IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 222 OF 2001

BETWEEN:

HON. BROWN MPINGANJIRA.....PLAINTIFF

and

HON. REV. DR. DUMBO LEMANI.....1ST DEFENDANT

DAVIS KAPITO.....2ND DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Kasambara/Nyimba, of Counsel for the Plaintiff

Kaphale/Phoya/Maulidi of Counsel for the Defendants

Selemani, Official Interpreter

Kapanda, J.

JUDGMENT

Introduction

On 22nd January, 2001, at 15.20 hours, my brother Judge, Honourable Justice Mwaungulu, granted leave to the Plaintiff to file a Notice of Motion for warrant of committal against Hon. Rev. Dr. Dumbo Lemani and Davis Kapito, herein after referred to as "the Defendants," on the ground that the Defendants had been making prejudicial comments on the then on-going criminal case involving the Plaintiff at the Blantyre Magistrate's Court. Pursuant to the said order of 22nd January 2001 the Plaintiff filed a Notice of Motion which was set down for hearing on 1st February 2001.

On the appointed day for the hearing of the motion the court could not hear the substantive application. The matter had to be adjourned to another date. But before adjourning the court directed the attention of Plaintiff's Counsel to the provisions of Order 52/4/3 of the Rules of The Supreme Court. This the court did because it was so clear that the motion, as it stood then, lacked particulars and that could have been fatal to the Plaintiff's case. To this end the Plaintiff amended the Notice of Motion thereby giving

sufficient particulars of the allegation of contempt of court made against the Defendants.

Amended Notice of Motion

In his amended Notice of Motion, made returnable on the 16th day of February 2001, it is the Plaintiff's prayer that the Defendants should be committed to prison for contempt of court. There are particulars of contempt stated in the said Amended Notice of Motion. The said particulars are as follows:-

PARTICULARS OF CONTEMPT

"(a) On or about 4-7 January 2001, the said defendants Hon. Rev. Dr. Dumbo Lemani and Davis Kapito willfully, knowingly, intentionally or negligently or unlawfully or wrongfully, ignored, or neglected or disobeyed to comply with a Blantyre Magistrates' Court Order that prevented any person from commenting or making prejudicial remarks on Criminal Case No. 52p of 2000 of Republic -vs- Hon. Brown Mpinganjira, whilst the case was being tried in the said court, at divers political rallies in the City of Blantyre, and a video cassette exhibited to the magistrate shows the defendants made prejudicial remarks that the plaintiff was being tried and would be jailed for corruption.

(b) On or about 4-7 January 2001, the said defendants with or without knowledge of the said court order, deliberately made prejudicial comments calculated to interfere with a fair trial against the plaintiff in an on going criminal trial of Brown Mpinganjira -vs- Republic, at a political rally in the City of Blantyre.

(c) The said defendant, especially, Hon. Rev. Dr. Dumbo Lemani, even after judgment of the said magistrate court, continued to say that he was prepared to go to jail and serve imprisonment for contempt of court, a sign that he was deliberate, unrepentant and contemptuous in his action, and the defendants' remarks were contained in Daily Times and Nation Newspaper exhibited in the affidavits hereto.

(d) On or about 4-7 January 2001 the said defendants conspired or attempted to pervert the course of justice by publishing statements affecting the character and conduct of plaintiff in the said criminal case."

At this juncture I wish to make an observation and deal with the allegation in paragraph (c) of the amended Notice of Motion. In my considered judgment, paragraph (c) is not an allegation of fact but an opinion that the Plaintiff or his Counsel has regarding the remarks that were made by the 1st Defendant to the reporters for "The Daily Times" and "The Nation" Newspapers. This court will not concern itself with matters of opinion but rather it shall concern itself with allegations of fact. In any event I do not think that the remarks are in any way contemptions to the court below. Further, I fail to understand how the statement has anything to do with the trial in the Magistrate Court. The view expressed in paragraph (c) has nothing to do with particulars of contempt of court. Put in short, I do not think that the allegation in paragraph (c) is worthy any further discussion

in this judgment. It is therefore dismissed. In the premises there remains, to be dealt with by this court, the allegations contained in paragraphs (a)(b) and (d) of the Amended Notice of Motion.

I now move to deal with the evidence in this matter. It is affidavit evidence. Both parties filed affidavit evidence. As regards the Plaintiff, on the one hand, there is an affidavit and a supplementary affidavit, of Mr Ralph Kasambara of Counsel for the Plaintiff, in support of the motion. The Defendants, on the other hand, filed a joint affidavit in opposition in their joint names. The supplementary affidavit filed on behalf of the Plaintiff is an expansion of what was deponed to in the earlier affidavit. I will all the same reproduce both so as to put the whole case of the Plaintiff in its proper perspective.

The Affidavit Evidence

The first affidavit in support of the motion, filed on 22nd January 2001, has the following relevant facts deponed:-

"2. The Plaintiff appeared in the Principal Resident Magistrate Court to answer the charges of corruption.

3. While the trial was in progress the Defendants kept on making prejudicial statements to his case at public rallies and televised on TVM notwithstanding court directive that no one should make any prejudicial statement on the matter.

4. There is already a video tape recording submitted to the Blantyre Magistrate Court as evidence of the statement made by the Defendants which I ask this court to take as part of the testimony."

In the supplementary affidavit, sworn on 13th February 2001, Mr Ralph Kasambara has this to say in support of the Amended Notice of Motion for committal herein which is relevant to these proceedings:-

"3. Whilst the trial was in progress the Defendants deliberately or negligently kept on making prejudicial statements or innuendos to the said case at public rallies and televised on TVM notwithstanding court directive that no-one should make any prejudicial statements on the matter.

PARTICULARS

(a) That the Plaintiff was a thief, and would be jailed for corruption in an on going criminal trial.

(b) There were innuendos that implied that the Plaintiff was already found guilty of corruption and theft.

