

IN THE SUPREME COURT OF UGANDA
HOLDEN AT MENGO

**CORAM: Odoki, CJ, Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba, JJ.S.C,
Byamugisha, Ag. J.S.C.**

CONSTITUTIONAL APPEAL No. 2 of 2002

Between

**1. CHARLES ONYANGO OBBO
2. ANDREW MUJUNI MWENDA:::::::::::APPELLANTS**

And

ATTORNEY GENERAL:::::::::::RESPONDENT

(Appeal from decision of the Constitutional Court (Manyindo, DCJ, Kato, Berko and Engwau, JJ.A., Twinomujuni, JA., dissenting), in Constitutional Petition No. 15/97 dated 21st July 2000).

JUDGMENT OF MULENGA, J.S.C.

This appeal is against a decision of the Constitutional Court in a petition seeking to invoke constitutional protection for the freedom of the press. The Constitution of the Republic of Uganda 1995, "the Constitution", in Article 29, guarantees protection of the individual right of freedom of expression, which includes freedom of the press. The central issue in this appeal is whether section 50 of the Penal Code Act, "section 50", which makes publication of false news a criminal offence, contravenes that protection.

Charles Onyango Obbo and Andrew Mujuni Mwenda, the appellants in this appeal, are practising journalists. At all the material times, they were, respectively, an Editor and a Senior Reporter of the Monitor newspaper. On 24 October 1997, the two were jointly charged in the magistrates' court on two counts of the criminal offence of "Publication of False News" contrary to section 50. The charges arose out of a story that the appellants extracted from a foreign paper called The Indian Ocean Newsletter, and published in the Sunday Monitor of 21st September 1997, under the headline: ***"Kabila paid Uganda in Gold, says report"***. The particulars of offence in one count recited the following excerpt from the story as the alleged false news:

"President Laurent Kabila of the newly named Democratic Republic of the Congo (formerly Zaire) has given a large consignment of gold to the Government of Uganda as payment for "services rendered" by the latter during the struggle against the former military dictator, the late Mobutu Sese Seko." The alleged false news recited in the other count was:

"The Commander of Uganda Revenue's (URA) Anti Smuggling Unit (ASU) Lt. Col. Andrew Lutaya, played a key role in the transfer of the gold consignment from the Democratic Republic of Congo to Uganda." On 24th November 1997, the appellants who believed that their prosecution was a violation of their several rights guaranteed by the Constitution, decided to seek legal relief through a joint petition to the Constitutional Court, under Article 137 of the Constitution, seeking, *inter alia*, declarations - (a) that the action of the Director of Public Prosecutions (DPP) in prosecuting them under section 50, was inconsistent with the provisions of Articles 29 (1) (a) and (e), 40 (2) and 43 (2) (c) of the Constitution; and (b) that section 50 is inconsistent with the provisions of Articles 29 (1) (a) and (b), 40 (2) and 43 (2) (c) of the Constitution. The court postponed consideration of the petition pending conclusion of the criminal case in the magistrates' court. I will revert to that postponement later in this judgment. It suffices to say here, that the trial court acquitted the appellants of the criminal charges.

Subsequently, the Constitutional Court considered the petition and decided -

- (a) unanimously, that the DPP's action in prosecuting the appellants was not inconsistent with the Constitution; and
- (b) by majority of four to one, that section 50 is not inconsistent with Article 29 (1)(a) of the Constitution;

and accordingly, dismissed the petition. In their appeal to this Court, the appellants do not challenge the unanimous decision that the DPP's action was not inconsistent with the Constitution. They also do not pursue their original allegations that the prosecution and the law it was based on, infringed upon their rights to the freedoms of thought, conscience, belief, and association, and/or freedom to practice their profession, which rights are protected under Article 29(1) (b) and (e), and Article 40 (2) of the

Constitution. The appeal to this Court is solely against the majority decision that section 50 is not inconsistent with Article 29 (1) (a) of the Constitution. In substance, the three grounds of appeal are that, the learned Justices of Appeal erred -

1. in (failing to find) that section 50 is not demonstrably justifiable in a free and democratic society within the meaning of Article 43;
2. in holding that section 50 is part of the existing laws saved by Article 273; and
3. in not addressing their minds to the vagueness of section 50.

To my mind, the issues in grounds 2 and 3 are inseparable from the issue in ground 1, and so it is unnecessary to consider the grounds separately. I will explain briefly. The submission in support of ground 2, is on the premise that section 50 was "rooted" in the provisions of Article 17 (2) of "the 1967 Constitution", which provisions were not re-enacted in the current Constitution when the former was repealed. Counsel for the appellants argued that in absence of those provisions, section 50 ceased to have constitutional roots, and therefore, ceased to exist. That is not correct. Section 50 did not originate from the repealed constitution. Article 17 of the 1967 Constitution guaranteed the right to freedom of expression in clause (1), and in clause 2, it gave an omnibus

"cover of constitutionality" to any law derogating from that right, if the law was *reasonably required in the interests of...public safety, public order* ". It is arguable that section 50 enjoyed that "cover of constitutionality", as a law reasonably required in the interests of public safety and public order. However, neither that particular clause, nor the 1967 Constitution as a whole, was the source of its existence. Section 50 existed long before Uganda acquired a constitution entrenching a bill of rights. It has never been repealed, notwithstanding the loss of the "cover of constitutionality" in 1995. It remains a law that existed "immediately before the coming into force" of the Constitution, which under Article 273, like all other existing law, has to be construed, in a manner that brings it into conformity with the Constitution. Whether it can be so construed, to conform with Article 43 is the underlying question in ground 1.

The substance of ground 3 is criticism of the construction of section 50. The gist of the criticism is that the section is too imprecise for a penal legislation. I must say that much of the criticism is quite valid. Precision and clarity in the definition of a criminal offence is essential, if a person accused of the offence is to have a fair trial. This Court has held that to be the import of clause 12 of Article 28 of the Constitution. See **Attorney General vs. Silvatori Abuki** Constitutional Appeal No.1 of 1998 [SCD

(Const.) 1999/2000 p.245]. In their petition, however, the appellants did not allege that section 50 contravened the right to a fair hearing guaranteed under Article 28; nor did they seek a declaration to that effect. In their written submissions to the Constitutional Court, they did not canvass the point, and in this appeal, the thrust of their contention remained that section 50 was inconsistent with the freedom of expression, with emphasis on freedom of the press. In that context, the criticism in ground 3 as presented, would be irrelevant to the issue in this appeal. This appeal is not concerned with fairness or otherwise of the appellants' trial in the criminal court. I hasten to acknowledge, however, that in defining any derogation of a right guaranteed by the Constitution, precision and clarity are of the essence. To that extent, the content of section 50 is relevant in considering if it is within the parameters of permissible limitation. That aspect of the criticism in ground 3 is an integral part of ground 1.

Mr. Nangwala, learned lead counsel for the appellants, submitted that the source of the error in the court decision was the failure, on the part of the majority of the learned Justices of Appeal, to address the import of the provision in paragraph (c) of Article 43 (2). Under that provision, a limitation on the enjoyment of a constitutional right, on the ground of public interest, is valid only if it is "*acceptable and demonstrably justifiable in a free and democratic society*". Counsel observed that although in the majority judgment the Constitutional Court correctly found section 50 to be a limitation on the right of freedom of expression; it failed to consider whether the section was within the parameters of that provision. He submitted that section 50, as such limitation, is not acceptable and demonstrably justifiable in a free and democratic society. He criticised the learned Justices of Appeal for failure to consider, and take leaf from, judicial precedents on the subject from other jurisdictions, which were referred to the court. He contended that Uganda as a democratic society, must apply the universal standards of a democratic society; and that under those standards, it is not justifiable to criminalize publication of false news. Mr. Rezida, the learned second counsel for the appellants focused on what he called the vagueness of section 50, and highlighted its very wide applicability, which makes it difficult to determine its scope.

In response, Mr. Cheborion Barishaki, Commissioner for Civil Litigation, submitted that it was necessary to use criminal law for excluding from the range of free choice, those acts that are incompatible with maintenance of public peace and order. Section 50 is such necessary criminal law. It prohibits excesses in the exercise of the freedom of expression. It prohibits publication of statements, which are false and are likely to cause public fear or alarm or to disturb public peace. He submitted that

the prohibition was proportional to the danger it is intended to prevent. The learned Commissioner submitted that in determining if that prohibition is "*acceptable and demonstrably justified*" in the context of Article 43, this Court should apply a subjective interpretation, because it is local circumstances that dictate what is acceptable and justified. A law may be acceptable and justifiable in the circumstances of Uganda, while it is unacceptable and unjustifiable in circumstances of another country, even though both countries are democratic societies. He invited this Court to uphold the majority decision of the Constitutional Court.

In his judgment, with which the majority of the Constitutional Court concurred, Berko J.A. considered the merits of the appellants' petition under two broad heads. Under the first, he considered the complaint against the DPP's decision to prosecute the appellants. His conclusion on that complaint is not subject of this appeal. The second was the complaint that section 50 is inconsistent with the Constitution. I will review in some detail how he handled it. First he dealt with a couple of preliminary points, which he concluded by holding -

- that in order for section 50 to conform to Article 43(1), it has to be construed as if the offence is constituted when the *false statement ... is likely to prejudice the rights and freedoms of others or the public interest; and*
- that sub-section (2) of section 50, which requires the accused to prove that he tried to verify the truth of the statement, is in accord with criminal procedure and is not unconstitutional.

The learned Justice of Appeal then dealt with the principal issue in the following passage of his judgment: -

*"I do agree that article 29 (1) of the Constitution guarantees free speech and expression and also secures press freedom. These are fundamental rights. It can be said that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society. Therefore in my view, the functions of the law, and particularly criminal law, should (be to) exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person "who falsely shouts fire, fire, in a theatre and causing panic". In my opinion where there are no constraints on freedom of speech and expression, the difficulty would arise that one of the objects of upholding free expression - truth - would be defeated. It is therefore important to regulate or limit the extent to which this can happen. That is reason for the justification for enacting article 43 of the Constitution. A citizen is entitled to express himself freely except where the expression would **prejudice the***

fundamental or other human rights and freedoms of others or the public interest. I find that s.50 of the Penal Code is necessary to cater for such excesses. Clearly, the democratic interest cannot be seen to require citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. The section prohibits illegal and criminal conduct under the cover of freedom of speech and expression. I do not subscribe to the argument that the truth or falsehood of the article is not the issue. In my view the truth or falsehood of the article is one of the ingredients of the offence the state has to prove. It may well be that no adverse consequences to public interest resulted in the publication of this particular article. That was the reason why the state could not prove the charges against the petitioners. There is no guarantee that such an eventuality could not occur in future. That is the justification for having such laws in place. In my view s.50 of the Penal Code Act is not inconsistent with the Constitution. " (emphasis is added). There are a number of flaws in this passage. To start with, I will highlight two major flaws, which closely touch on the scope of the right to freedom of expression. The first is that the learned Justice of Appeal omitted to consider if section 50 was within the parameters of Article 43 (2) (c). He only focused on rationalising the need for limitation on the freedom of expression by law, and was content to hold that section 50 was a necessary legal limitation. However, the appellants' case in the Constitutional Court, as in this Court, was not that the freedom of expression is absolute. They acknowledge that the enjoyment of the freedom of expression is subject to Article 43, which provides for general limitation on the enjoyment of human rights and freedoms prescribed in the Constitution. Their contention is that section 50 is inconsistent with the Constitution because the limitation it imposes on the enjoyment of the right to freedom of expression, is beyond what is permitted under Article 43. There is no finding on that contention in the majority judgment. It is therefore imperative for this Court to consider the contention and make a finding on it.

Falsity and Freedom of expression

The second flaw is implicit in the observation that in absence of constraints on the freedom of expression, the objective of upholding truth would be defeated. This presupposes that to extend the constitutional protection of freedom of expression to false statements is incompatible with 'upholding truth'. In my view, there is no such incompatibility. Extending protection of the freedom of expression to false statements does not necessarily defeat the objective of upholding the truth, because while truth and falsity are mutually exclusive, the purposes for protecting both are not. I will return to that later in this judgment. I will first consider whether the constitutional provisions pertaining to the protection of the right to freedom of expression, and to the limitation of its enjoyment, lend any credence to the supposition that the protection does not extend to false expressions.

The Constitution, declares the right to freedom of expression in Article 29 thus -

"29. (1) Every person shall have the right to -

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(a) freedom of speech and expression, which shall include freedom of the press and other media;" That declaration does not stipulate or specify what a person is free to say or express. The Constitution, unlike its 1967 predecessor, does not provide a definition of the freedom of expression or of the press. Nor does it describe the scope of that freedom. Even the Press and Journalist Act (Cap. 105), which was enacted in 1995 "to ensure the freedom of the Press", does not define that freedom. Nevertheless, there is no dispute as to what that freedom encompasses. In the 1967 Constitution, and before that, in the Independence Constitution of 1962, the freedom of expression was defined as *"freedom to hold opinions and to receive and impart ideas and information without interference."*. I do not think that the omission to include that definition in the Constitution altered the meaning or character of the freedom as previously defined. The definition still holds good. It is also instructive to look at definitions of the same freedom in international instruments, to which Uganda is party. The African Charter on Human and Peoples' Rights simply states in Article 9 that -

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

However, in order *"to elaborate and expound on the nature, content and extent of the right provided for under Article 9"*, the African Commission on Human and Peoples' Rights in its 32nd Ordinary Session in October 2002, adopted the Declaration of Principles on Freedom of Expression in Africa, and recommended to the African States to guarantee the freedom thus -

"1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."

In the International Covenant on Civil and Political Rights, Article 10 provides -

"1. Everyone shall have the right to hold opinions without interference.

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

From the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the limitation under Article 43, a person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required where a person's views are opposed or objected to by society or any part thereof, as "false" or "wrong". I think, with due respect, to the learned Berko J.A., he misconstrued what was in issue when he said -

"the democratic interest cannot be seen to require (sic) citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. The section prohibits illegal and criminal conduct under the cover of freedom of speech and expression."

First, it is inaccurate to assert that section 50 prohibits "*illegal and criminal conduct*". Rather, the section criminalizes conduct that is otherwise legitimate exercise of the constitutionally protected right to freedom of expression. It is for that reason that the appellants came to court to challenge the section as inconsistent with the Constitution. Secondly, the issue is not whether under democracy citizens are required or permitted to make demonstrably untrue and alarming statements under any guise. A democratic society respects and promotes the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that benefit, a democratic society chooses to tolerate the exercise of the freedom even in respect of "*demonstrably untrue and alarming statements*", rather than to suppress it. I think the point is well articulated in the following excerpt from an article by Archibald Cox in Society Vol.24 p.8 No.1 Nov./Dec. 1986 -

"Some propositions seem true or false beyond rational debate. Some false and harmful political and religious doctrines gain wide public acceptance. Adolf Hitler's brutal theory of a "master race" is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough; no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what

is debatable, and both from what is false." (emphasis is added) There is support for this view in judicial precedents from diverse jurisdictions that uphold and enforce the right to freedom of expression. The Supreme Court of Canada upheld the view in **R vs. Zundel** (1992) 10 C.C.R. (2nd) 193. McLachlin J., as she then was, writing the majority judgment, had this to say -

"Tests of free expression frequently involve a contest between the (majority) view of what is true or right and an unpopular minority view. As Holmes J. stated over

60 years ago, 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 call for attachment than any other it is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate "...Thus the guarantee of freedom of expression serves to preclude the majority's perception of truth or public interest from smothering the minority's perception." Rejecting an argument raised in that case, that a deliberate lie is not protected because it is an illegitimate form of expression, which does not serve any of the values for which the freedom of expression is guaranteed, she said in conclusion, at p.209 -

"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 criterion 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." (emphasis is added). I respectfully agree with that view. I should stress that applying the constitutional protection to false expressions is not to 'uphold falsity' as implied in the majority judgment. The purpose is to avoid the greater danger of 'smothering alternative views' of fact or opinion.

Freedom of Expression in Democracy

Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J.J. Rousseau's version of the *Social Contract* theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'etre* of the State is to provide protection to the individual citizens. In that regard, the state has the duty to facilitate and enhance the individual's self-fulfilment and advancement, recognising the

individual's rights and freedoms as inherent in humanity. Uganda acknowledges this in Article 20 of the Constitution, which reads -

"(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons."

Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression. This is as true in the new democracies as it is in the old ones. In **R. vs. Zundel** (supra) at p.205, the following excerpt from an earlier judgment in **Edmonton Journal vs. Alberta (A.G.)** (1989) 2 SCR 1326, was cited with approval -

"It is difficult to imagine a guaranteed right more important to democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasised.

..... It seems that the rights enshrined in s.2(b) should therefore

The European Convention for the Protection of Human Rights and Fundamental Freedoms, protects the right to freedom of expression under Article 10. In its judgment in the **Lingens Case**, (No.12/1984/84/131), the European Court of Human Rights said - *"freedom of expression, as secured in paragraph 1 of Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self- fulfilment. Subject to paragraph 2, 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. Such are the demands of pluralism, tolerance and broad-mindedness without which there is no "democratic society" These principles are of particular importance so far as the press is concerned. Whilst the press must not overstep the bounds set inter alia, for the "protection of the reputation of others ", it is nevertheless incumbent on it to impart information and ideas on political issues just as those in other areas of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them."* (see p.12 Para.41).

Uganda, like any other democratic society, is committed to upholding the right to freedom of expression. That commitment, and indeed our adherence to democratic practices may not be as long standing as in the older democracies, but it is as real and it is for that reason that it is entrenched in the most binding instrument of the land. The Constitution guarantees to everyone in Uganda the right of freedom to hold opinions and to receive and impart ideas and information without interference. I should add that the commitment is not evident in the Constitutional provisions only. The enactment in 1995, of the Press and Journalist Statute, to ensure press freedom, is additional evidence of the commitment. That statute, *inter alia*, repealed the Press Censorship and Correction Act of 1915, and introduced a good measure of self-regulatory mechanism for the promotion of professional and responsible exercise of press freedom. However, the strongest evidence, which is without doubt common knowledge, is the outpouring vigour and enthusiasm with which not only the media, but also the public at large, exercise the freedom of expression in practice. In my view, it is because of that commitment, and the importance of the freedom of expression to democracy, that restriction on the exercise of the freedom is permitted only in special circumstances.

Limitation on freedom of expression

It is common ground that the protection of the right to freedom of expression is subject to Article 43, which provides for permissible restriction as follows -

"(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

(2) Public interest under this article shall not permit -

a) political persecution;

b) detention without trial;

c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution." (emphasis is added).

The provision in clause (1) is couched as a prohibition of expressions that "prejudice" rights and freedoms of others and public interest. This translates into a restriction on the enjoyment of one's rights and freedoms in order to protect the enjoyment by "others", of their own rights and freedoms, as well as to protect the public interest. In other words, by virtue of the provision in clause (1), the constitutional protection of one's enjoyment of rights and freedoms does not extend to two scenarios, namely: (a)

where the exercise of one's right or freedom "prejudices" the human right of another person; and (b) where such exercise "prejudices" the public interest. It follows therefore, that subject to clause (2), any law that derogates from any human right in order to prevent prejudice to the rights or freedoms of others or the public interest, is not inconsistent with the Constitution. However, the limitation provided for in clause (1) is qualified by clause (2), which in effect introduces "a limitation upon the limitation". It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about a probable danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2), which expressly prohibits the use of political persecution and detention without trial, as means of preventing, or measures to remove, prejudice to the public interest. In addition, they provided in that clause a yardstick, by which to gauge any limitation imposed on the rights in defence of public interest. The yardstick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society. This is what I have referred to as "a limitation upon the limitation". The limitation on the enjoyment of a protected right in defence of public interest is in turn limited to the measure of that yardstick. In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.

The Co-existence in the same constitution, of protection and limitation of the rights, necessarily generates two competing interests. On the one hand, there is the interest to uphold and protect the rights guaranteed by the Constitution. On the other hand, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is conflict between the two interests, the court resolves it having regard to the different objectives of the Constitution.

As I said earlier in this judgment, protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance is permissible. The exceptional circumstances set out in clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice or breach of social values categorised as public interest. In **Rangarajan vs. Jagjivan Ram and Others; Union of India and Others vs. Jagvan Ram and Others** (1990) LRC (Const.) 412, the Supreme Court of India put the point this way, at p.427 -

"There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'."

I agree with the proposition that the freedom of expression ought not to be suppressed except where allowing its exercise endangers community interest. It is in that context that I have to consider whether section 50 is a valid limitation under the Constitution.

Section 50

As I have already indicated, the validity of section 50 now depends on whether its provisions fit within the parameters set down in Article 43. Section 50 reads thus -

"50 (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.
(2) It shall be a defence to a charge under sub-section (1) if the accused proves that prior to publication, he took such measures to verify the accuracy of the statement, rumour and or report as to lead him to believe that it was true."

In order to establish the offence under section 50, the prosecution has to prove the following ingredients

-
- That the accused published the statement, rumour or report;
- That the statement, rumour or report is false;
- That the published statement, rumour or report is likely to cause fear and alarm to the public or to disturb the public peace.

Significantly, to establish the guilt of the person accused of the offence, the prosecution does not have to prove that the accused knew the statement to be false. Instead, in order to establish his innocence the accused has the onus to prove that he tried to verify the accuracy of the statement. In this regard, I do not share the view expressed in the majority judgment of the Constitutional Court, where it was said -

"I do not find anything offensive about the requirement for the accused to establish his defence or offer an explanation after a prima facie case has been established against him. That is what obtains in an adversarial criminal justice system. An accused person is only required to enter into his defence after

*the court has found a *prima facie* case ... against him. This procedure is provided for by s.71 of the Trial on Indictment Decree... That requirement cannot therefore make the section unconstitutional."*

With due respect, the suggestion that the provision in section 50(2) is merely procedural, regulating the time for presentation of the defence case is erroneous. The provision places on a person on trial for that offence the onus of proving lack of guilty knowledge. Far from being '*what obtains in adversarial criminal justice system*', it is an exception to the general rule that in a criminal trial, the onus of proof remains on the prosecution throughout, and does not shift to the defence. Furthermore, I should point out and stress that by the definition of the offence, liability for conviction, let alone for prosecution, does not depend on any actual occurrence of public fear or alarm or disturbance of public peace. Liability for prosecution depends on the state prosecutor's perception of the impact the expression is likely to have on the public; and liability for conviction depends on whether the court is persuaded to share the same perception

In my view, although those two characteristics of the offence *per se* do not make the provision unconstitutional, they must be considered in determining if the limitation section 50 imposes on the constitutionally guaranteed right, is acceptable and demonstrably justifiable in a free and democratic society.

Objective of Section 50

It is important to identify the objective and effect of section 50, to the extent they are discernable. Much as counsel on both sides exhibited commendable effort in presentation of argument, neither addressed us on that aspect. I also have not been able to access the contemporary legislative materials that would have helped me to identify the 'mischief that the legislature sought to remedy in enacting section 50. In his minority judgment in the Constitutional Court, the learned Twinomujuni J.A., traced the origin of the false statement offences to a 13th century English statute that created the offence of *Scandalis Magnatum*. The offence was to tell or publish false news or tales that could cause "discord or slander between the King and his People or the Great Men of the Realm". He also referred to the judgment in **R vs. Zundel** (supra), in which it was said that the primary aim of *Scandalis Magnatum* had been "*the prevention of false statements, which in a society dominated by extremely powerful landowners could threaten the security of the state*". It was also observed therein that: "*This was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury*".

England abolished the offence in 1887. Going by the timing and definition of the offence under section 50, however, I think its objective cannot have been the same as that of *Scandalis Magnatum*. The aim of the colonial legislature, in enacting section 50, is more likely to have been akin to that of the legislature in the former colony of Southern Rhodesia, for enacting a similar law, of which Gubbay CJ., in **Mark Gova & Another vs. Minister of Home Affairs & Another, (supra)** had this to say -

"It was, however justified by the Government... on the basis that it would provide a safeguard against the attempts of irresponsible journalists and rumourmongers '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". I think it is reasonable to infer from the wording of section 50, that at the time, when political agitation for self governance was in early stages, the colonial legislature in Uganda would have wanted to provide a legal safeguard against the spreading of news, rumours or reports that could destabilise the populace, with probable effect of undermining the authority of the colonial regime. As for the retention of that law subsequent to the colonial administration, the probable reason is that the process of law reform has not been vigorous or extensive enough to review the relevance of laws, such as section 50, in the changed circumstances since their enactment. In the circumstances, one cannot with certainty, point to the purpose for which section 50 is retained in the Penal Code to day. The effect of section 50, however, is evident. It makes any person who publishes a statement, rumour or report, which the prosecution holds out to be "false" and to be "likely" to cause public fear or alarm, or a disturbance of public peace, liable to criminal prosecution, and to imprisonment if convicted. What can be said with certainty therefore, is that section 50 is supposed to protect the public against false statements, rumours and reports that are likely to cause any of the stated mischief.

It is not in dispute that the impugned section 50 is a limitation on the enjoyment of the right to the freedom of expression; and that it is concerned with public interest rather than the rights of others. What is in contention is whether, as such a limitation, it fits within the parameters of Article 43. To fit within those parameters, it must satisfy two conditions; namely -

- it must be directed to prevent or remove "prejudice to public interest" (clause 1); and in addition,
- it must be a measure that is acceptable and demonstrably justifiable in a free and democratic society (clause 2).

These conditions, which are interrelated, in effect constitute the sub-issues in this appeal.

Prejudice to public interest

I will consider the first sub-issue from two complimentary perspectives, namely the form and the substance of section 50. Clause (1) of Article 43 allows for derogation of rights, or limitation of their enjoyment, in respect of two exceptional circumstances or scenarios, namely, where the enjoyment of one's right "prejudices" either the personal rights of others or the public interest. Those are grave circumstances presenting actual mischief or danger to "the rights of others" or to "the public interest". In those exceptional circumstances, the Constitution allows for derogation or limitation in order to avert or remove real mischief or danger. The clause does not expressly or implicitly extend to a third scenario, where the enjoyment of one's right is "likely to cause prejudice". I do not understand the clause to permit derogation of guaranteed rights or limitation of their enjoyment, in order to avert speculative or conjectural mischief or danger to public interest. Section 50, however, relates precisely to that third scenario. It is directed to a danger, if it is a danger at all, which is remote, and even uncertain. At most, section 50 aims at pre-empting danger to the public interest. It is in that regard distinguishable from a law directed to prevent, for example, expressions that amount to threatening or inciting violence. The danger to the public interest in such circumstances is proximate to the act of the expression, and therefore the expression "prejudices" the public interest. A tragic example in recent history is the use of the mass media to ignite genocide in Rwanda. On the face of it therefore, section 50 in its current form does not fall within the description of the purposes for which limitation on enjoyment of rights is permissible under Article 43(1). Is it plausible then, pursuant to Article 273, to construe the section in a manner that would make it conform to Article 43(1)?

The majority view in the Constitutional Court was that section 50 would conform to Article 43 by transplanting into it, words from clause (1), to rephrase the definition of the offence. The learned Berko J.A. put it thus -

"In view of the above provision (Art.43), in order to obtain conviction under section 50(1) of the Penal Code Act the state has to prove that' the false statement, rumour or report is likely to prejudice the fundamental or other human rights and freedoms of others or the public interest!." With due respect, that definition would not produce the desired conformity, as it still would not fit within the two scenarios envisaged in clause (1) of Article 43. It would remain in the third scenario. What I have said about the offence in its current definition would apply with equal force to it as so redefined. I have

instead considered an option, which neither party canvassed in the lower court or in this Court, namely to remove the conjectural element and construe the offence as confined to publishing an expression, which "causes" public fear or alarm or disturbance of public peace. After all, the prohibition in section 50 applies to a publication that "causes" as much as to that which is "likely to cause" any of the stated mischief. However, I have concluded that such construction is not plausible for two reasons. First, it is tantamount to restructuring the legislation in a manner that goes beyond modification, adaptation, qualification and exception envisaged in Article 273. Given the uncertainty about the objective of enacting and/or retaining section 50, the court is ill suited to redefine it. The task is best left in the hands of Parliament, which is more suited: (a) to determine if in that area there is substantial concern, which justifies a limiting legislation; (b) to identify the strict objective of that legislation; and (c) to design the minimum measure and means for achieving that objective. Secondly, it appears to me that there is ample law, both criminal and civil, which covers the special circumstances envisaged under clause (1) of Article 43, e.g. law of defamation, criminal libel and inciting violence. Parliament may discover on inquiry, that there is no pressing or substantial concern to warrant any more restriction on the enjoyment of the freedom than is already in place. Alternatively, it may recognise on such inquiry, that the concern such as there may be, would best be dealt with under provisions of the Press and Journalist Act, rather than under the Penal Code. In the circumstances, I have to consider the impugned section as it is.

In regard to competing interests that I alluded to earlier, the competition in the instant case is between the interest of upholding the right to the freedom of expression, on the one hand, and the interest of protecting the public against such exercise of the freedom as is "likely to cause public fear or alarm, or disturbance of public peace", on the other. Ultimately, in the context of clause (1) of Article 43, the question to answer is whether the danger, against which section 50 protects the public is so substantial, as to prejudice public interest and warrant limitation of enjoyment of the guaranteed right to freedom of expression. In his judgment, Berko J.A. rationalised the limitation imposed by section 50 as an end in itself. He did not contemplate the notion of balancing the limitation against the protection of the right. That is evident *inter alia*, from the following assertions in the judgment -

"the function of the law, and particularly criminal law, should (be to) exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and the safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person 'who falsely shouts fire, fire, in a theatre and causing panic!'." (emphasis is added) In principle, I accept that the law should be utilised 'to exclude from the range of individual choice' (i.e. prohibit) acts incompatible with maintenance of public peace and the safety and rights of individuals. However, I am constrained to say, with due respect, that in his illustration, the learned Justice misconstrued or

overlooked pertinent issues. In the first place, the issue in this case is not whether law should be utilised to prohibit those acts. That is a given. The issue is whether the prohibition imposed by section 50 is valid under the Constitution. Where a law prohibits an act, which is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of Article 43. In that regard, a law prohibiting the 'false fire alarm', would fit within the parameters of clause (1) of Article 43 only on the premise, and to the extent, that the alarm 'causes panic', and the 'panic' so caused, prejudices public interest. Secondly, the illustration falls short of applying the full scope of section 50.

A court applying section 50 to the false fire alarm would convict and sentence to imprisonment, the person who shouted the false alarm, if it is satisfied that at the time the alarm was expressed, it was "likely" to cause panic, notwithstanding that no panic was actually caused. That would mean overriding the right to the freedom of expression, when the public interest is not prejudiced at all. In those circumstances can it be said that the danger, against which section 50 protects the public **is** substantial and prejudices the public interest? In my view, the answer must be in the negative. My conclusion is that both in form and in substance, section 50 does not fit within the parameters of clause (1) of Article 43. It goes beyond what is permissible under, and is therefore not saved by, that clause. That is sufficient ground for me to hold that section 50 does not pass the first test of validity. Nevertheless, because of the importance of this case, I will also test the impugned legislation against what I have called the constitutional yardstick.

Standard of limitation

In clause (2) (c) of Article 43, the Constitution sets out an objective standard against which every limitation on the enjoyment of rights is measured for validity. Counsel for the respondent urged the Court to construe that standard subjectively, on the premise that what is "acceptable and justifiable" varies from one democratic society to another. I do not agree. That approach would distort the standard set out by the Constitution. The provision in clause (2) (c) clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard. While there may be variations in application, the democratic values and principles remain the same. Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to.

The court must construe the standard objectively. In R vs. Oakes 26 D.L.R. (4th) 200, the Supreme Court of Canada elaborated on that standard in relation to s. 1 of the Canadian Charter of Rights and Freedoms, which in similar terms as Article 43, sets out the standard of justification of limitation on the enjoyment of rights guaranteed by the said Canadian Charter. In his judgment, with which all other members of the court concurred, Dickson C.J.C. said -

"Inclusion of these words (free and democratic society') as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown to be reasonable and demonstrably justified. s.1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification.... The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s.1 that the limits on the rights and freedoms enumerated in the Charter are exceptions to their guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s.1 can bring itself within the exceptional criteria which justify their being limited."

Similarly, under Article 43(2) democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. In determining the validity of the limitation imposed by section 50 on the freedom of expression, the court must be guided by the values and principles essential to a free and democratic society. In Mark Gova & Another vs. Minister of Home Affairs & Another, [S.C. 36/2000: Civil Application No. 156/99], the Supreme Court of

Zimbabwe formulated the following summary of criteria, with which I agree, for justification of law imposing limitation on guaranteed rights-

- *the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;*
- *the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations;*

- *the means used to impair the right or freedom must be no more than necessary to accomplish the objective.*

I have already indicated my view that the apparent objective, which section 50 promotes is not sufficiently important to warrant overriding the right to freedom of expression. In order to illustrate the reason for that view, however, let me revert to balancing the competing interests in the instant case. In the one balancing scale, are two benefits in real terms that are derived from upholding the right to freedom of expression. First, the individual derives self-fulfilment from the exercise of the freedom, or from receiving information or ideas from those who impart it. This is particularly true of the right to freedom of the press, because the essence of the media's existence is to impart knowledge to the public. Secondly, the country as a democratic society derives the benefit of promoting and maintaining democratic governance. In the second scale to balance against all that, is the non-quantifiable benefit derived from protecting the public, not against real or actual danger, but in effect against the speculative or conjectural danger of "likely public fear, alarm or disturbance of public peace". Clearly, the benefit in the second scale is so obviously outweighed that I have to conclude that it cannot justify overriding the benefit in the first scale.

Other considerations support the same conclusion that the limitation imposed by section 50 on the right to freedom of expression is not justified. The first is that the effect of section 50 is not proportional to the apparent objective it is supposed to achieve. Given that the objective of section 50 is to prevent publication of expressions likely **to** cause public fear alarm or disturbance of peace even if it does not cause any such mischief, **to** criminalize the publication and make it punishable with imprisonment, is akin to the proverbial killing of a mosquito with a sledgehammer. This is exacerbated by the special characteristics of the offence whereby the prosecution does not have to prove guilty knowledge but instead, to avoid liability, one has to take 'provable measures to verify' the accuracy of every statement, rumour or report before publishing it. Without in any way condoning reckless or even negligent publications, I think the provision thereby imposes a graver impediment on the freedom of expression than is necessary. The measure is clearly not proportional to the mischief, and that makes it that much less acceptable and/or justifiable in a free and democratic society.

A related difficulty inherent in section 50, is that its very wide applicability makes it extremely difficult to determine ahead of publication, what expression will be perceived as likely to cause the mischief guarded against. I have already alluded to the difficulties in determining falsity. Similar, if not worse,

difficulties confront those who have to guess before deciding to publish, what perception a publication might evoke. In **Mark Gova Chavunduka case**, Chief Justice Gubby put the point graphically thus - *"The expression 'fear, alarm or despondency' is over-broad. Almost anything 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)."* In practical terms, the broadness can lead to grave consequences especially affecting the media. Because the section is capable of very wide application, it is bound to frequently place news publishers in doubt as to what is safe to publish and what is not. Some journalists will boldly take the plunge and publish, as the appellants did, at the risk of

suffering prosecution, and possible imprisonment. Inevitably, however, there will be the more cautious who, in order to avoid possible prosecution and imprisonment, will abstain from publishing. Needless to say, both the prosecution of those who dare, and the abstaining by those who are cautious, are gravely injurious to the freedom of expression and consequently to democracy. Additionally, the wide applicability of section 50 has the adverse effect of placing in the state prosecutor correspondingly vast discretion in determining for what publication to institute a prosecution. The form and degree of fear, alarm or disturbance of peace; the fraction of the public perceived to be likely to incur any of the mischief guarded against; are all aspects of the offence left to the unfettered discretion of the state to determine on individual case basis. This unfettered discretion opens the way for those in power to perceive criticism and all expressions that put them in bad light, to be likely to cause mischief to the public. In that regard, I find the following observation of the Judicial Committee of the Privy Council in **Hector vs. Attorney General of Antigua and Barbuda** (1990) 2 AC 312, at p. 318 pertinent. Lord Bridge of Harwich said -

"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

That was said in respect of an express statutory provision, which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal

offence. In my view, it applies to situations where, under the guise of protecting public interest, section 50 is applied to expressions, which in essence amount to criticism of Government conduct. Some particulars of the appellants' criminal prosecution help to illustrate the problem.

The charge sheet alleged that the appellants published false news, citing the excerpts reproduced earlier in this judgment, but without particularising the mischief that the publication was likely to cause. That, of course, was a defect because publishing false news *per se* is not an offence even under section 50. However, no one addressed that defect. At the trial, the prosecution called four witnesses, who had read the offending article, to testify on their respective perceptions. In her ruling, the learned trial magistrate observed that there was considerable diversity in the evidence of those witnesses. Only one, the Senior Presidential Advisor on the Media, testified that upon reading the story he was extremely alarmed because he thought there was going to develop tension between Uganda and a neighbouring country. Two of the witnesses feared for personal reasons. The officer who allegedly escorted the gold feared because people would regard him as very rich; and an official of the Bank of Uganda, from whom the second appellant had sought information before publication, feared having been misquoted. The fourth witness, another official of the Bank of Uganda testified that the news elated her because she thought Uganda's foreign reserves would increase. The learned trial Magistrate herself said in the ruling: *It would be going beyond reason if I were to hold that the mere writing that Uganda was paid in gold which gold was transferred to Uganda by Lt. Col. Lutaya could cause fear or alarm.*" All this goes to show that a simple story can evoke diverse emotional reactions from different individuals. Similarly, the perception of the likely effect of a simple story on the public would differ from one prosecutor to another. It is even conceivable that another court, sharing the same perception as the state prosecutor in the instant case, could have convicted on the same facts. The effect of the offending statements in the instant case could hardly be different from that in the case of **Haruna Kanabi vs. Uganda** Criminal Appeal No. 12/95, where the High Court upheld a conviction under section 50 in respect of a false publication that the President of Uganda had visited Rwanda described as "the 40th district of Uganda", to solicit votes for the impending presidential elections. I am constrained to wonder, whether countering such "false news" by publishing "the truth" would not be a more effective measure than prosecution under the Penal Code.

Clearly, because of its broad applicability, section 50 lacks sufficient guidance on what is, and what is not, safe to publish, and consequently places the intending publisher, particularly the media, in a

dilemma. In my view, given the important role of the media in democratic governance, a law that places it into that kind of dilemma, and leaves such unfettered discretion in the state prosecutor to determine, from time to time, what constitutes a criminal offence, cannot be acceptable, and is not justifiable in a free and democratic society.

I find support for my conclusions, in several judicial precedents referred to in this appeal, in which courts in different jurisdictions considered legislation similar to section 50. It will suffice to highlight only two, in each of which the court declared the questioned legislation inconsistent with the constitution. The impugned legislation in **R vs. Zundel** (supra) was s.181 of the Canadian Criminal Code, which made it an indictable offence to *(a) wilfully and knowingly publish any false news or tale, which (b) occasions or is likely to occasion injury or mischief to any public interest*. The Canadian Charter of Rights and Freedoms, protects the right to freedom of expression under s.2 (b) in similar terms as our Article 29 (1) (a), and under s.1 it provides for justified limitation like our Article 43.

McLachlin J., as she then was, writing the majority judgment, carefully analysed the said s.181 showing its incompatibility with principles governing limitation of rights that is acceptable under s.1 of the Charter. In concluding, she said at p.222 -

*"The value of liberty of speech, one of the most fundamental freedoms protected by the Charter, needs no elaboration. By contrast, the objective of s.181, in so far as an objective can be ascribed, falls short of constituting a countervailing interest of the most compelling nature. In **Oakes** (supra), Dickson C.J.C. made it clear that the less important the provision's objective, the less tolerable is an adverse effect upon the fundamental freedom. Section 181 could support criminalization of expression only on the basis that the sanction was closely confined to situation of serious concern. In fact, s.181 extends the sanction of the criminal law to virtually any statement adjudged to be falsely made which might be seen as causing mischief or likely to cause mischief to virtually any public interest. I cannot conclude that it has been shown to be 'demonstrably justified' in 'a free and democratic society'. To summarise, the restriction on expression effected by s.181 of the Criminal Code, unlike that imposed by the hate propaganda provision at issue in **Keegstra** (case), cannot be justified under s.1 of the Charter as a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'."*

Accordingly the court held by majority that s.181 of the Canadian Criminal Code infringed the right of free expression guaranteed by s.2 (b) of the Charter, and that the infringement was not saved by s.1 of the Charter.

The Supreme Court of Zimbabwe in **Mark Gova Chavunduka and Another vs. Minister of Home Affairs and Another** (supra), considered section 50(2)(a) of the Law and Order (Maintenance) Act, a piece of legislation that is almost identical to our impugned section 50. That legislation similarly made it an offence, punishable with imprisonment for seven years, for a person to make, publish or reproduce any false statement, rumour or report "*(a) likely to cause fear, alarm or despondency among the public or any part of the public; or (b) likely to disturb the public peace.*" In his judgment, with which all the other members of the court concurred, Chief Justice Gubbay said -

"...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.. Does s.50(2) (a) of the Act overcome this threshold test? It is obvious that the provision does not just criminalize false statements; nor false statements which actually 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 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 court declared that s.50 (2)(a) of the Law and Order (Maintenance) Act of Zimbabwe infringed the right to freedom of expression, and so contravened the constitution.

The respondent in the instant case had the onus to show that the limitation imposed by section 50 on the right to the freedom of expression, is necessary to prevent prejudice to the public interest, and that the limitation is "acceptable and demonstrably justifiable in a free and democratic society". In my view, he did not discharge that onus.

In the result, I would allow this appeal and set aside the majority decision and orders of the Constitutional Court. I would grant the declaration that section 50 of the Penal Code Act (Cap. 120) is inconsistent with Article 29 (1)(a) of the Constitution and is consequently void. I would order that the

appellants have the costs of the appeal in this Court and of the proceedings in the Constitutional Court. I would allow a certificate for the counsel for the appellants. Before taking leave of the case, I should, for guidance, comment on the preliminary order made by the Constitutional Court to stay hearing of the petition pending disposal of the criminal case against the appellants in the magistrate's court. The court made the order at its own initiative, notwithstanding the unanimous view expressed by counsel on both sides that the petition should proceed before the criminal trial. The court stated the reason for the order as follows -

"It seems clear to us therefore that the purpose of this petition is to circumvent or even pre-empt the criminal prosecution. But as this court held in Const. Petition No.4/97 Arutu John vs. Attorney General where criminal proceedings are pending in another court and a petition is brought to this court in respect to the same matter, then the petition should be stayed pending the determination of the criminal matter in the trial court. Accordingly we order that the petition be stayed pending determination of Buganda Road court criminal case No. U 2636/97 against the petitioners." With the greatest respect to the Constitutional Court, that order was misconceived. It is inconsistent with the letter and spirit of the Constitution. Under Article 137, any person

may access the Constitutional Court in one of two ways. First, a person may petition the Constitutional Court directly for a declaration that any law, act or omission is inconsistent with, or in contravention of a provision of the Constitution. Secondly, a party to any proceedings in a court of law, in which a question arises as to the interpretation of the Constitution, may request that court to refer the question to the Constitutional Court for decision. Clause (7) of Article 137 provides that in either case, the court

"shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it." Where a court refers a question that arises in proceedings before it, it must await the decision of the question by the Constitutional Court, and *"dispose of the case in accordance with that decision."* The rationale for these provisions is obvious. The Constitution is the basic law from which all laws and actions derive validity. Where the constitutional validity of any law or action awaits determination by the Constitutional Court, it is important to expedite the determination in order to avoid applying a law or taking action whose validity is questionable.

JUDGMENT OF ORDER, JSC

I have had the advantage of reading in draft the judgment of my learned brother Mulenga JSC, with which I agree. I also agree with him that the appeal should be allowed with costs.

In his judgment, Mulenga JSC, set out the background to, and the grounds of, the appeal. I shall not repeat them in this judgment.

I wish to comment on the findings of the Constitutional Court which gave rise to the appellants' complaint in ground one of the appeal. Berko, JA wrote the lead judgment with which three other members of the Court concurred: For the sake of clarity, I shall reproduce herein-under the relevant passage of his judgment. He said:

"I do agree that article 29(1) of the Constitution guarantees free speech and expression and also secures press freedom. These are fundamental rights. It can be said that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society. Therefore, in my view, the function of the law, and particularly criminal law, should exclude from the range of individual choice those acts that are incompatible with the maintenance of public peace and the safety and rights of individuals. Freedom of speech and expression cannot be invoked to protect a person "who falsely shouts, fine, fire in a theatre and causing Public Panic." In my opinion where there are no constraints on freedom of speech and expression, the difficulty would arise that one of the objects of upholding free expression - truth-would be defeated. It is therefore important to regulate or limit the extent to which this can happen: That is the justification of enacting article 43 of the Constitution. A citizen is entitled to express himself freely except where the expression would Prejudice the fundamental or other human rights and freedom of others or the public interest. I find that section SO of the Penal Code is necessary to cater for such excesses. Clearly the democratic interest cannot be seen to require citizens to make demonstrably untrue and alarming statements under the guise of freedom of speech and expression. In my view, the truth or falsehood of the article is one of the ingredients of offences the state has to prove."

Mr. James Nangwala the appellant's learned counsel, criticized this finding of the Constitutional Court on several grounds. He contended, first, that the Court failed to address article 43 (2) (c) of the Constitution. Secondly, that many authorities were cited by the appellants to that court, but there's nothing to suggest that, that court considered them. This is in contrast with the dissenting judgment of Twinomujuni, JA. None of the authorities were binding, but were persuasive. Learned counsel contended that by practice, the Constitutional Court had to consider them, because they were relevant in considering what is acceptable and demonstrably justifiable in a free and democratic society. The learned counsel contended that, had the Constitutional Court considered the relevance of article 43 (2), and the authorities in question, it would not have come to the wrong conclusion, which it did, that section 50 is not unconstitutional.

