Obbo and Another v Attorney-General (2004) AHRLR 256 (UgSC 2004)

Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney-General □□□□□□□□

Supreme Court of Uganda, constitutional appeal 2 of 2002, 11 February 2004

Judges: Odoki, Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba, Byamugisha

Extract: Judgment of Mulenga.

Publication of false news

Fair trial (precision and clarity in definition of criminal offence, 8; presumption of innocence, 35)

Limitations of rights (acceptable in a democratic society, 9, 12, 13, 19, 28, 48, 49; balancing competing interests, 28-31, 42, 45-47, 50; proportionality, 51; predictability, 52-56; onus on state to prove that limitations are justified, 62)

Interpretation (international standards, 15, 16, 25)

Expression (false news, 18, 21, 22, 33-35, 39, 52, 53; democratic society, 19, 24, 26, 53; law

of defamation, 44; public figures must face a higher degree of criticism than others, 53, 54)

Democracy (protection of human rights, 23, 24, 48)

Judicial review (construction of statutes, 44)

Mulenga JSC

[1.] 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.

[2.] 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 21 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.

[3.] 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.

[4.] On 24 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.

[5.] 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.

[6.] 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 no pursue the 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.

[7.] 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.

[8.] 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 legal 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 v Silvatori Abuki constitutional appeal 1 of 1998 (SCD (Const) 1999/2000 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.

[9.] 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 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 focussed on what he called the vagueness of section 50, and highlighted its very wide applicability, which makes it difficult to determine its scope.

[10.] 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 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.

[11.] In his judgment, with which the majority of the Constitutional Court concurred, Berko JA 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.

[12.] 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 section 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 section 50 of the Penal Code Act is not inconsistent with the Constitution. (Emphasis is added).

[13.] There are a number of flaws in this passage. To start with, I will highlight two major flows, 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 focussed 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 to make a finding on it.

Falsity and freedom of expression

[14.] 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 provision 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.

[15.] The Constitution, declares the right to freedom of expression in article 29 thus: '(1) Every person shall have the right to (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 not 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.'

[16.] 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 in 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.

[17.] In the International Covenant on Civil and Political Rights, article 19 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.

[18.] 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 when 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 JA, 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 speech and expression.

[19.] 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).

[20.] 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 v Zundel (1992) 10 CRR (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 expression serves ... to preclude the majority's perception of truth or public interest from smothering the minority's perception.

[21.] 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 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 some times 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).

[22.] I respectfully agree with the 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

[23.] Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with JJ 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'Átre 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.

[24.] 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 v Zundel (supra) at 205, the following excerpt from an earlier judgment in Edmonton Journal v Alberta (AG) (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 only be restricted in the clearest of circumstances.

[25.] 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, [application 9185/82, decided 8 July 1986], 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 that pluralism, tolerance and broadmindedness 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 para 41).

[26.] 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. The 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

[27.] 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).

[28.] 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 'prejudice' 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 prohibit 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.

[29.] 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.

[30.] 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 v Jagjivan Ram and Others; Union of India and Others v Jagvan Ram and Others (1990) LRC (Const) 412, the Supreme Court of India put the point this way, at 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'.

[31.] 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

[32.] 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:

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.

[33.] 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.

[34.] 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 section 71 of the Trial on Indictment Decree ... That requirement cannot therefore make the section unconstitutional.

[35.] 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 providing 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.

[36.] 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

[37.] 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 JA, 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 v 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'.

[38.] 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 Chavunduka & Another v Minister of Home Affairs & Another, (SC 36/2000: civil application 156/99) 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.

[39.] 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 today. 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.

[40.] 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).

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

Prejudice to public interest

[42.] 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 recent 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)?

[43.] 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 JA put it thus:

In view of the above provision (article 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'.

[44.] 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, for example 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.

[45.] 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 JA 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:

[T]he 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).

[46.] In principle, I accept that the law should be utilised 'to exclude from the range of individual choice' (ie 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.

[47.] 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

[48.] 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 v Oakes 26 DLR (4th) 200, the Supreme Court of Canada elaborated on that standard in relation to section 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 CJC 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 belief 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 providing 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.

[49.] 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 Chavunduka & Another v Minister of Home Affairs & Another supra; 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.

[50.] 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.

[51.] 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.

[52.] 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 the Mark Gova Chavunduka case, Chief Justice Gubbay 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).

[53.] 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 cases 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 v Attorney General of Antigua and Barbuda (1990) 2 AC 312, at 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.

[54.] That was said in respect of an express statutory provision, which made the printing and 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.

[55.] 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 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 v Uganda criminal appeal 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.

[56.] 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.

[57.] 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 v Zundel (supra) was section 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 section 2(b) in similar terms as our article 29(1)(a), and under section 1 it provides for justified limitation like our article 43.

[58.] McLachlin J, as she then was, writing the majority judgment, carefully analysed the said section 181 showing its incompatibility with principles governing limitation of rights that is acceptable under section 1 of the Charter. In concluding, she said at 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 CJC made it clear that the less important the provisions 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 serious concern. In fact, s 181 extends the sanction of the criminal law to virtual 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, 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'.

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

[60.] The Supreme Court of Zimbabwe in Mark Gova Chavunduka and Another v 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:

[I]t 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.

[61.] The Court declared that section 50(2)(a) of the Law and Order (Maintenance) Act of Zimbabwe infringed the right to freedom of expression, and so contravened the Constitution.

[62.] 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.

[63.] 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.

[64.] 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 v 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.

[65.] 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.'

[66.] 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.