4. The said statements of the Defendants were meant to:-

(a) Deliberately and negligently prejudice the fair trial of the Plaintiff with or without knowledge of the court order.

(b) Unlawfully or wrongfully ignore or neglect or disobey to comply with the common law that adverse comments should not be made or published on on-going court proceedings.

(c) Wilfully, knowingly intentionally ignore or neglect a Blantyre Magistrate Court Order that prevented any person from commenting or making any remarks on the case.

(d) Conspire or attempt to prevent the course of justice in this said case against the Plaintiff in the Magistrate court.

5. There is a video tape recording submitted to the Blantyre Magistrate Court as evidence of publication of the said statements and some innuendos by defendants that were calculated to interfere with fair trial against the Plaintiff and I ask this court to take the video as part of testimony---"

The foregoing is essentially what is in evidence in support of the allegation of contempt of court made by the Plaintiff against the Defendants.

On 8th February 2001 the Defendants jointly filed an affidavit in opposition to the motion for warrant of committal for contempt of court. The affidavit was sworn on the same date of 8th February 2001. I hereby reproduce the pertinent parts of the Defendants' said affidavit which are as follows:-

"1. We are the Defendants in this matter.

2. On Monday 29th January, 2001, we were both served with a Notice of Motion for committal for contempt of court.

3. It is alleged against us in paragraph 3 of the undated affidavit of Mr Ralph Kasambara that whilst the Plaintiff's criminal trial was in progress, we kept in (on) making prejudicial statements to the case at public rallies and televised in (on) TVM notwithstanding court directive that no one should make any prejudicial statements on the matter.

4. None of us is a lawyer and had no prior knowledge that (it is) is against the law to comment on an on going court case.

5. Further, none of us had prior knowledge of the order allegedly made by the court hearing the case that no one should make any prejudicial statements on the matter. None of us was served with a copy of the alleged court order nor did we come to know of it through some other means.

6. Whatever statements we made, therefore, were made innocently and without guilty knowledge. Further, they were made in the belief that we were exercising the freedom to comment on matters of public interest and we did not intend them, neither were they calculated to interfere with the administration of justice.

7. We further deny that the statements we made were prejudicial to the administration of justice, both in law and in fact.

8. If the statement did prejudice the case (which is denied) we would surely not have made them if we had foreknowledge of the court order."

I wish to observe that none of the deponents was cross examined on what they have deponed in their affidavits. Consequently, the admissible facts set out in the said affidavits must be accepted as correct for the purposes of this judgment.

I now propose to deal with the arguments of Counsel in support of their respective positions in this matter:-

Contentions

On 16th February 2001 I heard both Counsel for the Plaintiff and the Defendants, regarding the law that should be applied to this case. But before proceeding to narrate the submissions made by both parties, through their lawyers, I want to say that both Counsel referred me to authorities in support of their respective arguments in these proceedings. I must praise them for their most comprehensive and lucid submissions, on the law, which they invited me to apply to these committal proceedings.

It has been submitted on behalf of the Plaintiff that the Defendants totally disregarded the Principal Resident Magistrate's Order despite the Press Releases that were on the Radio and in Newspapers. The Plaintiff, through Counsel, further argued that the Defendants made prejudicial statements which were calculated to interfere with the Administration of Justice.

The Defendants, on the other hand, have contended, through Counsel, that they did not know anything about the order either as is alleged in the Notice of Motion or as is submitted by Counsel for the Plaintiff. It is further argued that there is no sworn evidence that the Defendants had knowledge of the order by way of the alleged Press Releases on the Radio and in Newspapers. To this end it was further contended by Counsel for the Defendants that Judicial Notice should not be used as a short cut to avoid the

burden of proving that the Defendants had notice of the order issued by the court below.

The said order being referred to in the submissions above was made on 4th January 2001. The material parts of the order of the learned magistrate are as follows:-

"---I hereby order that no one is entitled to comment on the matter which is in court until the determination of this matter.

I therefore order that no one whether members of the Cabinet, Government or any Political Party and indeed the Head of State as well as the accused and the members of his side shall comment on this case and thereby impinging upon the independence of this court and the Judiciary. I therefore order both parties in these proceedings to make this order public to the President and his Cabinet and members of his party and to the members and sympathisers of the defence until the determination

of this matter. Whoever breaches this order shall be held in contempt of court---"

It is not known whether or not this order was brought to the attention of the people mentioned, either by the Director of Public Prosecutions or by Counsel for the Plaintiff,

as ordered by the Magistrate. There was an attempt by learned Counsel for the Plaintiff to say that there was a Press Release, in the Newspapers and on the Radio, regarding this order. Curiously, the Press Release was not put in evidence. What Counsel said in his submissions is not

evidence. This is a settled principal of law and there is no need to cite an authority for it.

I will deal with the Magistrate's Order in greater detail later in this judgment. It will suffice to put it here, at this point in time, that court orders are not served through articles and/or press releases in the media, print or electronic, unless the court so orders. There was no such order here. In the absence of such order the party who applied for this order ought to have prepared a formal order for the court's signature so that same was brought to the attention of the people and/or served on the individuals the order was directed at.

It has further been urged on behalf of the Plaintiff that the assertion by the Defendants, in their joint affidavit, to the effect that they had no guilty intention does not exonerate them from liability since at common law contempt offences are offences of strict liability. The cases of Reg -vs- Odhams Press Ltd (1957)1 QB 73 and Reg -vs- Griffiths (1957)2 QB 192 were cited in support of this argument on behalf of the Plaintiff. Defendant's Counsel has counter argued that there must be proof of mensrea i.e. an intention to interfere with the administration of justice before one can be found to be in contempt of court. There is substance in the submission advanced by learned Counsel for the Defendants.

