R v Zundel supra* at 246-248.

Unlike the situation in *R v Butler supra* where the court relied on the fact that pornography legislation may be found in most free and democratic societies to justify, as proportionate, the restriction it imposes on freedom of expression, the opposite is true with s 50(2)(a). Just as with s 181 of the Canadian Criminal Code, the purpose behind s 50(2)(a) – which has the effect of overriding the most precious of all the protected freedoms, resting as it does at the very core of a democratic society – fails for want of proportionality between its potential reach on the one hand and the "evil" to which it is claimed to be directed on the other.

Even if a rational link is assumed, one then must ask whether the breadth of the provision goes further than necessary to achieve that aim. In my view, it does.

Section 50(2)(a) captures not only the publication or reproduction of any statement, rumour or report made with actual knowledge of its falsity which causes fear, alarm or despondency. It sanctions the prosecution of all false publications or reproductions made negligently which the Attorney-General regards as

not having caused, but only likely to cause, fear, alarm or despondency among the public or even in a single member of the public.

The breadth of the expression "fear, alarm or despondency" in s 50(2)(a) is more far-reaching than that of "injury or mischief to a public interest" in the condemned s 181. Accordingly the remarks of McLACHLIN J in *R v Zundel supra* at 219 strike me as particularly relevant to the situation that pertains under s 50(2)(a):

> "Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its danger, however, lies in the fact that by its broad reach it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest, however successive prosecutors and courts may wish to define these terms. The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying 'the rainforest of British Columbia is being destroyed' because she fears criminal prosecution for spreading 'false news' in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood 'is destroying the health of the children living nearby' for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that this statement is a deliberate assertion of a false fact? Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?".

Two other passages in Her Ladyship's judgment, at 220 and 221, are also apposite to an analysis of s 50(2)(a), and commend repetition:

> "Not only is s 181 broad in contextual reach; it is particularly invasive because it chooses the most draconian of sanctions to effect its ends –

> prosecution for an indictable offence under the criminal law. Our law is premised on the view that only serious misconduct deserves criminal sanction. Lesser wrongs are left to summary conviction and the civil law. Lies, for the most part, have historically been left to the civil law of libel and slander; it has been the law of tort or delict that has assumed the main task of preserving harmony and justice between individuals and groups where words are concerned. This is not to say that words cannot properly be constrained by the force of the criminal law. But the harm addressed must be clear and pressing and the crime sufficiently circumscribed so as not to inhibit unduly expression which does not require that the ultimate sanction of the criminal law be brought to bear …".

And later:

> "(The) broad range of expression caught by s 181 – extending to virtually all controversial statements of apparent fact which might be argued to be false and likely to do some mischief to some public interest – combined with the serious consequences of criminality and imprisonment, makes it impossible to say that s 181 is appropriately measured and restrained having regard to the evil addressed – that it effects a minimal impairment … ."

I respectfully adopt the compelling force of this reasoning.

It only suffices to state, in sum, that the expansive sweep of s 50(2)(a) gives rise to the inevitable consequence of failing to confine and impair the exercise by the applicants of their right to freedom of expression as little as possible.

VI. CONCLUSION AND DISPOSITION

It necessarily follows that, in my judgment, s 50(2)(a) of the Act infringes the right of freedom of expression protected and guaranteed by subs (1) of s 20 of the Constitution and that such infringement is not saved by subs (2) thereof. I do not therefore find it necessary to deal with the argument under s 18(2) of the Constitution.

In the result I would order as follows:

1. It is declared that section 50(2)(a) of the Law and Order (Maintenance) Act [*Chapter 11:07*] is in contravention of section 20(1) of the Constitution.

2. The costs of the application are to be paid by the first respondent.

McNALLY JA: I agree with the learned CHIEF JUSTICE, but would add some brief observations. The wealth of learning which supports the conclusion reached by the His Lordship contains a relatively simple message, which is this: The section is too widely expressed, too unclear as to its limitations, and too intimidating (because no-one can be sure whether what he says or writes will or will not attract prosecution and imprisonment). That is why it cannot stand.

We are not saying that freedom of expression is limitless. We are not saying that people may publish anything they wish, however pornographic, however untruthfully subversive, however race-hatred inspiring.

It is not the Court's function to re-draft legislation. That is the function of Parliament and the State's draftsmen and women. All we are saying is that the section is unacceptable as it stands.

These remarks are necessary because, after our judgment in *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S), 1995 (2) BCLR 125 (ZS), about the control of demonstrations and street processions in terms of the same Act, it was said, by persons who do not seem to understand these things, that the Supreme Court had made the work of the police impossible, because we had tied their hands.

That is simply untrue. We struck down a section which was too wide and thus too oppressive. It was for the Government to rewrite the section in a more acceptable form. We said so explicitly. We went so far as to suggest that s 12 of the English Public Order Act, 1986 might provide a useful starting point. But nothing has been done. It was simpler to say "the courts have tied our hands. If there are disturbances, blame the courts, not us".

It is the urgent duty of the relevant Ministry to re-write the Act in proper form and to steer it through the necessary constitutional processes.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners