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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.279 OF 1993

BETWEEN:

ALEKE BANDA ..... PLAINTIFF

- and -

ROBERT DANGWE ..... 1ST DEFENDANT

- and -

MALAWI CONGRESS PARTY ..... 2ND DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Chizumila, Counsel for the Plaintiff

O R D E R

This action arises out of a calumny on the 23rd of the February, 1993 at Luchenza Township in Thyolo District during a rally attended by the Life President. Every year around this time, this has been going on for a number of years, the Life President takes off some time to see produce in his own estates and farms and those of his citizens. The Life President having declared a referendum on political pluralism in Malawi, these usual annual visits have been used by party stalwarts and apparachiks to countenance support for continuation of the one party system. In the course of this rally, the first defendant, Mr. Dangwe, District Party Chairman in Thyolo, made some untoward remarks about the plaintiff. As is usual, with all such visits, the whole ceremony, including these remarks, was broadcast live on the local radio station, Malawi Broadcasting Corporation. It was repeated in the evening and carried by the local daily and weekly papers. The power of radio, particularly in a country like ours, where there is no television, means that quite a sector of the national population, and I would think, a sizable of the international community, had the broadcast message.

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The calumnious statement is in Chichewa: "Aleke Banda anachotsedwa Ntchito ku Press chifukwa anabako ndalama". The translation is: "Aleke Banda was dismissed from Press Holdings Limited because he stole money there". The statement alleges a criminal offence punishable with imprisonment of up to 5 years, if it is simple theft, or 14 years, if theft by a servant.

When this statement was made the plaintiff was outside the country with others trying to explain the political situation in the country. Since he came back, there has been no attempt to retract the allegation. The first and second defendants have offered no apology. In fact, according to the plaintiff, virulent and vitriolic statements have continued to be made against him by members of the second defendant.

So on the 11th of March, 1993 the plaintiff took out this action against the first and second defendants claiming aggravated or exemplary damages for defemation. The defendants were served by post on the 11th of March, 1993. There was no notice of intention to defend. So on the 13th of April, 1993 the plaintiff obtained judgment in default of notice of intention to defend. The judgment was interlocutory with damages to be assessed by the Master. Notice of appointment of assessment of damages was taken out on 15th April, 1993 setting the case down for 30th April, 1993. Notice of hearing was sent by post on the 15th of April, 1993. On 30th April, 1993 the plaintiff appeared. The defendants did not. I heard the evidence. The plaintiff's legal practitioner made written submissions.

The words uttered by the first defendant at this particular political rally import or purport that the plaintiff stole money at Press holdings Limited. If true, as we have seen, the plaintiff committed a crime. If untrue, the first and second defendants are guilty of slander. The plaintiff has tried to show that this statement is antithesis or a backdrop from an excellent, selfless and impeccable political career, used chiefly for the good of others, and incompetent and intractable trail in business. The plaintiff wanted to show that the confidence and trust that the nation had in him is in the current political process being mollified for political reasons.

The plaintiff told the Court that his political career started at an age where most of us would not, the age of 14. In 1953 he was the Secretary of an organisation in Kwekwe of the Nyasaland African Congress. In Secondary School he was elected Secretary of the Southern African Students Association.

This was a political activist group among students. In March, 1959 he was detained by the Southern Rhodesia Government. He was deported to Malawi. He joined a Trade Union Movement. He was Editor of the Union's Magazine "Mtendere pa Ntchito". He became a member of Trade Union Congress which later introduced him to the political activities of Nyasaland. On 13th September, 1959, when the Malawi Congress Party was formed, he was elected Secretary General. Orton Chirwa was elected President. In 1959 the plaintiff founded Malawi News and became its first Editor.

When His Excellency the Life President was released from Gwelu prison, he and the Life President started Press Holdings Limited. The plaintiff was the first Managing Director because he was Secretary General of the Malawi Congress Party.

The plaintiff was a member of the first constitutional talks that were held at Lancaster House in London and all subsequent constitutional discussions that led to independence in 1964 and a Republic in 1966.

In the young nation that was being formed the plaintiff had slots in top Government and political positions. He was the first Commander of Malawi Young Pioners. In 1966 he was appointed Minister of Economic Affairs which included the portifolios of Natural Resources, Trade and Industry and Works. In 1969 he was appointed Minister of Finance and Minister of Information and Tourism. In 1972 he was Minister of Trade and Tourism.

In 1973 he lost the Cabinet and Party posts. According to him, he had visited Zambia. Because he was Secretary General of the Party, Zambian Newspapers speculated that he was successor to His Excellency the Life President. The article, according to him, had nothing to do with him. He nevertheless lost his government and political posts.

In 1974 he was reinstated in the Party. He did not assume any government or political post. He was appointed the first Deputy Chairman and Managing Director of Press Holdings Limited. According to the plaintiff, Press Holdings limited was in complete shamble. It could not produce accounts and had no budget. The company was re-organised after a consultancy that was brought at his aegis. Press Group became a very important conglomerate with more than 30 subsidiaries investing in banking, insurance, oil, transportation and many others.

During this period the plaintiff was Chairman of several institutions, National Bank of Malawi, the National Insurance Company, the Oil Company of Malawi, Air Malawi. He was also Deputy Chairman of Commercial Bank of Malawi.

The plaintiff had also some influence outside the Party, Government and business. He was, for example, the first Director General of Malawi Broadcasting Corporation, was a member of University Council, was Chairman of the Football Association of Malawi, Malawi Finance Company, Finance Corporation of Malawi and many others.

The plaintiff fell out of grace again in 1979. This led to his exit from Press Holdings. According to the plaintiff the economy of the country was in bad shape because of soaring oil prices and drought. Liquidity of the banks was at 17 and 13 percent for National Bank and Commercial Bank respectively, well below the prescribed 30%. This caused consternation among those connected with financial and economic management. The Life President, who was Chairman of the Press Group of Companies, withdrew large sums of money from the account of Press Holdings in the banks for various purposes. These drawings adversely affected the financial stability of Press Holdings, the two commercial banks, Admarc and the whole economy.

There was a discussion with all interested including the then Minister of Finance, Mr. Edward Bwanali, and the then Governor of Reserve Bank, Mr. John Tembo. On the basis of these discussions the plaintiff in his capacity as Chairman of Press Holdings sent a memo to the Life President advising the Life President against these large drawings which were virtually destroying financial management of these institutions. This did not go well with the plaintiff. He was dismissed and detained two weeks later. He was also expelled from the Party.

The Chief Commissioner of Police then, Mr. Kamwana went to Mzuzu to tell the plaintiff that he had orders to detain the plaintiff although the Commissioner did not know the reason. This was followed by two members of Special Branch who interrogated him for two days to determine if he had committed any political or criminal offence. They told him they had nothing against him. The plaintiff nevertheless remained in detention as ordered.

Subsequently, the Head of the Criminal Investigations and his men came again and intensified the enquiries. They also did not find anything. He continued in detention until he was released on 10th July, 1992.

The plaintiff told the Court that he is back now to settle and revamp his businesses and mend his family. This is not entirely true though because he has come back into political life because he is for change of the current one Party system. He has joined the United Democratic Front, another pressure group advocating for political pluralism. He is in the Executive Committee and he is the Chairman of the Campaign Committee. In fact, in February this year he was among the delegation of the Public Affairs Committee, an umbrella organisation of the Church, the United Democratic Front and Alliance for Democracy, another pressure group, to the United Kingdom as guests of Christian Council of Churches in Britain and Ireland. The delegation talked to various organisations including the British Government to drum up support for political pluralism. He and his colleagues gave interviews on the radio. He is the only one who appeared on television. In that television interview he informed viewers that the support for one party system was plummeting as judged from the number of people attending rallies of the two protagonists. He said that the Life President's rallies are not well attended. Immediately after these statements, the next political rally attended by the Life President of the Malawi Congress Party was the Thyolo rally where the statements made by the first defendant in the presence of many Party stalwarts were uttered. The plaintiff has referred to other derogatory statements made thereafter. He has not stated whether they were to the same effect that the plaintiff had stolen money from Press Holdings. The evidence on subsequent statements is a bit imprecise, in my view. The plaintiff has, however, stated that he had no apology from the defendants.

Before I consider the submissions by Counsel on quantum of damages, I should mention that the sort of slander pleaded here is actionable per se. At common law a false accusation that one had committed an offence punishable with imprisonment entitled the victim to damages, sometimes huge damages, without proof of any financial loss. Such an allegation threatened the victim, if acted upon, with imprisonment. Damages were, therefore, awarded without any consideration of financial loss. Hellwig v. Mitchell (1910) 1 K.B. 609, 613. In this particular case the plaintiff is said to be a thief and would be entitled to damages without proof of any financial loss, harm having

been done to his reputation and fame. Counsel for the plaintiff, however, raised a number of factors in this particular case, apart from the claim for exemplary damages, which I must take into account as aggravating the damages.

The first point taken by the plaintiff's Counsel is that the plaintiff's standing in Malawi and abroad is beyond reproach. The allegations levelled against the plaintiff put at askance the perception of the people who know the plaintiff. He submits that the estimation of the plaintiff has been grossly affected. The damages awarded should be able to compensate the plaintiff. I spent sometime trying to lay down the achievements and the estimation in which the country, the Life President, the financial institutions and, I would add, the Party held the plaintiff. My assessment is that the plaintiff was held in very high veneration. He is a man of good reputation. This should be reflected in the damages I award, (Scott v. Sampson 1882 8 K.B. 491, 503). In this case Cave, J. quoted a statement from Starkie on evidence which beautifully illustrates the approach of the Court. I am forced to reproduce it because it best expresses the view point of the law:

> "To deny this would",as is observed in Starkie on evidence, "to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantum of injury sustained a knowledge of the party's previous character is not only material but seems to be absolutely essential."

To reduce a man of such impeccable record as the plaintiff has been shown or known to be to a thief would require an award that would leave the plaintiff with such amount of damages as would make him happy or satisfied with the sum of money awarded each time he is reminded of the slander against him. If, as the plaintiff has shown, he left Press Holdings because of a conflict between the national interest and the President, it is a disservice to his reputation to be called a thief.

Secondly, Counsel for the plaintiff has submitted that I must take into account injury to the plaintiff's feelings. He has referred to the remarks of Lord Justice Pearson in Mackerry v. Associated Newspapers (1965) 2 K.B. 86, 104, 105:

> "Compensatory damages in a case which are at large may include several different kinds of compensations

to the injured plaintiff. They may include not only actual pecuniary loss or anticipated pecuniary loss or any social disadvantages which result or thought likely to result, from the wrong which has been done. They may also include natural injuries to his feelings - natural grief and distress which he may have felt as having been spoken of in defamatory terms and if there has been anything of high handed, oppressive, insulting, or contumelious behaviour by the defendant which increases the mental being and suffering caused by the defendant may constitute injury to the plaintiff's pride and his confidence, those are proper elements to be taken into account in a case where damages are at large."

Counsel submitted that arrogance and callousness displayed by the first defendant in this case when he published the defamatory words, the total disregard and failure to apologize by the defendants, the obvious pain suffered by the plaintiff when he gave evidence before the Court, loudly proclaim the justification for this Court to seriously consider the injury to the plaintiff's feelings. He stated that it would not be right to ignore the obvious blow to the plaintiff's pride in light of the long illustrious career at Press Holdings Limited. It is legitimate to say that when a false allegation like the one perpertrated is made it does spur a feeling of resentment and repulsion simply because it is untrue. There is more injury from the fact that it remains in the minds of people even if retracted. More importantly, the statement was made probably recklessly without consideration whether it was true or not.

Thirdly, Counsel has submitted that the extent of publication of the defamatory matter is a factor to be taken into account. In this particular case the defamatory words were uttered on the radio, the only local radio. Radio covers and reports to the whole nation. The publication, therefore, was not only made in the presence of the thousands who usually attend the President's rallies, but to the whole radio audience. It was repeated to the radio audience in the evening. It was also published in the Daily Times, a daily paper with a sizable circulation in the country. Counsel relied on Cole v. Mule (1846) 15 M & W 319. That was a case where several copies of the publication were multiplied and circulated. I think the point in this case is that this publication came to a very wide audience as we shall see later. Because this was a political rally on which the divide between one party advocates and multi-party advocates is it was intended to get to a wide audience.

Fourthly, Counsel submitted that in assessing damages the whole defendants' conduct must be looked at. Counsel relied on

Pread v. Graham (1890) 24 QBD 53, 55. Counsel submitted that the Court is entitled when assessing damages to consider the whole of the defendants' conduct from the time the defamation was published to the time when the verdict is given. The Court could consider the conduct before the action and during the trial. The statement of Lord Esher is correct. The only problem in this case is that the plaintiff has not led evidence of the conduct of the defendant before this action. He has not raised evidence on how the defendant behaved after this statement. Admittedly, no apology was proferred, but this is a different consideration. We will look at it later.

On this same point the plaintiff's legal practitioner submits that we must look at the intention of the party publishing the defamatory words. He submitted that damages would be enhanced where the defendant defames for personal gain, spite or ill-will, and damages would be reduced if the statement was made just out of mere lack of care and consideration. This was decided in Pearson v. Lamitre (1843) 5 M & G 700, 720. In giving evidence the plaintiff testified that the statement was made simply because he, who was a member of Malawi Congress Party, has joined the fight for political pluralism. Sometimes the best way to shoot down an idea is to shoot its champion. To that extent if the plaintiff is championing political pluralism anything that undermines him should be brought to the attention of the public to weaken the ideas expoused. This, however, does not justify stating defamatory matters. If the defamation was clearly motivated by advocacy of the one party State and not carelessly made, it aggravates the damages in this case and the Court should take into account.

The plaintiff, however, further submitted that the defendant made further publication of the defamatory remarks. He submitted that the subsequent publication was evidence of malice and this should aggravate damages. He prayed in aid the case of Durby v. Cusley (1856) 1 H & N 1, 13 where Polock C.B. said:

> "In one sense that may be so, but then the subsequent publication was evidence of malice and would, therefore, aggravate damages."

I have a bit of problems with this submission. First, it has not been shown that there were subsequent publications. If the subsequent publications are the re-broadcast by Malawi Broadcasting Corporation there must be evidence that this was so at the instance of the first and second defendants.

Furthermore, the plaintiff's legal practitioner submits that lack of apology increases damages to be awarded. He

relied on the case of Simpson v. Robinson (1948) 12 K.B. 511. Counsel made a whole submission on this issue to explain the nature and extent of apology. I don't think this is necessary it having been shown that the defendant did not offer any apology at all.

Similar problems affect the fifth submission on quantum of damages. On this point the Legal Practitioner for the plaintiff says that the defendant has not mitigated damages. I don't see any reason for this submission in so far as the defendants have chosen to let judgment to be obtained by the plaintiff. They have not shown up at the assessment of damages. Consequently, the damages would be awarded in full after taking into account all the circumstances of the case.

Before I consider the question of exemplary damages, I should deal with another aspect of Counsel's submission. Counsel cited before me several cases to assist me in assessing damages. I have always understood it to be the law that damages for defamation are at large. Courts never have relied on awards in previous cases. This was decided in Broome v. Cassell & Co. Ltd. (1972) AC 1027. In this case Lord Justice Hailsham, L.C., approved the words of Windeyer in Uren v. Fairfax & Sons Pty. Ltd. (1966) 117 C.L.R. 118, 150:

> "The variety of the matters which, it has been held, may be considered in assessing damages for defamation must, in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations."

At page 1072 the Lord Chancellor said:

> "In other words the whole process of assessing damages where there are "at large" is essentially a matter of impression and not addition".

Damages for defamation are not worked according to a certain formula, neither is there reliance on conventional awards like it is done in personal injury cases. At page 1071 the Lord Chancellor said:

> "This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety, and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or

where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large".

The awards from Malawi and the United Kingdom referred to by Counsel for the plaintiff are, therefore, of no assistance.

Finally, the legal practitioner for the plaintiff submits that I must award exemplary damages in this matter. He relied on Rookes v. Barnard (1964) A.C. 1129. He submitted that in Rookes v. Barnard there are three instances where exemplary damages would be awarded, in particular he emphasized the unconstitutional conduct by Government servants. I have real doubt where this category would apply in this case. It is obvious from Rookes v. Barnard and the subsequent case of Broome v. Cassell & Co. that this category is very restricted. It refers in strict sense to servants performing government functions. Lord Hailsham said:

> "The only category exhaustively discussed before us was the second, since the first could obviously have no application to the instant case. But I desire to say of the first that I would be surprised if it included only servants of the Government in the strict sense of the word. It would, in my view, obviously apply to the Police ..... and almost as certainly to local and other officials exercising improperly rights of search or arrest without warrant, and it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority. ..... I am not prepared to make an exhuastive list of emanations of Government which might or might not be included."

Inspite the recent amendment to the Constitution and Civil Procedure (Suits by and against Government and public officers) Act the distinction between Government and Party still remains. A Party groups people of like minds with the sole purpose of electing people into Government. The Party is not Government. Government encompasses Central Government and local Government. Only those performing Government and public functions and exercise legal authority were envisaged by Lord Devlin and Lord Hailsham in Rookes v. Barnard and Broome v. Cassell. Lord Reid says at page 1087:

> "The first category is oppressive, arbitrary or unconstitutional action by servants of the Government. I should not extend this category -

I say this with particular reference to the facts of this case - to the oppressive action by private corporations or individuals."

"This distinction has been attacked on two grounds: first that it only includes Crown servants and excludes others like the Police who exercise governmental functions but are not Crown servants and, secondly, that it is illogical since both the harm to the plaintiff and the blameworthiness of the defendant may be at least equally great where the offender is a powerful private individual. With regard to the first I think that the context shows that the category was never intended to be limited to Crown servants. The contrast is between "the government" and private individuals. Local government is as much government as national government, and the Police and many other persons are exercising governmental functions. It was unnecessary in Rookes v. Barnard to define the exact limits of the category. I should certainly read it as extending to all those who by common law or statute are exercising functions of a governmental character."

In my view, the first category in Rookes v. Barnard cannot be extrapolated to Party enthusiasts and apparachiks who, though have real influence on Government, are not performing functions of a governmental character.

Counsel for the plaintiff submitted that the principle just stated was applied to defamation in Broome v. Cassell & Co. This is not correct. All their Lordships, Lord Hailsham, the Lord Chancellor, Lord Justices Reid, Morris, Diplock and Kibrandon, who gave the majority opinion and Dilhorne and Wilberforce, who were in the minority proceeded on the second category of Lord Devlin's speech in Rookes v. Barnard. Counsel submitted that the first category applied because the second defendant is the sole political party enshrined in the Republican Constitution. As I have said earlier, it is very clear from the Constitution of the Republic that there is a distinction between the organs of the Government and the Party. The functions of the two should not be mixed. There is, however, validity in Counsel's argument that exemplary damages should be awarded in this case following the principles laid down in Rookes v. Barnard.

The case of Rookes v. Barnard, a decision of the House of Lords, particularly the principles as laid down by Lord Devlin with which Lord Justices Pearce, Hodson, Evershed and Reid agreed, was made with good intentions. It was recognised before this decision that exemplary damages were awarded

widely. What their lordships, particularly Lord Devlin, tried to do in this case was, from the different cases which he reviewed, to categorise and limit instances where exemplary damages should be awarded. The problem that followed that decision, particularly in the common law jurisdiction, later in the Court of Appeal, probably emanates from the fact that one Judge was the mouthpiece of all the Judges present. At least in the United Kingdom itself the matter has been settled by Broome v. Cassel & Co. confirming Rookes v. Barnard.

Other common law jurisdictions, however, have not welcomed the decision in Rookes v. Barnard and Broome v. Cassell & Co. The significance of these two decisions of the House of Lords as precedent and prescription for other common law jurisdictions has been undermined by the decision of the Privy Council in Australian Consolidated Press v. Uren (1969) 1 A.C. 590. There, Lord Morris, delivering the judgment of the Board, bypassed Rookes v. Barnard on the development of common law in Australia. Newzealand and Canada have also bypassed Rookes v. Barnard. This immediately raises the question whether Rookes v. Barnard should be followed in Malawi.

In Rookes v. Barnard the House of Lords decided that exemplary damages would be awarded in three circumstances: where there is oppressive or arbitrary or unconstitutional actions by servants of the Government, where the defendant is out to have profit over his wrong and where there is express provision by statute. The case before me is for slander with a political motivation or advantage. The situation is not covered in the categories in Rookes v. Barnard. The second category would have been the nearest in view of what I have said before in the first category. There is nothing, however, on the evidence to suggest that there was any material gain. Prior to Rookes v. Barnard, however, the situation was quite different. Exemplary damages were widely awarded. This was recognised even by lord Devlin in Rookes v. Barnard for at page 410 he said:

> "I am well aware that what I am about to say, if accepted, impose the limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them for a wider range."

In Mayne and MacGregor on Damages 12th ed. (1961) the following passage appears at paragraph 207:

> "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so when his conduct is wanton, as where it discloses fraud, malice, violence, cruelty,

insolence, or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights ....."

The question before me is whether Malawi should adopt the situation before Rookes v. Barnard and award exemplary damages widely than was advocated by the House of Lords. It might be important to look, therefore, closely at the case of Broome v. Cassell & Co. which was a case of libel. There was not much ado with the first and third categories. There were, however, indications from other members of the House who gave the majority opinion to have second thoughts on the scope of the second category. Lord Reid said:

"We are particularly concerned in the present case with the second category. With the benefit of hindsight I think I can say without disrespect to Lord Devlin that it is not happily phrased. But I think the meaning is clear enough. An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim. Such a case is within this category. But then it is said, suppose he commits the tort not for gain but simply out of malice, why should he not also be punished? Again I fully admit there is no logical reason. The reason for excluding such a case from the category is simply that firmly established authority required us to accept this category however little we might like it, but did not require us to go farther. If logic is to be preferred to the desirability of cutting down the scope for punitive damages to the greatest extent that will not conflict with the established authority then this category must be widened. But as I have said I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority. On that basis I support this category."

His Lordship conceded that there was authority to award damages where there was spite. He also had no logical reason for excluding spite. He was, however, prepared to award exeplary damages where authority had covered it before. I think in the same breath he would be prepared to create authority if circumstance arose.

The Lord Chancellor and Lord Morris, who was part of the decision in Rookes v. Barnard and Australian Consolidated Press

Limited v. Uren, conceded that the second category which limited punitive damages where there was a material or monetary advantage could be expanded. They, however, felt that the Court could regard spite, malice, contumely as aspects of aggravation and award accordingly without resorting to punitive damages. Lord Diplock was loathsome to award punitive damages in what he called the third category:

> "I see no reason for restoring to English law the anomaly of awarding exemplary damages in the third category of cases. If malice with which a wrongful act is done or insolence or arrogance with which it is accompanied renders it more distressing to the plaintiff his injured feelings can still be soothed by aggravated damages which are compensatory."

Some members of the House justified the limitations created by Lord Devlin on the basis that what was awarded as exemplary damages was punitive, an aspect which could be left to the criminal law. This point is unnecessarily over-emphasized. Damages, even of compensatory nature, are in so many ways punitive. This is so in matters of defamation where no real tangible injury exists. The common law even before Rookes v. Barnard recognised punitiveness in civil cases which were diametrically different from punishment in criminal cases. Admittedly, in monetary terms punitive damages in civil cases far exceed fines prescribed for certain offences. The harm in certain cases in civil actions might be very far reaching and not adequately covered by punishment in the criminal law: damages through a civil suit narrows the chasm, re-enforces res integrum by putting the parties status quo ante. Here lies the difference between the purposes of criminal law and damages in a civil law The balance is that a Court would invariably consider the tortfeaser's ability to pay before awarding punitive damages.

Broome v. Cassell & Co., however, was not a unanimous decision. Lord Justices Dilhorne and Wilberforce dissented. Lord Justice Dilhorne was critical of the categorisation. He thought the sort of limitations Lord Devlin was trying to introduce could only be made by the Legislature. At page 1109 he said:

> "But the substantial criticism that can be made is that by his categorisation, the previously existing and recognised power to award exemplary damages is restricted. Lord Devlin indeed appreciated the novelty

of what he was doing when he said that acceptance of his views would "impose limits not hitherto expressed on such awards" ..... I do not think that this should have or could properly be done. It should have been left to the Legislature."

In coming to decide what approach should be taken in Malawi it might be important to consider the advice of Lord Justice Diplock in Broome v. Cassell & Co. and close up with a remark from Lord Justice Wilberforce which may have a significant bearing on this case. Lord Justice Diplock recognised that it was the duty of that House to prescribe laws after taking into account the norms in England. These norms reflect socio-economic developments. He also, however, recognised that other common law jurisdictions were developing, and at that, differently from England. They also retain equal power to prescribe. The strong force of the common law, however, is its capacity to adapt to the changing needs of the society:

"The common law would not have survived in any of those countries which have adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in Judges to adapt its rules to the changing needs of the contemporary society - to discard those which have outlived their usefulness, to develop new rules to meet new situations. As the supreme appellate tribunal of England, your Lordships have a duty, when occasion offers to supervise the exercise of this power by English Courts. Other supreme appellate tribunals exercise similar functions in other countries which have inherited the English law at various times in the past. Despite the unifying effect of that inheritance upon the concepts of man's legal duty to his neighbour, it does not follow that the development of social norms in each of the inheritor countries has been identical or will become so. I do not think that your Lordships should be deflected from your functions of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function. The fact that the Courts of Australia, of New Zealand, and of

several of the common law of Canada have failed to adopt the same political decision for exemplary damages as this House did for England in Rookes v. Barnard affords a cogent reason for re-examining, but not for rejecting it, if, as I think it be the case, re-examination confirms that the decision was a step in the right direction - though it may not have gone as far as could be justified."

The organic and functional nature of the common law entails recognition of developments in the legal system to which the development of the law must regard. One of those developments is the press and Lord Wilberforce recognised the potential and potentate influence of the media. In trying to justify why Rookes v. Barnard should not have excluded libel he said:

"It is difficult to believe that Lord Devlin was intending to limit the scope of punitive damages in defamation actions so as to exclude highly malicious or irresponsible libels. At least if he intended to do so at a time when the media of communication are more powerful than they have ever been and certainly not motivated only by a desire not to make money, and since elsewhere the judgment shows him conscious of the need to sanction the irresponsible, malicious or oppressive use of power, I would have expected some reasons to be given."

Earlier he said:

"Defamation is normally thought of as par excellence the tort when punitive damages may be claimed. It was so presented in argument by Counsel for the respondent (arguing against punitive damages) and he was an acknowledged expert in the subject. Every practitioner and every Judge would take this view."

The mention of the power of the media of communication is not salutary. The media today is a very powerful institution not only in disseminating information but also in influencing policy decisions and change. I think that those who own the media and those who use the media must recognise that it has immense power for good and for evil. They must, therefore, be discreet about how they use it and what information it

disseminates. They bear the consequences. The media, therefore, in a developing country has a special significance in the political realm. It can be manipulated by the powerful and those who have access to it for much good and harm. It is in recognition of this that our Zambian counterparts just across the border, were prepared to break ranks with Rookes v. Barnard and Broome v. Cassell & Co. The justification of such departure was the peculiar situation of Zambia as a developing country. It was recognised that in the context of modern commercial and industrial societies large corporations, powerful individuals and institutions wield so much power and influence which can be used against the vulnerable and gullible. In Times Newspapers Zambia Ltd. v. Kapwepwe (1973) ZLR 292, 301 Baron, D.C.J. said:

> "Be that as it may, since I see nothing illogical in the principle of exemplary damages in a civil action, it follows that I see no reason to limit the kind of case in which such damages may be awarded. Furthermore, in the context of modern commercial and industrial societies, and in particular in the context of a young developing society such as ours, I see very positive reasons for declining to lay down any such limitations. The actions of large corporations may be every bit as oppressive as those of governmental or quasi-governmental bodies; ..... Persons wielding power, whether or not they be persons in authority, must, particularly in a society such as ours, use that power with the utmost responsibility; it is therefore not merely proper but necessary that in cases where power is abused, either deliberately or recklessly, it should be open to the Court to award exemplary damages against the defendant in order to punish and deter him and to mark its disapproval of his conduct."

Doyle, C.J. said in Cobbett-Tribe v. Zambia Publishing Co.Ltd. (1973) Z.R. 9:

> "Zambia society is in a state of development, of much less sophistication than that of England. Its two daily newspapers are in a very powerful position. Daily newspapers, and no doubt other organisations and persons, are in a position to do great good and great harm. I see powerful reasons why the Court, in awarding damages, should have the power, where a person wantonly, maliciously or contumeliously does great harm, to give such damages as will bring home to him that tort does not pay and will restrain him in the future from indulging in similar conduct.".

What is said about daily newspapers in Zambia is very true of our national radio.

In Malawi we give the utmost venerance to decisions of the House of Lords in England. In that sense Rookes v. Barnard and Broome v. Cassell & Co. are very persuassive indeed. Their significance as precedents, however, is mulcted. There are problems with Rookes v. Barnard because the decision of that Court was made by one Judge. Given that the decision was changing the law as previously understood, one would have thought all the Judges should have expressed their opnions. Rookes v. Barnard was, however, applied in the Court of Appeal without question. Some of their Lordships who sat in Broome v. Cassell & Co. followed it without ado in the Court of Appeal. The Court of Appeal, however, doubted it in Broome v. Cassell & Co. In the House of Lords the decision was not unanimous. The Lord Chancellor and Lord Justices Morris, Reid, Diplock and Kilbrandon upheld Rookes v. Barnard. Justices Wilberforce and Diplock dissented. For the majority of their Lordships in Broome v. Cassell & Co. the decision was a matter of policy. Rookes v. Barnard has not been warmly received in other common law jurisdictions. It has just been rejected across here in Zambia. The question is how much is left of it that the Malawian Courts should have? I think in Malawi the proper course is to break ranks with Rookes v. Barnard. It is suggested that there was uncertainty before Rookes v. Barnard. There was not. It was certain that exemplary damages could be awarded widely. The sitution in Malawi is markedly different from England. The level of socio-economic development places some people in realms of influence socially, economically and politically. The tendency to use these influences to excess are well known. I think that the Courts should retain that power to award exemplary damages in all cases where it is justified. The limitations envisaged in Rookes v. Barnard would cause more problems.

Coming down to this case the words that were said by the District Party Chairman at Thyolo imputed that the plaintiff was a thief. It may be argued that the damage was not consequential at least for those people who know the plaintiff's life in politics, commerce and finance. It is to these people, however, where the plaintiff could be shunned following the revelation by the District Party Chairman that the plaintiff is a thief. The allegation here is of a crime punishable with imprisonment. Damages, and in most cases very exorbitant ones, would be awarded even without proof of damage. For to impute an offence of the nature under consideration to a man threatens him with criminal investigations and prosecution

and imprisonment. As we have seen the plaintiff has an impeccable record. The allegation, therefore, really undermines and demeans and diminishes his reputation. Worse still this was broadcast on radio. It must have been intended that it should spread farther. Up to that time the radio was controlled by a Government belonging to the defendants Party. The Party supports a one party State. The defendants said these words well knowing that they were said on the radio. The words would be re-broadcast later. The media would report them. The words were intended for a wide audience. If the allegations were true, no doubt, it was in the interest of the current political process to come up with such a scintilating disclosure. The statement was false. The defendants were deliberately using a medium of communication partly controlled by a Government of their Party to advantage by undermining the plaintiff's renown. There was no effort to check the correctness of the information. These words were being said against a political opponent in order to weaken his political position. In Times Newspapers Zambia Ltd. v. Kapwepwe, Baron, D.C.J. was prepared to award exemplary damages against a newspaper which supported a particular political party for publishing libel against an opponent. At page 301:

> "Thus Lord Reid would - and I agree that it should be so - award exemplary damages against a newspaper which supports a particular political party for a libel on a political opponent committed deliberately in order to weaken his political position."

It must be obvious that I am prepared in this case to consider awarding exemplary damages. I am, however, guided by the direction in Rookes v. Barnard. In Rookes v. Barnard it was decided that the Court must first of all decide on the compensatory damages after taking into account all the circumstances of the case. If, and only if, the compensatory damages do not punish the defendant should punitive damages be awarded and the Court must award a larger sum. Taking into account all the circumstances that I have mentioned, I think the correct award is K300,000.00. I think this adequately compensates the plaintiff and punishes the defendants without recourse to an award of punitive damages.

MADE in Chambers this 26th day of May, 1993, at Blantyre.

D.F. Mwaungulu
REGISTRAR