I wish to note that the cases of Odhams and Griffiths are dealing specifically with publishers or distributors or printers of magazines. I cannot agree that these cases are conclusive with respect to the present case which is not dealing with printers or publishers or distributors of newspapers or magazines. Further, with due respect to Counsel for the Plaintiff, it is not correct that at common law offences of contempt are strict liability offences. What learned Counsel submitted in this respect is not the full, fair, frank and correct position of the law as commented upon by the authors whom he appears to be quoting. It was actually remarked, by the learned authors of The Law of Contempt, Sweet and Maxwell (1982) para 20-6 page 34, that:-

"---Before the passage of the Act it was established that to publish matter calculated to prejudice the fair trial of a pending case was an absolute offence. It was equally clear that in certain other forms of contempt mens rea was a necessary constituent, though how far this extended as a general principle was not clear. It could not be said with certainty whether absolute liability was the general rule and cases requiring mens rea the exception, or vice versa. By confining strict liability to certain closely defined situations, the 1981 Act makes it clear that mens rea is now the general rule and cases of strict liability the exception---"

Furthermore, the following statement of Lord Russell C.J. in the case of Queen -vs- Payne (1896)1 QB 577 at page 581 seems to suggest to me that

at common law mens rea was a prerequisite on a finding of contempt of court:-

"I wish to express the view which I entertain that applications of this nature have gone

too far--- No doubt the power which the court possesses in such cases is salutory power, and it ought to be exercised in cases where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of court, but the applicant must show that something has been published which is clearly intended, or at least calculated to prejudice a trial which is pending---" (emphasis added)

I must add that, in my view, in this dictum there is recognition that some remarks made of a person standing charged with an offence can be best described as defamatory and not contemptions. The remedy available for such libelious statements would be to sue in a defamation action and not commencement of proceedings to commit a person to prison for contempt of court.

Learned Counsel for the Plaintiff has further submitted that the order that the learned magistrate made was to be obeyed by everyone whether or not one was in the courtroom. It is the further argument of Counsel for the Plaintiff that the case of A-G -vs- Leveller Magazine (1979)A.C. 440, supports the proposition that the order of the magistrate applied to everyone whether those in court or outside the court. The Defendants, through their learned Counsel Mr Maulidi, have argued to the contrary and coincidentally Counsel for the Defendants also cited the Leveller Magazine case in support of his said contention to the contrary. The case quoted is a House of Lords decision. I have had the occasion to read all the speeches of all the Law Lords and I do not find the argument by learned Counsel for the Plaintiff to be borne out by any of the speeches of their Lordships. In this regard I will now proceed to quote the relevant parts of the speeches of the Lords who commented directly or indirectly on the matter to demonstrate what I have just said above. It is important that I do this so that it is known what is the true position of what their Lordships said.

Lord Diplock, at pages 451 F-G; 452 A-B, had this to say which is revealing:-

"My Lords, in the argument before this court little attempt was made to analyse the juristic basis on which a court can make a "Ruling" "Order" or "Direction" call it what you will - relating to proceedings before it which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their Legal representatives or as witnesses. The Court of Appeal of Newzealand in Taylor -vs- AG (1975)2 NZLR 675 was clearly of the opinion that a court had power to make an explicit order directed to and binding on the public ipso jure as to what might lawfully be published outside the courtroom in relation to the proceedings before it. For my part I am prepared to leave this an open question in the instant case. It may be that a "Ruling" by the court as to the conduct of proceedings can have binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for the Ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interest of justice and (2) it would be apparent to anyone who was aware of the Ruling that the result which the Ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the Ruling and its purpose may constitute a contempt of court, not because it is a breach of the Ruling but because it interferes with the due administration of justice----" (emphasis added)

And Lord Scarman, at page 471H, 472A, 473H and 474A, said the following which is instructive:-

"----Can a court make an order, or give a Ruling which is binding on persons who are neither witnesses nor parties in the proceedings before the court? It is a misconception of the nature of criminal contempt to regard it as being an offence because it is a breach of a binding order. The offence is interference, with knowledge of the court's proceedings, with the course of administration of justice--- and those who are alleged to be in contempt must be shown to have known, or to have had a proper opportunity of knowing, of the existence of the order---" (emphasis added)

And Viscount Dilhorne, at page 456A, had this to say concerning the decision of the Court of Appeal of Newzealand referred to by Lord Diplock:-

"It is not necessary to express an opinion on whether that case was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute----"

Further, Lord Edmund Davies, at page 464A, said the following which is very illuminating:-

"For myself I found this difficult to follow, particularly as no instructions were forthcoming of what Counsel had in mind. After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such prohibition against the publication that all disobedience to it would automatically constitute a contempt---"

It is so clear, contrary to what learned Counsel for the Plaintiff has submitted, that in this case the House of Lords was in doubt as to whether one would automatically be in contempt of a court if he/she disobeys a court order without proof that the alleged contemnor had knowledge of the existence of the order. Further, it is evident from these speeches that their Lordships were of the opinion that the order would not be binding on people, let alone apply to those persons, who were not in the courtroom. In point of fact I find their Lordships reasoning to represent the correct position of the law with regard to restriction orders made by a court. I hasten to add that I can do better than adopt these dictums in connection with the order that was made by the court below in so far as the said order had the effect of wanting to regulate the conduct of persons who were not parties or witnesses in those proceedings.

In view of the above observations the questions that come to mind are these: has it been shown that the Defendants knew of the existence of the order? Did they have an opportunity of knowing of the existence of the order? In my considered opinion whether or not a person had an opportunity of knowing the existence of the order is a question of fact that must be proved by evidence. There is no such evidence here. As earlier observed it is not known whether or not the order of the court below was brought to the attention of the people the learned magistrate had in mind when he made the order herein. There was an assertion, by Mr Nyimba of Counsel during submissions, that there was a press release, on the radio and in the print media, drawing the attention of the members of the

public to the said order. Again, as noted earlier on in this judgment, it is surprising that no such press release has been mentioned in the affidavit evidence in this matter. On the material before me I find it as a fact that the order was not published for the attention of the people concerned, including the Defendants, as ordered by the court below. It must be noted that negligence in not knowing that there was such an order is not equivalent to having knowledge of it.