Mr. Cheborion the Commissioner for Civil Litigation in the Attorney General's Chamber representing the respondent, criticized the appellant's counsel for framing ground one the way it was framed. He contended that the appellant's counsel restricted themselves to a narrow aspect of the Constitutional Court's decision. According to the learned Commissioner, the Constitutional Court was saying that section 50 is necessary to protect public safely by limiting the rights protected by article 29 (1). There is no way the Constitutional Court could have said that section 50 was unjustifiable. Section 50 seeks to prohibit publication of false statements and rumours; statements likely to cause fear or an alarm to the public, which may result in disturbance of public peace. These the learned counsel called excesses, which go beyond the rights protected by article 29 (1) for which the authors should be presented. The learned Commissioner submitted that in order to determine whether section 50 contravenes article 29 (1), it should be read together with clauses (1) and (2) of article 43. He also contended that the test of "What is acceptable and demonstrably justifiable in a free and democratic society" is a subjective one."

Article 29 (1) (a) of the Constitution provides:

"29 (1) Every person shall have the right to - (a) Freedom of speech and expression, which shall include freedom of the press and other media."

The freedom of expression protected by this article is not absolute. It is subject to the provisions of articles 43, which state:

"43 (1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest

(2) Public interest under this article shall not permit-

(c) Any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justified in a free and democratic society or what is provided in this constitution."

Section 50 (1) of the Penal Code Act, which the appellants challenged in the petition as being unconstitutional provides:

"50 (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or disturb the public peace is guilty of a misdemeanour.

(2) It shall be a defence to a charge under sub-section (1) if the accused proves that, prior to publication, he took such measures to verify the accuracy of the statement, rumour and or report as to lead him reasonably to believe that it was true."

I agree with the learned counsel for the appellants, with great respect, that the majority of the learned Justices of the Constitutional Court appear to have been more concerned with justification of the limitation which s.50 imposes on the freedom of expression and freedom of the press than with the protection of those freedoms. The learned Justices recognized the Constitutional protection of that freedom under article 29 (1) and the limitation placed on that freedom by article 43 (1) but, again, with respect they were more concerned with the limitation under article 43 (1) than with the provisions of article 43 (2) (c). The learned Commissioner put it rightly that clauses (1) and (2) of article 43 should be read together with article 29 (1), but with respect, I am unable to accept his argument that the test of what is acceptable and demonstrably justifiable in free and democratic society must be a subjective one. To my mind the test must conform with what is universally accepted to be a democratic society. There can be no varying classes of democratic societies. First because, Uganda is a party to several international treaties on fundamental and human rights, and freedoms, all of which provide for the universal application of those rights and freedoms and the principles of democracy. The African Charter for Human and Peoples Rights, and the International Covenant on Civil and Political Rights are only two examples.

Secondly, the preamble to the Constitution recalls the history of Uganda as characterized by political and constitutional instability; recognizes the people's struggle against the forces of tyranny, oppression and exploitation and says that the people of Uganda are committed to building a better future by establishing, through a popular and durable constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress. I have not the slightest doubt that when the framers of the Constitution committed the people of Uganda to building a democratic society, they did not mean democracy according to the standard of Uganda with all that it entails. They meant democracy as universally known.

At the hearing of the petition in the Constitutional Court the appellants referred to numerous authorities in support of their case. Most of these were cases decided in Common Law Jurisdictions, like our own, dealing with issues of law and fact similar to those in the instant case. It is a universally acceptable practice that decided cases decided by the highest courts in jurisdictions with similar legal systems, which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so. In the instant case, the Constitutional Court, in my view, ought to have followed those authorities having a bearing on this case to which the appellants referred it.

In considering whether section 50 contravenes article 29 (1), which protects the freedom of speech and expression and of the press, certain cardinal principles of constitutional interpretation must, in my view, apply. Some of these are that: The instruments being considered must be treated as a whole and all provisions having a bearing on the subject matter in dispute must be considered together as an integrated whole; provisions relating to the fundamental human rights and freedom should be given purposive and generous interpretation in such away as to secure maximum enjoyment of the rights and freedoms guaranteed; and when the state or any person or authority seeks to do an act or pass any law which derogates on the enjoyment of the fundamental rights and freedoms guaranteed under Chapter Four of our Constitution, the burden is on that person or authority seeking the derogation to show that the act or law is acceptable within the derogations permitted under article 43 of the Constitution. See: **Maior General David Tinyefuza Vs Attorney General, Constitutional No. 1 of 1997 (SCU) (unreported): De Clerk & Suct Vs Du Plassis and Anor (1994) 6**

BLR 124, at page 128 - 9 (The Supreme Court of South Africa): Troop Vs Dulles US ZL.

Ed. 785 of 590 (1956). Under article 29 (1) (a) everyone has the right to freedom of speech and expression and freedom of the press. This right is derogated by article 43 (1) to the extent that in the enjoyment of that freedom, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest. There is a limit placed on derogation with regard to public interest. It is that any limitation or the enjoyment of this right shall not go beyond what is acceptable and demonstrably justifiable in a free and democratic society.

The importance of freedom of speech expression and the press guaranteed by article 29 (1) (a) in a democratic society cannot be over emphasized. Freedom of expression is the right to express one's opinion by word of mouth, writing, printing, and pictures or in any other manner. It includes the freedom of communication and the right to propagate or publish opinion. Communication could be made through any medium, newspaper or cinema.

In the case of **Edmonton Journal Vs Alberta (1989) 45 CRRI** the Supreme Court of Canada said: *"It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The vital importance of the concept cannot be over emphasized. No doubt that is why the framers of the Charter set forth S.2 (b). It seems that rights enshrined in S.2 (b) should therefore only be stricted in the clearest circumstances."*

The Charter is the equivalent of Chapter Four of our Constitution and S.2 (b) is similar to our article 29 (1) (a).

In **Manika Ghandi Vs Union of India (1978) 2 SCR 621,** Bhagwanji, J of the Supreme Court of India put it this way:

"Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the

democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential."

Another illustration of the importance of freedom of expression in a free and democratic society is to be found in a statement by Alexander Meiklejohn a leading American Philosopher in his book ***Political Freedom, 1960 page 17.***

"When men govern themselves it is they and no one else who must pass judgment upon unwisdom and unfairness and danger, and that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American..... (These) conflicting views may be expressed, must be expressed, not because they are valid, because they are relevant ... To be afraid of ideas, any idea is to be unfit for self government."

In my view, section 50 of the Penal Code clearly contravenes the freedom of speech expression and the press guaranteed under article 29 (1) of the Constitution, but the crucial issue is whether the limitation imposed by section 50 goes beyond what is acceptable and demonstrably justifiable in a free and democratic society under article 43 (2) (c). As it was the respondent who sought to justify the limitation of section 50 of the Penal Code on the freedoms protected by article 29 (1) (a) the burden lay on him to prove that the restriction is necessary within the limits prescribed by the Constitution. See: Regina Vs. Oakes, 26 DLR (4th)201 (The Supreme Court of Canada) and Patel Vs. Attorney General (1963) ZLR (the High Court of Zimbabwe): Re Ontario Film Appreciation Society and Ontario Board of Censors. 147 DLR (3rd) 58 at 64; and Major General Tinyefuza Vs. Attorney General (Supra). The respondent's justification for section 50 was stated in paragraph 6 (a) of his answer to the appellants' petition. It was to the effect that section 50 reiterated article 43 of the Constitution which required that the enjoyment of that right should not prejudice the fundamental or other human rights and freedoms of others or public interest. In his submission supporting the findings of the learned Justices of the Constitutional Court, to which I have already referred, the learned Commissioner did not show how the alleged false article published by the appellants prejudiced or would have prejudiced the fundamental or other human rights of others or the public interest.

In the case of **Zundel Vs the Queen and others (1992) 10 CRR (20) Canada** Zundel was charged with publishing false news likely to cause injury or mischief to public interest contrary to section 181 of the Criminal Code of Canada, which is almost similar to, and has the same historical origin as, our section 50 the Penal Code. The state submitted that the false news published by Zundel were not protected by section 2 (b) of the Canadian charter of Human Rights (similar to our article 29 (1) (a) of our constitution. The leading judgment of the Supreme Court of Canada said this on page 207:

"The second argument advanced is that the appellant's publication is not protected because it serves none of the values underlying s.2 (b). A deliberate lie, it is said, does not promote truth, political or social participation, or self-fulfillment. Therefore it is not deserving of protection.

A part from the fact that acceptance of this argument would require this Court to depart from its view that the content of a statement should not determine whether it falls within s.2 (b), the submission presents two difficulties which are, in my view, insurmountable. The first stems from the difficulty of concluding categorically that all deliberate lies are entirely unrelated to the values underlying s.2 (b) of the Charter. The second lies in the difficulty of determining the meaning of a statement and whether it is false.

The first difficulty results from the premise that deliberate lies can never have a value. Exaggeration - even clear falsification -may arguably serve a useful social purpose linked to values underlying freedom of expression. A person fighting cruelty against animals may knowingly cited false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g. "cruelty to animals is increasing and must be stopped."

A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the

virus. An artist for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie. Consider the case of Salman Rushdies Satanic Verses viewed by many Muslim societies as perpetrating deliberate lies against the prophet. All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under s.2 (b) would be to exclude the statements such as the examples above from the possibility of Constitutional protection. I cannot accept that such was the intention of the framers of the Constitution.....

*The second difficulty lies in the assumption that we can identify the essence of communication and determine that it is false with accuracy to make falsity a fair criterion for denial of constitutional protection. In approaching this question, we must bear in mind that tests which involve interpretation and balancing values and interest, while useful under s.1 of the Charter (similar to our article 43), can be unfair if used to deny *prima facie* protection. One problem lies in determining the meaning which is to be judged to be true or false. A given expression may offer many meaning, some which seem false, others of a metaphorical or allegorical nature, which many possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times. The guarantee of freedom of expression seeks to protect not only the meaning intended to be communicated by the publisher but also the meaning or meanings understood by the reader The result is that a statement that is true on one level or for one person may be false on another level for a different person."*

The learned judge then concluded at page 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 criterion 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 benefits of the constitutional guarantees of free speech. I would rather hold that such speech is protected by s.2 (b), leaving arguments relating to its value in relation to its prejudicial effect to be dealt with under s.1 (our article 43)."

Although this Canadian Case is not binding on our Court, the facts of the case are on all fours with those of the instant case that I do not see any reason why, after finding it highly persuasive, I should not follow it. I am fortified in my belief in the correctness of the Canadian authority by a statement made by Archibald Cox in a publication called **SOCIETY VOL 24 P.8 No.1 November/December, 1986** where he stated:

"Some propositions seem true or false beyond rational debate, some false and harmful, political and religious doctrines again wise public acceptance. Adolf Hitler's brutal theory of a "master race" sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough; no man, no committee and surely no government has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both, from what is false. To licence one to impose his truth upon dissenters is to give the same to all others who have, but fear to loose, power. The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of a free people. "(Emphasis mine)

In the instant case, I am not satisfied that the respondent established that the limitations placed on the enjoyment of the freedom of expression and the press, guaranteed by article 29 (1) (a) of the Constitution by section 50 of the Penal Code Act is not beyond what is acceptable and demonstrably justified in a democratic society.

In my opinion, Section 50 fails the test laid down in clause 2 (c) of article 43 of the Constitution. It should, therefore, be struck down as inconsistent with the Constitution. I would allow the appeal and make the orders proposed by my learned brother Mulenga, JSC.

JUDGMENT OF KANYEIHAMBA. J.S.C.

I had the benefit of reading in draft the judgment of my learned brother, Mulenga, J.S.C, and I agree with the reasons he has articulated for his judgment. I also agree with his decision that this appeal ought to succeed. I will only add one or two comments of my own in support and by way of emphasis and elucidation. The facts and background to this appeal have been ably narrated and described in the judgment of Mulenga, J.S.C. and there is no need for me to repeat them here.

of growth and development over time to meet new social, political and historical realities often unimagined by its framers."

This is what was envisaged in Article 273(1) of the 1995 Constitution which provides,

"Subject to the provisions of this Article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."

In my view, the rights which the appellants legitimately exercised were in conformity with the provisions of the Constitution which guarantee their freedoms and Section s.50(1) of the Penal Code Act, in so far as it restricts those freedoms unconstitutionally must be struck down as null and void. The appellants were rightly acquitted and they have correctly pursued their rights by challenging that penal provision and the manner in which they were prosecuted which must equally be held to have been unconstitutional and unjustified. It is worth noting that the appellants took all the necessary and reasonable steps to investigate the falsity or truth of what they reported. They should never have been prosecuted.

In the **Tinyefuza case (supra)**, I endeavoured to spell out the constitutional functions of each organ of Government.

The Constitution provides for and demarcates the powers and functions of government amongst the various organs and institutions of state but principally Parliament, the Executive and the Judiciary. Pertinently, Article 79 of the Constitution provides. *inter alia*, that subject to the provisions of the constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda and, that except as provided in the Constitution no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda without authority conferred by an Act of Parliament made for that purpose. Consequently, the provisions of Article 43 must always be borne in mind. They provide that,

"43(1) In the enjoyment of the rights and freedoms prescribed in this Chapter no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

2. Public interest under this article shall not permit:-

(a) political persecution

(b) detention without trial

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution."

These exceptions mean that the freedom of speech and expression which includes the freedom of the Press and other media is not absolute, but if the Executive or Parliament are to act or legislate in favour of these exceptions, they must do so strictly in accordance with the provisions of the Constitution and if called upon, justify what they have done or legislated for before courts of law which have the duty to protect the Constitution and the laws of Uganda and harmonise the same.

It is Parliament, the representative body of the people in a democratic and free society that has the power to make and unmake any law and to proscribe any acts or behaviour as coming within the purview of the exceptions enumerated in Article 43. However, for Parliament to do so it must comply strictly with the provisions of the Constitution. Thereafter, it is a principle of constitutionalism that other arms of the state share a platform with Parliament in the running of state affairs and in the protection of individual liberty.

Where Parliament has made a law in accordance with the Constitution, citizens are bound to obey it. In the case of the Press, citizens' rights are fortified by the knowledge that journalists exercise discretion of self-restraint and are subject to the Press Act. Be that as it may, the freedom of the Press is largely unrestricted even if those who exercise it may be prosecuted or sued under a given law, aware of the old adage "*publish and be damned*".

In my opinion, however, the provisions of section 50 of the Penal Code Act (Cap. 120) conflict with the Constitution and constitute a clear case which calls for intervention by the courts.

In the result, I would allow this appeal and make the orders proposed by Mulenga, J . S . C .

JUDGMENT OF TSEKOOKO. JSC:

I have read in advance the draft judgment prepared by my learned brother, the Hon. Justice Mulenga, JSC, who has set out the facts of the petition. I agree with his reasoning and the conclusion that this appeal should succeed, that section 50 of the Penal Code is inconsistent with the constitution and is void. I also agree with the other orders he has proposed. I desire to add brief observations.

In their petition in the Constitutional Court, the appellants as petitioners averred in paragraph 3(b) that section 50 of the Penal Code Act under which the petitioners were charged is inconsistent with the constitution in so far as it limits the enjoyment of the rights and freedom prescribed in Articles 29 (1) (a) and (e), 40 (2) and 43 (2) (I) of the Constitution of 1995.

The most relevant Article is 29 (1) (a) which reads as follows.

"29 (1) Every person shall have the right to: -(a) Freedom of speech and expression which shall include

freedom of the press and other media"

Section 50 (1) which creates the offence states:

"Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour"

The history and incorporation of S.50 in our law is not quite clear. But the British Colonial authority must have introduced it as one of the colonial laws when Uganda was a British Protectorate at the time when the offence had ceased to exist in England where it originated. Whatever its background, the section has been on our statute books from colonial days up to the present day posing a threat to prosecute any body who publishes a false statement, rumour or report. The appellants having been aggrieved because they were prosecuted, challenged the law in the Constitutional Court which by majority decision dismissed the petition. The appeal to this court is based on three grounds. Mr. Nangwala, counsel for the appellants argued the first and second grounds while his colleague, Mr. Rezida, argued the third ground.

Ground 1 and 2 were framed in the following words:

1. Having found that Article 29 (1) of the Constitution guarantees speech and expression and also secures press freedom and having held that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society, the learned Justices of Appeal erred in not finding that section 50 of the Penal Code Act Is not demonstrably justifiable in a free and democratic society within the meaning of Article 43 (1) and (2) of the Constitution.

2. The learned Justices of Appeal erred in holding that S.50 is part of the existing laws saved by Article 273 of the Constitution.

Although the appeal is stated to be against the majority's decision, ground two is actually an appeal against the conclusions of the whole Constitutional Court. This is because Twinomujuni, JA, in his illuminating dissenting judgment agreed with the majority view when he held, at page 20 of his typed judgment, that: -

"Without prejudice to the debate whether section 50 of the Penal Code Act passes the standards set by article 43, I am of the opinion that section 50 of the Penal Code Act is valid law until it is declared otherwise by a competent Court of law." The majority's decision was to the same effect. Be that as it may, I would like first to make observation on procedure. I agree with the opinion expressed by Mulenga, JSC that the Constitutional Court erred first on 15/12/1997 when it ordered for stay of hearing the Constitutional petition pending the disposal of the criminal prosecution which was taking place in an inferior court of the Chief Magistrate and secondly when on 18/5/1999 the Constitutional Court again ordered for the petition to be *"stayed until disposal of criminal appeal pending in the High Court."*

The Court did not give sound reasons why it thought that the hearing of a criminal matter took precedence over a constitutional petition. It would seem that the court acceded to the view of Mr. Cheborion, Principal State Attorney, that a constitutional petition was akin to a civil case and as such criminal proceedings took precedence over constitutional matters. Acceding to this view would run counter to the provisions of Art 137 (7) of the Constitution. In addition, I should point out that the practice of criminal matters taking precedence over civil matters originated from England, where the practice has long ceased to apply. I therefore see/no good reason for Uganda to stick to an old habit which has died in the **country of its origin**.

Now in his submissions, Mr. Nangwala when arguing grounds 1 and 2 pointed out that S.50 has its roots in Article 43 (1) and that the majority in the constitutional Court failed to address their minds to Article 43 (2) (c). He also contended that the majority did not consider the cases he had cited to the Court. He relied on a number of decisions including **Regina Vs Oakes**, 26 D.L.R. (26th) Page 200 and **Zundel Vs The Queen & Others** 10 C.R.R. (2nd) page 193, (both are Canadian decisions) and **Mark Gova Chavunduka & Another Vs The Minister for Home Affairs & Another** Civil Application No.156/99 (Zimbabwe) to support his arguments that S.50 is inconsistent with Constitutional provisions.

In reply Mr. Cheborion argued the three ground separately. He supported the majority decision to the effect that criminal law is necessary to exclude from the range of individual choices those acts which if allowed would breach public peace, safety and rights of other individuals. He contended that S.50 which is part of existing law is justifiable in the Ugandan context. Among the authorities he relied on are **Uganda Vs Commissioner of Prisons Ex parte Matovu** (1966) E.A 514 and **C. Muhindika and & others Vs The People** - Appeal No.95 of 1995 (Zambia). He contended that the test of what is demonstrably justifiable in Art 43 (2) (c) is subjective and must be in the Ugandan context.

Mr. Nangwala's complaint about apparent lack of study by judicial officers of cases cited to court by advocates is not new. I have heard it raised in some other appeals in this court and in some other fora outside the court system. I therefore would like to make observations on it. Advocates appear to harbour the view that a court before which some case is cited is under an obligation to specifically cite the case and perhaps express an opinion thereon by saying, for instance, that the court has examined the case and found it relevant, or irrelevant, to the facts of this case. I think it is generally accepted that every case must be decided on its own facts because no two cases have identical facts.

In law, we normally refer to decided cases as precedents. A precedent is a judgment or decision of a court of law cited as an authority for deciding a similar set of facts. Therefore a precedent is a case which serves as an authority for the legal principle embodied in its decision. A case is only an authority for what it actually decides. It has been said that "*the only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding a case before him:*" See *Re. Hallett* (1880) 13 Ch.D.712. An authoritative precedent is one which is binding on the court to which it is cited and must be followed; a persuasive precedent is one which need not be followed but which is worthy of consideration. See **Concise Law Dictionary** by Osborn, 5 Ed; page.248.

Courts should at least as a matter of courtesy acknowledge the effort of advocates who produce relevant and useful or binding decided cases. A binding authority would normally be a decision of a superior court within the same jurisdiction

Normally a court would be expected to express an opinion on a relevant and binding case cited to that court especially if the court makes a decision contrary to that case. Persuasive cases are of two types; namely decision by peer courts (judgments of the Judges of the High Court) in the same jurisdiction or decisions of a lower court of record where that lower court has given well reasoned treatment of a question of law. Persuasive cases are also decisions by courts from other common law jurisdictions dealing with similar question as that raised before the court.

In my view binding authorities from superior courts in the same jurisdiction must be followed unless there exist circumstances which permit departure. The court departing from a binding case should explain why. Persuasive authorities from the same jurisdiction such judges of the same court dealing with similar facts or same law ought to be followed so as to maintain consistency. The value to be attached to persuasive authorities from other common law jurisdictions depends on the hierarchy of the court which decided the case. Obviously a court has no business in wasting time considering irrelevant cases.

It is instructive to note that Article 132 (4) of the constitution refers to the fact that decisions of this Court bind us as well unless we find it right to depart. I have gone through the written submissions which counsel for the appellants presented to the Constitutional Court. Cases are cited in those submissions. They are the same authorities which have been cited to us. None of those cases were binding on the Constitutional Court because the cases were decided by courts from other jurisdictions. However, a number of them are of considerable persuasive value. One of them is the **Zundel case** in which the Supreme Court of Canada considered and decided matters identical to those raised in the petition. Its persuasive value is clear. In the Court below the majority decision did not allude to any of those cases and no reasons were given why. I quite recognise that the court is very busy and may not have adequate time to consider many of the decisions cited. But a reference to authoritative relevant cases is good practice. As I said from the start I have discussed this complaint at some length because it keeps recurring.

The learned Commissioner for Civil Litigation's contention that we should apply a subjective test to decide on "***what is acceptable and demonstrably justifiable in a free and democratic society***" in Uganda has no foundation.

The learned Commissioner relied on **Matovus Case** (supra) and that of **Muhinduka** (supra) in support of his view. These two decisions do not, with respect, support that view. The latter case

was concerned with legal provisions which regulate the holding of public meetings in Zambia. Relevant Art.20 of the Zambian constitution stated: -

"..... and except so far as that provision or the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society"

I have studied the case and especially page 172 (to which the Commissioner referred us) where the Zambian Court quotes a passage from an Indian case **[Rangarajan Vs Jagjivan Ram & Other** (1990) LRC (Const.) 412]. There the Indian Court stated that there was no legal yard stick of ascertaining what is reasonably justifiable in a democratic society. The Court held the Indian law to be unconstitutional. According to the **Muhinduka case**, the Zambian law, like that of India, could not be justified on a number of grounds and therefore the court found the law to be unconstitutional. It appears to me that the approach adopted by the two Courts was the objective test in ascertaining whether the law being questioned, was or was not reasonably justified in a democratic society. In my opinion this is in accord with the approach of the Canadian Court in the Zundel Case (supra) and that in the Oakes case (supra). I agree with those approaches.

I fully agree with the view that by incorporating in our constitution the Human Rights provisions which are set out in various international instruments, the framers of our constitution, consciously, opted for the objective test in determining "**what is acceptable and demonstrably justifiable in a free and democratic society**". "**Demonstrably**" as used in our Art 43 (2) (c) appears to connote that whoever wants to show that the act or commission complained of is justifiable, that person must prove it by evidence. In our case the respondent should have adduced evidence to prove that the existence of S.50 in the Penal Code Act is justifiable in a free and democratic Uganda within the provisions of the current Constitution.

In view of the presence of Art. 29 (1) (a) in our constitution, what would be the underlying object of section 50 and the mischief or evil which it seeks to achieve. Are Ugandans so gullible that they must be protected against rumours by S.50?

By Art.20 (1) fundamental rights and freedoms of the individual are inherent and not granted by the state. Freedom of expression is a fundamental right protected under Art. 29. By this Article, every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media. By criminalizing what is perceived as publication of false news or

rumours under S.50, the section has the effect of demonstrably restricting or even prohibiting freedom of expression enshrined in Art.29 (1). I think that the reasoning of the Supreme Court of Canada in **Zundel's Case** (supra) which considered issues similar to the one in this appeal and the reasoning in the Nigerian case of the State Vs The Ivory Trumpet Publishing Co. Ltd. (which was a case of sedition) the courts' discussions there are of considerable value and I would adopt the same. As the custodian and guarantor of the fundamental rights of the citizens a Constitutional Court has a duty cast upon it of striking down any law which restricts the freedom of speech as guaranteed to the citizens under the constitution.

I would allow the appeal. I agree with the orders proposed by Mulenga, JSC.

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment prepared by my learned brother, Mulenga JSC, and I agree that, for the reasons he has given, this appeal ought to succeed. I also agree with the orders he has proposed.

I shall make only a few comments for emphasis. The first point relates to the importance of freedom of expression in a democratic society. Freedom of expression is one of the fundamental freedoms pertaining to the citizen as a human being. As Cassin R said in Man and the Modern State, "*no one has the power to control his internal thoughts and feelings nor to prevent him from outwardly expressing his thoughts and feelings. Moreover freedom of objection and of discussion is one of the surest sources of truth.*" (See Valiant F Sir (ed) *An Introduction to the Study of Human Rights, 1972, page 46.*)

Freedom of expression is recognised and protected by many international conventions and declarations as well as national constitutions. This freedom is guaranteed under Article 29 (1) (a) of the Uganda Constitution. Although the Constitution does not define what constitutes freedom of expression, it is generally accepted that it entails the freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without inference by public authority and regardless of frontiers (see: the International Covenant on Civil and Political Rights, Article

19, and the European Convention on Human Rights, Article 10). In *Thornhill V Alabama* 310 US 88, pages 101-102, the US Supreme Court observed that freedom of speech or of the press should be identified with "*the liberty to discuss publicly and truthfully all matters of public concern without fear of subsequent punishment.*"

Freedom of the press is a special freedom within the scope of freedom of expression. Freedom of the press is considered as the right to investigate and publish freely. But as Lord Denning said in *Schering Chemicals V. Falkman Ltd (1981)* 2.W.L.R.848, freedom of the press "*covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it*"

The importance of freedom of expression including freedom of the press to a democratic society cannot be over-emphasised. Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic government, on the basis of informed decisions. It promotes a market place of ideas. It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable.

In *Mark Gova Chavunduka & Another vs The Minister of Home Affairs and Another*, Supreme Court Civil Application No.156 of 1999, the Supreme Court of Zimbabwe emphasised the special objectives that freedom of expression serves in a democracy, in these words:

"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 change. See to the same effect Thomson Newspapers Co. vs Canada (1998) 51 CRR (2nd) 189 (Can.SC) at 237."

Democracy is a fundamental constitutional value and principle in Uganda. The Preamble to the Constitution declares that the people of Uganda are committed to establishing "*a socio-economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress.*"

Clause II of the National Objectives and Directive Principles of State Policy in the Constitution sets out Democratic Principles, which provide, *inter alia*, that,

"(i) The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance."

Furthermore Article 1 of the Constitution recognises the sovereignty of the people and declares that "*all authority of the State emanates from the people of Uganda, and the people shall be governed through their will and consent.*" It is further provided in Article 1 (4),

"The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."

The Bill of Rights in Chapter 4 guarantees not only civil and political rights but also social, cultural, and economic rights. Indeed the entire Constitution reflects a commitment by the people of Uganda to establish a free and democratic society. The implementation of the various government policies on democratisation and liberation clearly demonstrates that Uganda is building a democratic society.

The breadth and importance of the right to free speech were emphasised by the European Court of Human Rights in ***Handyside vs The United Kingdom*** (1979 - 80), 1.EHRR 737,

(para.49) as being inherent in the concept of a democratic and pluralistic society. In a celebrated statement, the Court observed,

"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for the development of every man. Subject to para. 2 of Article 10 (of the European Convention on Human Rights), 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 which offend, shock, 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."

The second point to emphasise is that freedom of expression is not absolute or boundless, even in the most democratic societies. Instead limitations may be imposed on the freedom of expression, which strike a balance between State involvement in the press and media autonomy, as well as between freedom of expression and of the press and other basic rights and social interests, protected by law.

The Uganda Constitution abolished claw-back clauses in the Bill of Rights, which previously unduly restricted the enjoyment of basic human rights and freedoms. The general standard set for testing the permissible limitations is now contained in Article 43. In case of freedom of expression guaranteed under Article 29 1(a), no restriction on the freedom is permissible unless it is intended to protect the rights of others or the public interest. As regards public interest, the limitation must not go *"beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution."*

The scope of the limitations imposed on freedom of expression has been considered by courts in various jurisdictions throughout the world including United Kingdom, Canada, India, Zimbabwe, Zambia, Nigeria, European Union and the United States. The criteria or tests to be adopted in deciding whether the limitation is permissible have been evolved. Of particular relevancy have been the decisions which have considered, whether the offence of publishing

a false statement or rumour, is a permissible limitation to freedom of expression. These include the decisions in the Canadian case of **R V. Zundel (1992) 10 CCR (2nd) 193** and the Zimbabwean case of **Mark Gova Chavunduka & Another V. Minister of Home Affairs and Another**, (supra). These decisions have been ably considered in the judgment of my learned brother Mulenga JSC. In both cases provisions similar to section 50 of the Penal Code Act were struck down as unconstitutional.

The offence of publishing false news under section 50 of the Penal Code Act is too vague, wide, and conjectural to provide the necessary certainty required to impose an acceptable limitation on freedom of expression. The determination of falsity of a statement and likelihood of causing fear or alarm are problematic. The limitation puts the press and other media in a dilemma as to whether to publish and face punishment or not to publish and withhold the information from the public. It imposes an unacceptable chilling effect on the freedom of the press. It does not serve any pressing or substantial social need, which outweighs the need to protect freedom of expression. On the contrary, the limitation is out of proportion to the objective intended to be attained. The limitation is not necessary to protect the rights of others or to protect the public interest. It is therefore, not acceptable or demonstrably justifiable in a free and democratic society.

I agree with what Mc Nally J.A. said in his concurring judgment in the **Mark Gova Chavunduka Case**, (supra),

"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 or 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.....All we are saying is that the section is unacceptable as it stands."

I am of the opinion that Section 50 of the Penal Code Act was saved under Article 273 of the Constitution, but no modification can bring it in conformity with the Constitution. The Section is in conflict with the provisions of Article 29(1) (a) of the Constitution and is therefore void. It is my considered opinion that Section 50 of the Penal Code Act belongs to those laws which should have been repealed following the promulgation of the 1995 Constitution. It is high time that a comprehensive exercise is carried out to review or repeal such laws which are inconsistent with the Constitution.

I agree with Mulenga JSC, that the Constitutional Court was in error to suspend the hearing of the constitutional petition pending the conclusion of the criminal prosecution. The Court should have heard the petition first and suspended the hearing of the criminal case, because Constitutional Cases take precedence over other cases.

As the other members of the Court also agree with the judgment and orders proposed by my learned brother, Mulenga JSC, the unanimous decision of the Court is as follows: -

- (a) This appeal is allowed;
- (b) It is declared that Section 50 of the Penal Code Act is inconsistent with Article 29 (1) (a) of the Constitution, and is void;
- (c) The appellants will have the costs of this appeal and in

the Constitutional Court. A certificate for two counsel is allowed. Dated at Mengo this 11th day of February 2004

2004

JUDGMENT OF BYAMUGISHA Ag. JSC

This is an appeal against the decision of the Constitutional Court wherein by majority decision it dismissed the appellants' petition. I had the benefit of reading in draft the lead judgment that

was prepared by Mulenga JSC and I agree with the reasons he has given that this appeal ought to succeed.

However, I have a few remarks of my own to make. The facts that led to the institution of the petition in the lower court are sufficiently stated in the lead judgment, therefore I do not have to repeat them. The basis of the complaint by the appellants both here and in the lower court was that as journalists they published the article in question in exercise of their constitutional rights under **Article 29(l)(a)** and **(e)** of the Constitution. They contended that the publication was done in the enjoyment of their rights in the reasonable belief that such publication was acceptable and justifiable in a free and democratic society under **Article 43(2)(c)** of the Constitution. It was their contention that the action of the Director of Public Prosecutions to prosecute them for allegedly publishing false news under **section 50(1)** of the Penal Code Act was a violation of their freedom of expression and the press. According to the appellants the actions of the D.P.P and the provisions of **section 50**(supra) are inconsistent with and or in contravention of the provisions of the Constitution.

The Attorney General in the answer to the petition justified the existence of the section and the action of the **D.P.P** to prosecute the appellants. In particular it was stated that the petitioners' freedom of expression guaranteed under the Constitution is subject to the qualification in **Article 43** of the Constitution whose provisions fully support the offence created by **section 50** of the Code. In paragraph 6 of the answer, the Attorney General defended the action of the **DPP** and contended that **section 50** does not make freedom of expression, press and association as well as the right to practice the journalism profession criminal acts. Instead it was contended that the section reiterates **Article 43(1)** of the Constitution which requires that in the enjoyment of rights guaranteed under the Constitution one has to be mindful of the rights of others.

There is no doubt in my mind that Chapter 4 of the Constitution guarantees fundamental human rights and freedoms. This is what is referred to as the bill of rights in some jurisdictions. **Article 29(1)** protects certain freedoms. For purposes of the matter now before this court it states as follows.

20 "(1) Every person shall have the right to-(a) freedom of speech and expression, which shall include freedom of the press and other media.

- (b) ...
- (c) ...
- (d)

(e) freedom of association which shall include the freedom to form associations or unions, including trade unions and political and other civic organisation."

Article 43 states as follows:

"(1) In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest

10 (2) Public interest under this article shall not permit

(a) political persecution;

(b) detention without trial;

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided under this Constitution."

The provisions of this Article clearly indicate to me that the enjoyment of fundamental human rights and freedoms is not absolute. One has to be mindful of the rights of others and public interest while exercising these rights. The limitations to be imposed in the enjoyment of the stated rights have to be acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution. What does section 50(supra) prohibit? In order to answer this question it is necessary to produce the provisions of the section in full. It states as follows:

"(1) any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or disturb public peace is guilty of a misdemeanour."

The section prohibits the publication of any false statement, rumour or report that is likely to cause fear and alarm to the public or disturb public peace.

Who determines that a statement or rumour that has been published is false? Article 120 of the Constitution clothes the Director of Public Prosecutions with powers to institute criminal proceedings against any person or authority in any court with competent jurisdiction. In the exercise of these powers the D.P.P. is independent and is not subject to the control or direction of anybody. Furthermore he is supposed to be guided by public interest, the interest of the administration of justice and the need to prevent the abuse of legal process.

Is there any justification to prosecute news paper proprietors, editors and journalist for allegedly publishing news that are perceived to be false by the D.P.P? I do accept in principle that journalists in their day to day activities of disseminating information in the public domain should strive to be honest, fair, truthful and maintain high standards of ethical behaviour. Having said that however, I do not accept that publication of news that is perceived to be false should remain a criminal offence in this country. I am saying so because first, the dissemination of information into the public domain has been revolutionised by the Internet. There is no single country or group of countries, organisation etc, that can claim to monopolise the sources of information or the truth or falsehood of such information. The advances that have been made in information technology, satellite broadcasting and the internet is making it almost impossible to hide reports like the one that was published by the appellants from reaching the Ugandan public. To me this is the reality on the ground at the present time.

The protection under the Constitution for freedom of the press and expression is, in my view not meant for statements or rumours that are perceived to be truthful.

Secondly, publication of newspapers like the one the appellants were working for at the time material to this appeal, is governed by the **Press and Journalist Act (Cap. 105)**. The Act came into force on the 28th July 1995 just a few months before the coming into force of the 1995 Constitution. One of the stated objectives of the Act is to ensure freedom of the press. None of the advocates who appeared before us cited the provisions of this Act. The Constitutional Court also did not consider it. The Act itself does not define what freedom of the press is. I shall try to examine some of its provisions and determine their purpose and effect on the provisions of **section 50**(supra). **Section 3** governs the right to publish a newspaper. It says:

- "(1) A person may, subject to the provisions of this Act publish a newspaper.***
- (2) No person or authority shall, on ground of the content of a publication, take any action not authorised under this Act or any other 5 law to prevent the (a)Printing (b) Publication;or (d) circulation among the public, of a newspaper."***

Section 4 requires publishers of newspapers to comply with any other law. It states that:

"Nothing contained in Section 3 of this Act absolves any person from compliance with any law-is (a) prohibiting the publication of pornographic matters and obscene publications in so far as they tend to offend or corrupt public morals;

(b) *prohibiting any publication which improperly infringes on the privacy of an individual or which contains false information."*

One of the functions of the editor of a mass media organisation is to ensure that what is published is not contrary to public morality. This is contained in **section 7 (a)** of the Act. The Act also set up a Media

Council. The functions of the council are set out in **section 10**. These are:

- (a) *to regulate the conduct and promote good ethical standards and discipline of journalist;*
- (b) *to arbitrate disputes between-*
 - (i) *the public and the media; and*
 - (ii) *the state and the media;*
- 30 (c) *to exercise disciplinary control over journalists, editors and publishers;*
- (d) *to promote, generally, the flow of information;*
- (e) *to censor films, video tapes, plays and other related apparatuses for public consumption;*
and
- (f) *to exercise any function that may be authorised or required by any law.*

The Act repealed the Newspaper and Publications Act and the Press Censorship and Correction Act Under **section 9** of the now repealed Press and Censorship Act the Minister had powers to order the proprietor of any newspaper that has published any statement which in the opinion of the Minister is false or distorted to publish a correcting statement. If the proprietor refused to publish a correcting statement the statement that was originally published would be deemed to be a seditious publication. The proprietor of the newspaper would be prosecuted. It can be said therefore that **The Press and Journalist Act** ushered in a new regime of press freedom with some limitations as set out in the Act. The powers of the Minister were abolished. To me this was a significant development. It means that the proprietors of newspapers have the freedom to publish within the parameters set down by the Act. The powers of the Minister having been abolished, it is my humble opinion that these powers were not transferred to the D.P.P. I am constrained to say so because the whole purpose of abolishing the powers of the Minister was to stop press censorship by Government and its officers. To me it would defeat the purpose and intention of the Act if the powers that were once exercised by the Minister were transferred to the D.P.P who is an officer of Government in a Ministry headed by a Minister.

The Act imposes a duty on proprietors of newspaper and their editors to ensure that what is published in the newspaper is not against public morality or does not infringe on the privacy of an individual. For different reasons I would tend to agree with the submissions of Mr Nangwala, learned counsel for the appellants, that when the 1995 Constitution came into force, **section 50** was no longer an effective legislation. It was rendered ineffective by the **Press and Journalist Act**.

The 1995 Constitution ushered into this country a new constitutional order. One of the objectives of the Constitution is to build democracy. No society can build democracy and strong institutions to defend that democracy if there is no free flow of information even if some of that information is false. Democracy by its very nature comes at a price. Mr Chebrion Barishaki learned Commissioner for Civil Litigation submitted before us that we should take into consideration the peculiar

circumstances of this country. He did not elaborate. However, the framers of the Constitution had the peculiar circumstances of this country in mind when they enacted the Constitution. These are highlighted in the preamble as political and constitutional instability, tyranny, oppression and exploitation. They stated the goals to be attained. These were to be unity, peace equality, democracy, freedom, and social justice. I consider these to be the values, norms and aspirations of the people in this country that have to be nurtured. Therefore the respondent had the burden to justify the existence of **section 50** in view of the stated objectives to be attained and **Article 43** of the Constitution.

My understanding of the article is that the Constitution as the supreme law of the land was made the yardstick to be used in measuring all the existing and future laws. In other words all laws had to conform to the new constitutional order. This was reflected in **Article 273**. The article states as follows:

"(1) Subject to the provisions of this article, the operation of the existing law after coming into force of this Constitution shall not be affected by the coming into force of this Constitution

but the existing law shall be construed with such modifications, qualifications and 15 exceptions as may be necessary to bring it into conformity with this Constitution.

(2) For the purpose of this Article, the expression existing law" means the unwritten law of Uganda or any part of it as existed immediately before coming into force of this Constitution, including any Act of 20 Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date."

There is no doubt in my mind that when the appellants filed their petition they were challenging a law that they thought rightly or wrongly was in existence before the coming into force of the Constitution. The statement in the petition and the accompanying affidavit of Charles Onyango Obbo, the first appellant, bears testimony to that fact. The petition alleged that **section 50**(supra) is inconsistent with and/or is in contravention of the provisions of the Constitution. The petition ended with one of the prayers seeking a declaration that the section is inconsistent with the provisions of **Articles 29(l)(a) and (b), 40(2) and 43(2)(c)** of the Constitution.

Having said that, the burden was on the appellants to prove that the State or somebody else under the authority of any law has violated their rights and freedoms to publish guaranteed under the Constitution. Once that has been established, the burden shifts to the State or the person whose acts are being complained of to justify the restrictions being imposed or the continued existence of the impugned legislation.

In the matter now before us the appellants I think established by their petition that the acts of the D.P.P to prosecute them was inconsistent or in contravention of their rights as enshrined in the Constitution. The burden shifted to the State to justify the restrictions as being demonstrably justifiable in a free and democratic society or within the confines of the Constitution. The justification was contained in the answer to the petition and the accompanying affidavit sworn by Monica Mugenyi, a State Attorney in the Attorney General's chambers. Paragraph 6 of the answer stated as follows:

"The actions of the Director of Public Prosecutions and Section 50 of the Penal Code Act are not inconsistent with the constitution as:

(a) They do not make freedom of expression, press and association as well as the right to practice the journalism profession a criminal acts as alleged in ground 5(1) of the Petition. Instead section 50 of the Penal Code Act reiterates Article 43(1) of the Constitution which requires that freedom to be mindful of the freedoms of others, the trampling upon which entitles not only the Director of Public Prosecutions but also the Public to seek protection from Courts of law.

(b) Article 43(2)(c) is not a magic wand in the hands of journalists to publish irresponsibly, maliciously or unprofessionally. (c) The democracy in Uganda is not measured solely by the petitioners simply because the truth or authenticity of their actions are being questioned in a Court of Law but is subject to the rule of Law and must be for the good of society generally."

The answer to the petition did not state that the restrictions imposed by **section 50** are demonstrably justifiable in a free and democratic society or what is provided under the Constitution. The answer to the petition should have shown why publication of false news and rumours ought to remain a criminal offence in a free and democratic society like ours. To me this was the crux of the matter. In other words, Attorney General should have shown clearly that the limitation imposed by **section 50** falls within **Article 43**(supra) or any other provisions of the Constitution and the provisions of the **Press and Journalist Act**. It is my considered opinion that the Director of Public Prosecutions should not have the powers to determine on behalf of over 20 million people living in this country that a statement, rumour or report published by any person is likely to cause fear and alarm to the public or to disturb public peace.

This cannot be right.

The Attorney General in my view did not discharge the evidential burden of justifying the continued existence of the impugned section on our statute books.

Uganda, like many other countries in the world have chosen the path of democratic governance. There are many authorities from many jurisdictions, which have been reproduced in the judgments that have just been delivered. It is not necessary to reproduce them here. But these authorities as I understand them stress the importance of freedom of expression as being the corner stone of every society that is democratically governed.

Uganda chose a path of democratic governance and therefore she has a duty to protect the rights regarding the free flow of information, free debate and open discussion of issues that concern the citizens of this country. In order to exercise these rights there must be an enabling regime for people to freely express their ideas and opinions as long as in enjoying these rights such people do not prejudice the rights and freedoms of others or public interest. These are the only restriction that **Article 43**(supra) imposes. As long as in expressing one's opinion even if it is false, the person doing so does not prejudice the rights and freedoms of others, or the public interest there would be no harm done. In my view, of the Constitution for criminalising every statement that is published even if that statement has not caused any prejudice to the rights of others. Even if there is a violation or prejudice of other peoples' rights, there is a remedy or remedies that are provided under the existing law where one can seek redress in a civil court. This means that our society must learn to accommodate a wide variety of views, beliefs etc, even if such views or beliefs are repugnant and contrary to our own.

I would allow this appeal in the terms proposed by Mulenga JSC.

JUDGMENT OF KAROKORA, J.S.C.

I have had the advantage of reading in draft the judgment prepared by learned brother the Hon. Justice Mulenga, JSC in which he sets out the facts and discusses fully the questions of law which arise in this appeal. I entirely agree with him that the appeal should be allowed and I have nothing to add to what he says regarding the applicability of section 50 of the Penal Code Act. I agree with him that the section is too broad, lacking sufficient guidance on what is and what is not safe to publish, because it is bound to be differently interpreted.

Consequently, I would agree that the intending newspaper reporter or editor in the media would be in dilemma as to whether the news he intends to publish constitutes a criminal offence or not. Further, considering the important role of the media in a democratic governance, I think that a law that places that role into that kind of dilemma and leaves such unfettered discretion in the hands of Police/State prosecutor to determine what constitutes a criminal offence would be unacceptable and unjustifiable in a free and democratic society.

Further, I would agree with him that criminalizing false news under section 50 (1) of the Penal Code Act would not exist side by side with the rights of freedom of speech and expression, which includes freedom of the press and other media guaranteed by article 29(1)(a) of the constitution in a free and democratic society, because the strict enforcement of section 50 of the Penal Code Act would be tantamount to taking away the rights guaranteed under article 29(1)(a) of the constitution.

In the circumstances, section 50 of the Penal Code cannot stand in view of article 29(1) (a) of the constitution. It is therefore null and void.

Finally, the majority of learned justices of the Constitutional Court having earlier observed in the lead judgment of Berko, JA with which other 3 justices agreed that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society, then in my view, since the respondent adduced no evidence as required under article 43(1) of the constitution to prove that the news/article published in the Sunday Monitor Newspaper dated 21st September, 1997 prejudiced the fundamental or other human rights and freedom of others or the public interest, they were in error when they held that section 50 of the Penal Code Act was not inconsistent with article 29(1)(a) of the constitution.

Moreover, I think that the respondent in the instant case could not justify prosecution of the appellant under section 50 of the Penal Code Act by claiming that they did so in public interest, because the onus was on the respondent to adduce evidence, which they never did, to prove that the existence of section 50 of the Penal Code Act is acceptable and demonstrably justifiable in a free and democratic Uganda today within the meaning of article 43(2)(c) of the constitution.

In the result I would allow this appeal and adopt orders proposed by Mulenga JSC.

Dated at Mengo this 11th day of February 2004