It has further been submitted on behalf of the Plaintiff that this court should ignore the joint plea by the Defendants, in their joint affidavit, that they were ignorant of the law that commenting on an on-going court case is against the law. It has been forcefully put in argument, by Counsel for the Plaintiff, that ignorance of the law is no defence and that ignorance of the law only goes to the question of punishment. I totally agree with learned Counsel for the Plaintiff that ignorance of the law is no defence. But I wish to add that this aphorism that everyone is deemed to know the law thus ignorance of the law is not defence is in fact, as commented by eminent jurists, incorrect. The principle of law is that a person is deemed to know a law that is published and intelligible to the people at large.

It has been argued on behlaf of the Plaintiff that the Defendants' answer, in their affidavit evidence, to the effect that they did not make any prejudicial statements should be dismissed by this court. Counsel for the Plaintiff has further submitted that whether or not the remarks were prejudicial is a question of fact and continued to say that the learned magistrate on transferring this case to the High Court had found that the remarks, allegedly contained in the video tape and allegedly made by the Defendants, were contemptuous. I was then invited to accept the video tape just as the learned magistrate did. This court was therefore requested to make the same finding of fact as the court below.

In response, through Counsel, the Defendants have argued and contended that the finding of the learned magistrate was made in their absence and without their being given an opportunity to be heard. It is, therefore, their argument that this court should enquire into the matter and make its own findings of fact. I do not propose to give any opinion on this

point at this stage. I will do so when I am making my findings on the issue(s) for determination in this case.

It is the further argument of Counsel for the Plaintiff that should this court find that there is hearsay evidence in this matter then same should be admitted into evidence on the authority of the case of Savings and Investment Bank Ltd -vs- Gasco Investments and Others No.2 (1988)1 All ER 975, (1988)1 Ch. D. 422. It is further contended by Counsel for the Plaintiff that these proceedings are interlocutory therefore hearsay evidence is admissible in terms of O.52 of the Rules of Supreme Court and on the authority of the said case of Savings and Investment Bank Ltd.

On the other hand it has been submitted on behalf of the Defendants, also citing the same case of Savings and Investment Bank, that hearsay evidence should not be admitted in the present proceedings because these committal proceedings, which arose from criminal proceedings, are not interlocutory. It is Mr Kaphale's argument that the matter before this

court is a free standing action. I totally agree with Defendant's Counsel on his submission in this respect. The case authority, cited above, has been quoted

out of context by learned Counsel for the Plaintiff and is of no relevance to the present case.

As I understand it the principle of law enunciated in the Savings and Investment Bank case is that proceedings for committal for contempt of court for breach of an undertaking given in a civil action are themselves civil proceedings, and, where their purpose is to further the proper conduct of the main action and the final resolution of the issues between the parties, they are interlocutory proceedings within the meaning of O.42 r.5 (2) of the Rules of Supreme Court, and, accordingly, hearsay affidavit evidence is admissible in the contempt proceedings unless the court exercises its power to rule otherwise - Ord. 52/4/3 of the Rules of Supreme Court.

Indeed, a reading of the case will show that it is not in all committal proceedings that hearsay evidence is admissible. The admission of hearsay evidence in contempt proceedings will be admitted at the discretion of the court, and, if it is to be admitted it must be in such cases where the proceedings are for a breach of an undertaking given in an action and the purpose of the committal proceedings, which are themselves interlocutory in nature, must be for the furtherance of the proper conduct of the main action between the parties in that main action. It is a fact that the Defendants were not parties to the criminal proceedings in the court below. The Principal Resident Magistrate Court was dealing with a criminal action in which the parties were the State and the Plaintiff.

Furthermore, the law relating to the admissibility of hearsay evidence in contempt proceedings, as demonstrated by the Savings and Investment Bank case, is that it can not be done in a free standing lis.

The foregoing observations can be understood better if one reads the opinions of the Justices of the court of Appeal of England in the said case of Savings and Investment Bank -vs- Gasco Investments and Others No.2 reported in (1988)1 Ch. D. 422. Lord Justice Purchas had the following to say at pages 428H, 429A:-

"---By its terms Ord.41 r.5(2) is merely permissive and is of course subject to Ord.38 r.2(3): the evidence may be given by affidavit unless--- the court otherwise directs--- There are, therefore ample residual powers in the court to exclude any particular part or parts of any affidavit evidence which might

otherwise be admissible under Ord.41m r.5(2) and, of course, ultimately it is for the court to determine what weight should be attached to any particular piece of hearsay evidence---"

And at page 436 B-C Lord Justice Purchas observed that:-

"---Once it is accepted that a motion to commit may be either interlocutory or final depending upon the purpose for which the order or undertaking was given, upon the breach of which the motion is founded, the various authorities fall into place. The danger

of admitting hearsay evidence in the case of some interlocutory motions may be avoided by the exercise by the court of its discretion to exclude it, and its admission in others may be very much in the interest of justice---"

In the same case this is what Lord Justice Nichols had to say at pages 445H-446:-

"---Clearly, an application for an interlocutory injunction is an interlocutory proceeding. Having regard to the broad distinction drawn by both Lord Jessel M.R. and Cotton L.J., I can see no reason to doubt that equally, they would have regarded a committal application founded on a breach of such an injunction as an interlocutory proceeding. Such an application is not brought to decide the ultimate rights of the parties. It is brought to enforce an order already made.Of course, what is decided on a committal application is a lis of a very serious nature: whether the respondent is guilty of contempt of court by committing a breach of an order of the court, and if so what action the court should take. There is a final adjudication upon that issue. But that issue is ancillary to the issues raised in the action, and it arises out of an order already made in that action. It is a step in that action. Furthermore, application of an interlocutory nature often do raise issues which are determined once and for all on those applications---"(emphasis added)

And Lord Justice Russel had this to say at page 448C-D:-

"As to the judges concern that hearsay was an inappropriate form of evidence in committal proceedings where the liberty of the subject is concerned, the counter balancing consideration is that such evidence is not infrequently the only form of evidence available where time is of essence if compliance with the court's orders and sanctions to support such compliance are to be achieved. Reliance upon hearsay evidence is not mandatory and

the court can be entrusted to ensure, so far as is humanly possible, that no injustice results from the admission of such evidence---"(emphasis added)

These dictums, by their Lordships, are self explanatory and enlightening in so far as the admissibility of hearsay evidence is concerned in respect of contempt proceedings. I notice that there was no attempt to show that the said hearsay evidence, which the Plaintiff wanted to be admitted, was the only one available neither has it been demonstrated that time would not have allowed for other forms of evidence to be obtained except hearsay evidence. I endorse the reasoning of their Lordships in this case. I will therefore reject any hearsay evidence.

It is also submitted on behalf of the Plaintiff that the right to a fair trial, provided for in our constitution, entails that there should be no prejudicial statement made of a person who is undergoing a criminal process. Consequently, one can not violate another person's right by invoking his/her own right because to every right there is a limitation placed. To this end, it has been argued by learned Counsel, there is the subjudice rule so as to ensure that the right to a fair trial is protected. It has further been contended on behalf of the Plaintiff that if this court finds as a fact that the Defendants did make prejudicial statements then it is wholly irrelevant that the Defendants were exercising their freedom of expression.

The Defendants, through their Counsel, have not responded squarely to Mr Kasambara's argument. But they all the same contend that it will be dangerous for the courts to make it

a rule of law that any comment by the public or the newspapers, about an on-going case would be contemptious. It is Counsel's averment that if such were the rule then same would infringe on the freedom of expression as enshrined in the constitution.

I wish to agree with learned Counsel for the Plaintiff on his submissions on the law regarding the right of an accused to a fair trial. At the same time the arguments by learned Counsel for the Defendants are also pertinent. Indeed the law is that not all comment is contemptious but only such comment that is prejudicial, in the sense that same would create a real and substantial risk of prejudicing the proceedings. The person found responsible for making such types of remarks will be held in contempt of court.

But as was commented by their Lordships, in the case of A-G -vs- The Times Newspapers (1974)AC 273, the law of contempt and its attendant problems does cause difficulties where it conflicts with the freedom of expression. It is for this reason that one would only be punished for contempt of court if he/she made comments that would create a real and substantial risk of prejudicing proceedings before a court of law. The risk must not be imaginary or imagined. In the premises it is necessary that the relevant speeches of their Lordships, in the Times Newspapers case, be put here in this judgment so that we should all be guided accordingly lest we start punishing people for every other comment they make on an on-going case before a court of law or tribunal.

I found the views of their Lordships to be instructive and representing good law which I endorse in these proceedings. At page 294 D-E this is what Lord Reid stated in the Times Newspapers case:-

"---The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for the purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it can not be allowed where there would be real prejudice to the administration of justice---"

And Lord Reid continued, at pages 296E-H, 2974A, to articulate his view of the law as follows:-

"---I know of no better statement of the law than that contained in the judgment of Jordan C.J. in Ex-parte, Bread Manufacturers Ltd (1937)37 S.R. (N.S.W.)242, 242-250: it is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of his law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, can

not be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant. It is well settled that a person can not be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that the person whose conduct is being criticized has become a party to litigation either as Plaintiff or as Defendant, and whether in relation to the matter which is under discussion or with respect to some other matter---"

Pausing here I wish to observe that an analytical reading of this dictum suggests that guilty intention was still a prerequisite in cases of contempt even before the enactment, in England, of the Contempt Act 1981.

Turning again to the opinions of their Lordships in the Times Newspapers case, the following is what Lord Diplock said, at pages 311H-312A-B, regarding the conflict between freedom of expression and contempt of court:-

"---The remedy for contempt of court after it has been committed is punitive; it may involve imprisonment, yet it is summary; it is generally obtained on affidavit evidence and is not accompanied by the special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence. Furthermore, it is a procedure which if instituted by one of the parties to litigation is open to abuse, [particulary in relation to so called "gagging" writs issued for the purpose of repetition of statements that are defamatory but true] the courts have therefore been vigilant to see that the procedure for committal is not lightly invoked in cases where, although a contempt has been committed, there is no serious likelihood that it has caused any harm to the interests of any of the parties to the litigation or to the public interest---"

And Lord Simon of Glaisdale, at page 321A-B, put it this way:-

"There is one particular situation where the law might strike the balance between the competing interests either way, but it strikes it in favour of freedom of discussion. This is where a matter is already under public debate when litigation supervenes which the continuance of the debate might interfere with. The situation of public debate involves that there is probably at stake some matter of which the public has a legitimate interest to be informed; and

the law, in pragmatic judgment, says that conditionally the debate may continue---"

I thought that it was important that the views of their Lordships should be quoted so that we are guided accordingly. This is so because there is not much jurisprudence in Malawi on this topical issue of the conflict that often arises between the freedom of expression and the law of contempt. It is trusted that what I have noted above will not lead newspapers and the members of the general public to think that the courts, in Malawi, will condone, in any way, discussions or publications that are contemptious and have a tendancy of interfering with the administration of justice.

In the course of arguments in this matter I did ask both Counsel to address me on the issue of whether or not the learned Magistrate had the power and/or jurisdiction to make the order that he made, on 4th January 2001, at the commencement of the criminal proceedings that were before him. I did so because, in my judgment, in the present proceedings there has been a good discussion of the said order. In fact the Plaintiff has referred to the order in both the Amended Notice of Motion and the affidavits in support of his application herein. In response to an invation from this court, Counsel for the Plaintiff is contending that the learned Magistrate had such power and/or inherent jurisdiction to do so. On the other hand Counsel for the Defendants has a different opinion. It was Mr Maulidi's contention, on behalf the Defendants, that the court had no competence to make an order

that restricted what could be said outside the courtroom by members of the general public.

Before giving my opinion on the matter I want to quote the pronouncements of Justice Forbes and Lord Denning M.R. in R -vs- Horsham Ex parte Farquharson (1982)QB 762. I am quoting the dictums not because they are binding on this court or that they are directly on point. The statements are being reproduced because they shed some light on the position of the law regarding the power of the court as regards restriction orders. Forbes, J, in the above cited case had this to say at page 769G-H:-

"---There may have been a common law power to order in certain cases that publication of court proceedings should be postponed until the case was concluded--- but such cases could have been exceptional. In general courts had no power to make orders prohibiting publication of any part of the proceedings---"

And Lord Denning, at page 790C-G, made the following observations in respect of restriction orders:-

"---It could be done on the application of one party, and the acquiescence of the other, without the court giving much, if any, thought to the public interest. It could be nothing more or less (than) a power, by consent of both parties to muzzle the press. I hope that every High Court Judge would be slow to make such an order--- can we be sure that all Chairmen will be able to withstand persuasion of the advocate who is anxious to save his client from damaging publicity? Or a witness from embarrassing revelation? When the other side do not object--- Take it to the extreme. An order might be made by someone or other--- In some tribunal or other out of lack of knowledge or dislike of the press or even a sense of power---"(emphasis added)

I hope that nothing that I have quoted will lead the press or the public at large to think that this court approves in any way discussions or publications that are contemptuous. The dictums have been quoted with a view to highlighting

the dangers of issuing restriction orders or what are popularly known as "gagging" orders.

Now let me give my judgment on the question of whether or not our magistrates have powers and/or inherent jurisdiction to make orders as was done in the court below. It is my considered opinion that a magistrate has no such inherent powers and/or jurisdiction.

It is only the High Court that has unlimited original jurisdiction and it therefore has inherent jurisdiction or power to make a “gagging” or restriction order. The power and/or the jurisdiction of the magistrate is derived from statute. The Act of Parliament that establishes the subordinate courts does not confer on them inherent jurisdiction and/or powers. Accordingly, a magistrate who purports to exercise such inherent power and/or jurisdiction that is not invested in

him/her by statute is acting ultra vires. Let it be noted that judicial independence is not about assuming powers that are not invested in a court by the relevant law establishing it.

In the absence of any other statutory power and/or jurisdiction conferred on the leaned Magistrate I find that he had no power and/or jurisdiction to make the order he made which, had the consequence of regulating the conduct of people not within the confines or vicinity of the court. If we allow the subordinate courts to make orders which they are not empowered to make it would mean that every magistrate court in the land would be given a new power, by its own order, to postpone discussion of a case before it or another court. Such an order could be made, and would be made, against the public at large and the press without any notice of it or any opportunity of being heard on it. That would create a bad precedent. The people of this country rejected dictatorship by the executive and I believe they would not want dictatorship by the magistrate’s court, in the form of ultra vires orders, that have the effect of muzzling the freedoms enshrined in our constitution.

But let me sound a word of caution here. A magistrate has power to regulate the conduct of a hearing in his/her court. Thus when he/she is hearing a case she/he has the power, inter alia, to make an order that has the effect of regulating the conduct of people within the courtroom or in the vicinity of the court. This the magistrate could do on the ground that the

conduct of such people may interfere or tend to interfere with the course of justice or the proceedings before him or her.

Having reviewed and analysed the elaborate arguments of both parties it is now necessary that I should move to isolate the issue or issues for determination in this case. In my view, after looking at the Amended Notice of Motion, the affidavit evidence and the submissions of Counsel, there is only one issue that requires determination in this matter. There were of course some ancillary issues that arose during the time I was reviewing and

analysing the submissions of Counsel. I have dealt with those auxiliary issues.

Issue for Determination

The heart of the issue in this matter, which requires the decision of this court, is whether or not the allegation of contempt of court has been proved. Put in another way, I must decide on the sole question of whether or not there is evidence on record to prove that the Defendants are in contempt of court. I must put it here that I will decide on the said issue stated above on the basis not of sympathy for either of the parties but on the basis of the evidence on record, if there is any, and also the relevant law.

Law and Findings

Before moving on to decide on the said main issue for determination in these proceedings my attention has been drawn to the standard of proof that is required, on the part of the Plaintiff, for this court to be satisfied that a case of contempt of court has been made out against the Defendants. Lord Denning M.R. in the case of Bramblevalle Ltd (1970)1 Ch. D. 128 at page 137A-B said that:-

"A contempt of court is an offence of a criminal nature. A man may be sent to prison for it. It must be satisfactorily proved. To

use the time honoured phrase, it must be proved beyond reasonable doubt---"

As explained in the above cited dictum the standard of proof in contempt proceedings is proof beyond reasonable doubt. This principle of law will be borne in mind when determining the issue set out above.

Whilst it is admitted that the production of mechanically produced evidence, such as photographs, tapes and the like do not constitute an infringement of the hearsay evidence rule it is still trite law that a party relying on a film or (a video tape) must satisfy the court that it is authentic and before this piece of evidence is allowed into evidence there must be testimony defining and describing the provenance and history of the recording up to the moment of its production in court as an item of real evidence - R -vs- Robson and Harris (1972)2 All E.R. 699; (1972)1 WLR 651.

The reason for having this rule of evidence and/or law, as rightly pointed out by Mr Phoya of Counsel, is because tape recordings are suspectible to being altered by the transposition, excision and insertion of words and phrases. Such modification may escape detection and even elude technical experts.

In the affidavit evidence before this court, sworn by learned Counsel for the Plaintiff, there is no attempt to describe the provenance and history of the recording of the video tape that is said to form part of the evidence in support of the motion for warrant of committal. The deponent does not identify the source of this video tape neither has he identified the person who recorded it. There is no information in the affidavit as regards when or where the video tape recording was done. Indeed there is no information in the affidavit as to whether video tape is an original or a copy. In as much as the contents of a video tape, on which a party relies, may be proved by the testimony of the person who has seen the video tape, that evidence can only be allowed if the history and provenance of same is defined, described and explained. In view of the above observations will it be in the interest of justice that this video tape be accepted in evidence or that this court should accept as the truth what Mr Ralph Kasambara has deponed regarding the contents of the tape?

If this court were to accept that video tapes, whose origins are not explained, should be allowed in evidence to prove matters in issue, then there will be no safeguards to the liberty of individuals in this country. It will be most unsafe, when the liberty of a subject

is concerned, to admit a video tape as evidence when its source and history is not known. That would give room to an unscrupulous litigant, or indeed even the state, to manufacture evidence to be used in proceedings whose consequence would be the loss of liberty of

an individual. That will be bad for our country. The Rights Human and Freedoms enshrined in our new Constitution will be rendered useless if the courts are not cautious and do not get satisfied about the source and history of this type of real evidence.

This video tape goes to the heart of the issue in these proceedings and it would be highly prejudicial from the Defendants point of view due regard being had to the observations that I have made above. The video tape was relevant, if not crucial, to the Plaintiff's case and it could have been admitted in evidence as real evidence had it not been for this doubt as regards its origin and history and also as to whether it is an original or a copy. This court will be slow in accepting such type of video tape into evidence where the liberty of a person is involved.

This finding applies with equal force to what Mr Kasambara has deponed with regard to the contents of the video tape which he says he watched. The source from which he is deponing viz the video tape has been found by this court to be unacceptable as proof of the matter in issue hence his observations fall together with the video tape. Further, I wish to remark that it will be an improper exercise of discretion for a court to allow a person to give sworn affidavit evidence of contents of a private video tape, recorded mechanically by a person who is not himself called as a witness or who has not himself sworn any affidavit - Likaku -vs- Rep (1966-68) ALR Mal. 83. The relevance of this video tape and the weight to be attached to it, in order for it to be admitted in evidence, can only be established by the person who has personal knowledge of the circumstances in which it was recorded.

In the course of his detailed submissions learned Counsel for the Plaintiff made a proposition that a copy video tape may still be allowed in evidence. The case of Kajala -vs- Noble, noted in the (1982) Criminal Law Review 836, was cited as an authority on that point. Learned Counsel continued in his argument to say that the High Court in England said that these are the last days of the best evidence rule. In Malawi though, there are binding authorities on this court on the best evidence rule. These, just to mention a few, are viz R -vs- Richard (1961-63)ALR Mal. 1, Kathumba -vs- R (1964-66)ALR 389; DPP -vs- Mwalwanda (1964-66) ALR Mal. 412(SCA); Likaku -vs- Rep (1966-68)83; Mpinganjira -vs- Sauka 8 MLR 215 (SCA) and Mapwesa -vs- Rep 11 MLR 190 (SCA): a decision of 1st October 1984. All these cases demonstrate that in Malawi the best evidence rule is alive and unfortunately it is still ruling us from its grave even though it is dead in England. Perhaps it is important to note what Godard C.J., as he then was, observed in the case of Hollington -vs- F. Hewthorn and Co Ltd (1943)2 All. E.R. 35. I found his dictum to be helpful and I hope that it will so illuminating to all of us in Malawi as we conduct court business. This is what Goddard C.J. said at page 39D-E:-

"Where it is clear that over a long period of time there has been a unanimous opinion---among judges of first instance that some particular class of evidence is inadmissible the court should be slow to differ from it unless it can be clearly shown that communis

opinio, which we are satisfied hitherto prevailed is based on wrong premise---”

It was not shown to this court that the opinion of this court and that of the Malawi Supreme Court of Appeal, regarding the inadmissibility of secondary

evidence, unless a proper foundation for the admission of the said secondary evidence is laid, has been based on a wrong premise.

There was also an attempt to quote the case of Kajala -vs- Noble and the cases of Taylor -vs- The Chief Constable of Cheshire mentioned in the (1987)Crim. Law Review 119 and R -vs- Fowden and White referred to in the (1982)Crim. Law Review 588 in support of the contention that the video tape herein should be admitted in these proceedings. I must put it here, at the outset, that these cases, that were brought to my attention, are not full reports and it will be dangerous for me to read into them what learned Counsel was saying about these case authorities. I will not refer to these cases in detail for the reason that I found it impossible to derive any significant assistance from them. This is so because there are no law reports in which these cases are fully reported.

Be that as it may be, it is important that I make my observations regarding what I managed to casually read about these cases. This is from the Criminal Law Review copies provided to me by learned Counsel and also from Blackstone’s Criminal Practice (1995)ed. Blackstone Press Ltd. In Kajala’s case the copy film was accepted into evidence because it was shown that the copy produced into court was an authenticated copy of the original film that was being kept by the British Broadcasting Corporation. The cases of Taylor and Fowden are distinguishable from the present case. In my most considered opinion it appears to me, and this is because I have failed to get a full report about these cases, that the tapes were admitted in evidence because the purpose was to prove the identity of the person shown in the film. And in Taylor’s case it appears the court qualified the admission of the video tape in that it said that the video tape was admissible subject to comments as to weight and persuasiveness following the loss of the tape. It should be noted that in England, where criminal trials are almost invariably presided over by a judge sitting with a jury, the judges are very slow at rejecting the admission of video tapes. That is so because they are not judges of fact but the jurors are. I have no doubt, in my mind, that the video tapes were admitted into evidence because the jurors were still going to determine the weight to be attached to them. In any event from the extracts furnished to me by Counsel I do not recall that there is any discussion regarding the manner the tapes were introduced into evidence.

I will now move on to make a finding on the Plaintiff’s assertion, made in paragraphs 3 and 4 of the supplementary affidavit in support of this motion. It is rather regrettable that no-one from Television Malawi (TVM) has either sworn an affidavit or given viva voce evidence to show that TVM did broadcast the alleged prejudicial statements allegedly made by the Defendants. Worse still, the recording that was allegedly televised on TVM was not produced in evidence in these proceedings. In point of fact there is no mention, in the said affidavit, as to when the said material was allegedly televised on TVM. In the premises this assertion can not be allowed to stand as proof of contempt of court. It is not standing on firm ground.

About the video tape it is my observation that the person who recorded the video tape should have sworn an affidavit or he/she should have been called to give viva voce evidence on the recording of the tape. Further, this unknown and mysterious person should have testified or should have sworn an affidavit so that there was material before this court about the accuracy of same realising that the said video tape is a private property- Hudson -vs- Ashby (1896)2 Ch. 1. The failure by the Plaintiff to do the foregoing has greatly undermined the reliability of this tape.

The deponent of the said supplementary affidavit, and indeed even the earlier affidavits, relied upon by the Plaintiff should have deponed on facts relating to viz: from whom he obtained the video tape, when and from what location the tape was recorded, according to the source of his information. Strangely, it is so clear from the affidavit and supplementary affidavit in support of this motion that these facts were not deponed to. Further, there is no evidence to give an account of how the tape first came into existence and how it had since been in safe and secure custody up to the time it was produced in the court below without the opportunity for fabrication or tampering of any kind.

This tape can not be accepted into evidence as a matter of law and discretion in view of the above observations. To allow this video tape into evidence will be tantamount to turning this court into a “Kangaroo” court where evidence is admitted anyhow and from any other source without the court being satisfied of its authenticity and without warning itself of the danger of admitting evidence which is suspectible to falisification.

It was argued by learned Counsel for the Plaintiff, and it is also deponed in the affidavit evidence in support of the motion, that the learned Magistrate in the court below accepted the video tape and made a finding on the contents of the said tape and to that end this court should take judicial notice of same and accept the video tape into evidence. I think that it is necessary for this court to quote the relevant parts of the alleged finding in the Ruling of the learned Magistrate. At pages 116-118 of the hand written record this is what the leaned Magistrate ruled:-

“---It is clear from the viewing of the video tape that acts amounting to contempt were indeed committed by the two mentioned persons requiring the holding of an enquiry as to why they should not be held in contempt--- It is therefore my finding that in the matter the High Court has the jurisdiction and power--- to hold an enquiry in this matter and if satisfied that contempt was committed against (by) the two persons against this court to punish them for same---

I therefore refer this matter to the High Court for the High Court of its own motion to enquire into the alleged contempt and if the two mentioned persons are held in contempt of this court to rightly punish them---”

In my judgment, if there is any finding of contempt made by the court below, such finding is not binding on this court. It should be emphasised that this court must come to a decision on the facts before it without regard to the findings of the court below. In fact the learned Magistrate appears to be alluding to the fact that in his view the High Court

has the jurisdiction and power to hold an enquiry in this matter and if satisfied that there was contempt of court by the Defendants then they should be punished. It can not, therefore, be said for certain that there was a positive finding of fact by the learned magistrate. If anything the learned magistrate was blowing hot and cold, so to speak, in the sense that in one breath he appears to be making a finding of fact and in another breath he is saying that the High Court should carry out an inquiry to find out if there was any contempt of court.

Further, the case of Hollington -vs- F. Hewthorn and Co Ltd (1943)2 All E.R. 35 is very instructive on the submission of learned Counsel for the Plaintiff. Goddard, L.J. in Hollington's case, had this to say at page 44:-

"---However the other course may be, it is, in our opinion, safer in the interest of justice that on a subsequent trial the court should come to a decision on the facts placed before it without regard to the result of (the) other proceedings before another trial---"

This observation applies with equal force to the present proceedings.

In any event the video tape, in my view and as is clearly revealed by the record, was admitted improperly and without regard to its source and history. There is nothing on the record of the court below to show that there was any evidence put before it regarding the person who recorded the video tape, when and where it was recorded, whether or not it was an original or a copy. Moreover, there was no information placed before the learned Magistrate concerning the custody of the tape from the time it was recorded to the time it was being produced before the learned Magistrate. Furthermore, its admission was in the absence of the Defendants or their Counsel and without any argument as to the propriety of its admission into evidence. As rightly put by Mr Kaphale of Counsel, the Defendants had no opportunity to challenge the admissibility of the tape and its contents. It is trite law, and I need not cite an authority for it, that no man or woman is to be condemn ed without being heard. With due respect the learned Magistrate's findings, which the Plaintiff wants this court to take Judicial Notice, to the effect that it was clear to him that acts amounting to contempt of court were committed by the Defendants was tantamount to condemning the Defendants without hearing them on the matter. That was most unfortunate. In this respect the learned magistrate erred.

Conclusion

The case by the Plaintiff against the Defendants is founded on what is contained in the video tape and the alleged broadcast, by TVM, of the so-called prejudicial statements and innuendos concerning the case the Plaintiff was answering at the Principal Resident Magistrate Court sitting at Blantyre. The affidavit evidence in support of the motion herein; the amended statement of facts together with its attached affidavit verifying the said amended statement of facts obviously show that the Plaintiff's motion for a warrant of committal is based on the said video tape and what was allegedly televised on TVM. In view of my findings on this video tape and the statement of fact regarding the alleged broadcast on TVM can it be said that the case against the Defendants has been proved beyond reasonable doubt? The answer is definitely no. I must say that the Plaintiff's affidavit evidence, in my judgment, is not anywhere near sufficient to prove the

allegation of contempt of court as required by law. For all the reasons that I have given above in respect of the video tape and the affidavit evidence in support of this motion I conclude that the Plaintiff's motion should be and is hereby dismissed.

Costs

This court has a complete discretion whether to order one party or another to pay the costs of a contempt application. The Plaintiff (the Applicant) has failed to establish that a contempt was committed by the Defendants. In point of fact the Defendants have successfully defended this motion for the warrant of their committal.

I therefore exercise my discretion in favour of the Defendants and award the costs of these proceedings to the Defendants. The Costs are to be taxed by the Registrar if not agreed.

Pronounced in open Court this 12th day of March 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE