AT BLANTYRE

M.S.C.A. CRIMINAL APPEAL NO. 9 OF 1992
(Being Criminal Case No. 1 of 1992)

BETWEEN

CHAKUFWA TOM CHIHANA……………………………… APPELLANT

AND

THE REPUBLIC……………………………………………… RESPONDENT

CORAM: THE HONOURABLE THE CHIEF JUSTICE
The Hon. Mr. Justice Mkandawire, J.A.
The Hon. Mr. Justice Mbalame, J.A.
Glasgow QC,/Wood/Mhango/Nzunda, Counsel for the Appellant
Beveridge QC/Nitch-Smith/Nyirenda, Counsel for the Respondents
Longwe/Maore, Court Reporters
Mthukane/Kalimbuka, Official Interpreters.

JUDGMENT

BANDA, CHIEF JUSTICE

The appellant was on 14th December last convicted by the High Court sitting at Blantyre on a first count of importing seditious publications contrary to Section 51(1) (d) of the Penal Code and on a second count of being in possession of seditious publications

without lawful excuse contrary to S.51 (2) of the said Code. He was sentenced on the first count to a term of imprisonment of 18 months with hard labour and on the second count he was sentenced to a term of imprisonment of 24 months with hard labour. The sentences were ordered to run concurrently. He now appeals to this Court against both the conviction and the sentence. We do not intend to recapitulate the facts of the case in this appeal because they are fully set out in the judgment of the trial Court and there does not seem to be any dispute on them.

Mr. Glasgow submitted that the judgment of the learned trial Judge was flawed in a number of respects and that the conviction returned against the appellant was bad in law. In particular Mr. Glasgow contended that the appellant's convictions were contrary to the domestic law of Malawi and that the convictions were also contrary to Malawi's obligations under international law. The main contention for the appellant was that criticism of Government which calls for peaceful and democratic change cannot be contrary to the law of Malawi. It was further contended that if Malawi law is as the trial Judge found then it is fundamentally different not only from the law of England but also from the law which prevails throughout the Common law world. Mr. Glasgow has submitted that such a surprising conclusion should only be accepted by the Court after examining the relevant provisions of the Penal Code in its constitutional context and in the light of the underlying and fundamental right to freedom of speech. We were referred to Section 2(1) (iii) of Schedule 2 to the Constitution of Malawi. That Section provides in the following terms:-

"The Government and people of Malawi shall continue to recognise the sanctity of the personal liberties enshrined in the United Nations Declaration of Human Rights and of adherence to the law of Nations."

We accept that the UNO Universal Declaration of Human Rights is per of the law of Malawi and that the freedoms which that Declaration guarantees must be respected and can be enforced in these Courts. It seems to us, therefore, that it is the right of every citizen of the Republic of Malawi to have a candid, full and free discussion on any matter of public interest. It is open to every citizen of the Republic to express his or her concern on any aspect of Government policy. This Court must be the protector of the fundamental Human Rights which are part of our law. However, that right to freedom of speech or expression may be subject to restrictions and limitations: While Section 2(1) (iii) of the Constitution recognizes the sanctity of the personal liberties enshrined in the United Nations Universal Declaration of Human Rights, Section 2 (2) of the Constitution accepts that reasonable restrictions and limitations will be imposed on those liberties. That Section expressly provides in the following terms-

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or

the national economy."

We were also referred to the African Charter on Human and People's rights. This Charter, in our view, must be placed on a different plane from the UNO Universal Declaration of Human Rights. Whereas the latter is part of the law of Malawi the African Charter is not. Malawi may well be a signatory to the Charter and as such is expected to respecet the provisions of the Charter but until Malawi takes legislative measures to adopt it, the Charter is not part of the municipal law of Malawi and we doubt whether in the absence of any local statute incorporating its provision the Charter would be enforceable in our Courts.

A number of cases on civil liberties were cited to us. We have read the full reports of such case where, thee are available, but in most cases we have confined ourselves to the extracts which Counsel for the appellant kindly made available to us. We have carefully read all the cases cired to us namely Chief Arthur Nwankwo v. The State (1985) 6 NCLR 288 at 253, Kedar Nath Singh v. The State of Bihar (1962) 2 SCR 769, Hector v. A.G. of Antigua and Bermuda (1990) 2 AC 312 and Ivory Trumpet v. The State (1984) 5 NCLR 736. All these cases including those from United States jurisdiction recognise restrictions and limitations which may be imposed on the right of freedom of speech in the interest of national security, for the prevention of disorder or crime and for the protection of the reputation and rights of others who may be the object of criticism. In the case of Kedar Nath singh (Supra) the Court there held that the law of sedition was constitutionally valid inspite of the restrictions which are impoed on the fundamental freedoms of speech and expression. Similarly, it is interesting to note that in the Nigerian case of Nwankwo the Court held that the law of sedition in Nigeria "must be construed differently from English cases decided on Common Law." But the Court further held, on the facts, that the sections enacting the law of sedition were inconsistent with the provisions of the constitution which the Court described as "a composite document distinct from others and must be viewed only in the light of its words and circumstance." However, it does not follow in our judgment that any section enacting the law of sedition must of necessity invariably be inconsistent with a constitution which guarantees the right of freedom of speech and expression. It must and will depend upon the facts and circumstances of each particular case having regard to the words of a particular law of sedition and the provisions of the Constitution in issue.

We have also reviewed and considered the cases of A.G. v. Guardian Newspapers (No. 2) (1990) 1 AC 109 and Derbyshire County Council v. Times Newspapers (18/2/93) (unreported) including the case of Castells v. Spain (1991) 14 EHER 42 and 46. These cases were brought under Article 10 of the European Convention on Human Rights. That Article of the Convention recognizes the fact that the right of freedom of speech has limitations and restrictions which may be imposed by law in the interest of national security, territorial integrity, prevention of disorder or crime. The Convention accepts the view that even people who might be criticized have rights which need protection under the law: It was held inter alia, in the case of Derbyshire County Council v. Times

Newspapers Ltd. And others (Supra) that there was no difference in principle between English law and Article 10 of the Convention. It is clear, therefore, that even principles of English common law recognise the restrictions and limitations which are imposed on the right to freedom of speech. Thre can be no doubt, therefore, in our judgment, that from the authorities cited before us, the limitations and restrictions on the right to freedom of speech and expression are of universal application. We are satisfied and find that there is nothing inconsistent between the law of sedition as provided for in S.50 and S. 51 of the Penal Code and the Constitution of Malawi. We are satisfied that the restrictions and limitations which the criminal law of Malawi imposes on the right of freedom of speech are no more a flagrant violation of the purposes and principles of the UNO Universal Declaration of Human Rights any more than the principles of English common law and the European Convention on Human Rights do. It is, therefore, wrong to describe or treat the right to freedom of speech as absolute.

In our judgment the main issue in this appeal revolves round the contention that the law of sedition of Malawi involves an element of incitement to violence which must be proved before a conviction on a charge of sedition can be grounded.

An appeal coming to this Court is by way of rehearing. We must consider the facts and materials which were before the trial Court. We must then make up our mind remembering the judgment appealed from and weighing and considering it. After full consideration of the trial Court's judgment we must not hesitate from disagreeing with it if we come to the conclusion that it was wrong. We must always remember, of course, that the trial Court had the advantage of seeing and hearing witnesses. We must be slow to reject the findings of fact made by a trial Court unless we are satisfied that there is insufficient evidence to support those findings or there is congent evidence to the contrary which ha been misinterpreted or overlooked.

The trial Judge found that the appellant had imported into Malawi the relevant document and that he was in possession of them when he was arrested. Those findings have not been challenged and indeed Mr. Glasgow's contentions proceeded on the basis that those findings were correct.

I was submitted by Mr. Glasgow that incitement to violence was a necessary element in offences of sedition under English Common law and that since Section 3 of our Penal Code requires that the provisions of the code shall be interpreted in accordance with the principles of legal interpretation obtaining in England the law of sedition in Malawi should be construed consistent with the principles of English Common law. He contended that the trial Judge was bound by S. 3 of the Penal Code to apply English law. He cited the cases of R v. Collins 173 ER 910; R v. Burns (1886) 16 COX CC 55 Boucher v. R. (1951) 2 DLR 369 and R v. Chief Metropolitan Stipendiary Magistrate exp Choundry (1990) 91 Cr. App. R 393 as authorities for the proposition he was propounding before this court.

Mr. Beveridge for the respondents has submitted that on a full examination of the relevant document the learned trial Judge came to the right conclusion. He contended that the learned trial Judge made a careful consideration of the contents of all relevant documents. It was Mr. Beveridge's submission that the correct approach, in point of law, was to consider the findings of the trial Court and the relevant statutory provisions before embarking on a Jurisprudential exploration of the law in other jurisdictions. H e contended that the documents were seditious under S. 50 (1) (a) of the Penal Code where the seditious intention is an intention to bring into hatred, or contempt or to excite disaffection against the person of the President or the Government. It was the contention of Mr. Beveridge that the relevant statutory provisions which make four exceptions in S.50 (1) (i), (ii), (iii) and (iv) are intended to preserve a sufficient measure of freedom of speech for the citizens of Malawi and that, therefore, Ss. 50 and 51 of the Penal Code are not inconsistent with the Constitution of Malawi.

Mr. Glasgow submitted that the word "disaffection" which I repeatedly used in S. 50 means enemity and hostility and that both words involve an element of actual or potential violence. He also submitted that under S.50(1) (b) there must be an element of violence otherwise the defence provided in Section 50 (1) (iii) woulkd be meaningless. As we understand it, it appears to us that Mr. Beveridge concedes that S.50 (1) (b) is capable of carrying an element of violence but his submission was that the learned trial Judge found that the appellant had the seditious intention as defined in S.50(1) (a) of the Penal Code.

It is not the contention of Mr. Glasgow that the law of Malawi is a bad law or that it is contrary to Malawi international obligations. Similarly, it was not Mr. Glasgow's contention that the case of Wallace Johnson v. R (1940) AC 231 was bad law or that it was wrongly decided. His submission is that the law of Malawi must be construed in accordance with the evolving principles of English Common law and the case of Wallace Johnson v. R was a decision steeped into colonialism and that it would be inappropriate for this Court to apply it to a free and democratic Africa. He cited cases in Africa and other jurisdictions where Wallace Johnson v. R was not followed. He also referred us to the Zambia case of Chitenge v. The People (1966) ZR 37. It is a Court of Appeal of Zambia's decision. That case purports to explain the decision in Wallace Johnson v. R. Chitenge's case seems to suggest and as we understand it, it is also the contention of Mr. Glasgow that Wallace Johnson v. R was decided in that way because there was a statutory rule of construction which prevented the Privy Council from applying the principles of English Common law. It is, however, interesting to note, as the Zambia Court conceded in Chitenge's case, that the relevant section of the Criminal Code of the Colony of the then Gold Coast ws never cited to the Privy Council and they did not make any reference to it in their judgment. It is, therefore, difficult to understand why Chitenge's case is being cited as authority for the ratio decidendi in Wallace Johnson case. We have read he full report of Wallace Johnson and the Privy Council in that case did not refer to or consider the rule of statutory construction in question and their decision, therefore, could not have

been based on a statutory provision which was never cited to the Court, was never argued before the Court and was never considered by the Court. The decision in Wallace Johnson was based on the finding of the Privy Council that it was to the Criminal Code of the Colony of the then Gold Coast they had to look for the law and found that the words of the code were clear and unambiguous and that incitement to violence was not a necessary ingredient as thereby defined by the code. In their Lordship's view, it was wrong to add words which were not in the code and which were not necessary to give a plain meaning to the section. A similar conclusion was reached by the Privy Council in 1947 in the case of King Emperor v. Sadashir Narayan Bhaterae. It was an appeal from the High Court of Bombay. On two occasions, therefore, the Privy Council reached the same conclusion on the interpretation of similar statutory provisions. Indeed the King Emperor case expressly adopted and approved the decision in Wallace Johnson case. It must be remembered that there is no statutory definition of edition in England and the meaning and extent of the offence there must be gathered from the decided cases. Those cases, in our judgment, are irrelevant where you have a statutory definition of what is seditious intention as we have in our code here.

We have carefully considered the submissions made by both Counsel which they presented with skill and restraint and we are grateful to them both. We have also considered the facts and materials which were before the learned trial Judge. In deciding whether the law of Malawi admits the element of incitement to violence it seems to us that the proper approach is to consider carefully the statutory provisions of the seditious intention as defined by S. 50 of the Penal Code. The definition of seditious intention falls under five heads and are as follows:

S. 50 – (1) A "Seditious intention" is an intention-

(a) to bring into hatred or contempt or to excite disaffection against the person of the President or the Government.

(b) to excite the subjects of the President to procure the alteration, otherwise than by lawful means, of any other matter in the Republic; or

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Republic; or

(d) to raise discontent or disaffection amongst the subjects of the President; or

(e) to promote feeling of ill-will and hostility between different classes of the population of the Republic.

Apart from briefly referring to S. 50(1) (iii) and S. 50(1) (b) Mr. Glasgow did not fully deal with the other definitions of seditious intention so as to show to the Court which of the definitions, in his view, carry the element of incitement to violence. The proper way, in our view, of looking at the definitions is to consider each definition separately and find if it is capable of carrying an element of incitement to violence. In our judgment, each definition of seditious intention provides a distinct foundation for a separate count of sedition. The definitions in S. 50(1) of the Penal Code should be construed disjunctively and not cumulatively. We are reinforced in this view by the use of the word "or" at the end of each paragraph clearly indicating that they are to be treated as alternatives. It is our considered view and are satisfied that S. 50(1) (b) is capable and does involve an element of incitement to violence, but it is possible to prove a charge of sedition under that paragraph by proof of unlawful means short of violence. Similarly we are equally satisfied and find that the other definitions of seditious intention do not involve an element of incitement to violence. The words "hatred, contempt and disaffection" in S. 50(1) (a) must have their ordinary grammatical meaning. Consequently, to the extent that the learned trial judge found that incitement to violence was not an element in the law of sedition in Malawi he was clearly wrong.

It is to the law of Malawi, however, that we must look to find hether the appellant commited the offence of sedition. The primary source for our law is the Penal Code of Malawi which must first be considered. It is true that Section 3 of the Penal Code enjoins this Court to interpret the provisions of the Code in accordance with the principles of legal interpretation obtaining in England. But that Section in our view does not apply where it "may be otherwise expressly provided." We can only refer to the rules of construction obtaining in England when there is no express provision and where the words of the Section being interpreted create a difficulty, an absurdity or an ambiguity. It seems to us that it is not necessary to look to principles of English Common law in order for us to know what "hatred, contempt or disaffection means". Those words in our judgment must be given their ordinary grammatical meaning. We must, of course, look to the decisions of other courts where they have interpreted similar statutory provisions and this we have done.

It is trite law that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words but also to take into consideration the antecedent history of the legislation, the purpose and the mischief it seeks to suppress. In the Wallace Johnson v. R case the Privy Council was interpreting similar statutory provisions as enacted in our S. 50 (1) (a). The words which the Court was interpreting in that case were "to bring into hatred or contempt or to excite disaffection……" similar to those used in S. 50(1) (a) of the Penal Code. The Privy Council held in that case that the words of the definition were clear and unambiguous and that incitement to violence was not a necessary ingredient of the crime of sedition and that the criminal code of the Colony of the then Gold Coast nowhere required proof of violence. In the case nearer nome of A.G. for S.R. v. Nkala (1961) R & N 774 the Federal Supreme Court came to the

same conclusion. The Federal Supreme Court there was interpreting similar statutory provisions which, as in the Wallace Johnson case, were similar to those in S. 50(1) (a) of our Penal Code. Both in the case of Wallace Johnson and Nkala it was held that the words "hatred, contempt and disaffection" should be construed in the ordinary grammatical meaning and that the words were clear and unambiguous. Both Courts held that they could not read into the Section words importing incitement to violence.

As we have already indicated, the only reason why Mr. Glasgow has urged the Court not to follow the decision in Wallace Johnson case is not that it is bad law, but that it is a 1939 decision and that it was decided during a colonial period. We find this argument difficult to accept. Indeed the cases which Mr. Glasgow himself has cited to us in support of the principle of English Common law which requires incitement to violence as a necessary ingredient in the law of sedition are very old cases. They are 19th Century decisions vide R v. Collins (1897) 173 ER 910, R v. Burns (1886), 16 COX CC 355. While these cases, old as they are, continue to be good law Wallace Johnson case decided in 1939 must be bad law because it was decided in colonial times. In any event it is to be noted that the principle of English Common law which requires incitement to violence as a necessary ingredient in the law of sedition has now been doubted by no lesser a Judge than Lord Scarman in the House of Lords' cae of R v. Lemon (1979) AC 617. In our view, to reject a judicial decision on the ground advanced by Mr. Glasgow would be a political and not a judicial rejection. Indeed, it seems to us that it was the same political considerations which influenced the Court in Nwankwo case not to follow the Wallace Johnson case. And in our view to distinguish a judicial decision on the basis of political considerations as Mr. Glasgow has urged us to do would be a travesty of the principle of judicial precedent and practice (stare decisis) and it is a species of judicial activism which must be resisted. We are satisfied and find that the decisions of the Privy Council in Wallace Johnson and King Emperor are impregnable.

We have carefully considered all the materials and facts which were before the trial Judge including the possible defence that might have been available to the appellant and, in particular, we have had to consider whether the defence in S. 50(1) (iii) was, on the facts as found by the trial Judge, available to the appellant. We have considered the circumstances in which the statements were made and in which they were found. We have also considered the explanations given by the appellant as to the particular sense in which he used some words. We accept that some of the appellant's statements were no more than a criticism of the way in which this country has been managed politically and economically but we are satisfied that on reading the statements as a whole we find that the learned trial Judge was correct when he found that some of them were seditious. The fact that the statements made are true is no defence. The appellant may well have felt honestly and sincerely that what he stated was true but the law says that is not a defence. A seditious intention in the sense of intent to cause anger, hatred, contempt and disaffection can, in our view, be clearly inferred from the emotive words used in the appellant's statements. In addition to the statements the learned trial Judge found seditious, we also find that to state that the President and his Government are the worst

dictatorship on the whole continent of Africa was intended to arouse feelings of hatred, contempt or disaffection against the President and his Government. Furthermore, we also find that to assert that the country, including the Armed Forces and the Civil Service, have been slaves under a dictatorship for 30 years could not have been intended to ender the President to the people and members of the Armed Forces. In our view, you cannot expect a slave to continue to give loyalty and allegiance to somebody who has enslaved him. That statement, in our judgment, was intended to inflame or incite feelings of hatred, contempt and disloyalty or disaffection among the people and members of the Armed Forces and the Civil Service against the person of the President and is, therefore, seditious. We note that in England there is the Incitement to Disaffection Act 1934 which provides for the prevention and punishment of endeavours to seduce members of the Armed Forces from their duties and allegiance. The statements we have referred to and those found by the learned trial Judge as seditious cannot, in our judgment, be described as constructive and reasonable political polemics and criticism. The words were deliberately couched in emotive vein in order to achieve the desired effect. The appellant conceded that words in a speech or statement are chosen because of the effect a speaker want s to have on his listeners. In our judgment, the appellant's statements had crossed over the line between political criticism and insult. We find, accordingly, that the convictions against the appellant were amply justified. We would, therefore, dismiss the appeal against conviction.

Although we were not addressed by Counsel for the appellant on the question of sentence, we have had to consider it. An appellate Court does not alter a sentence on the mere ground that it might itself have imposed a different sentence. A sentence must be manifestly excessive having regard to all the circumstances of the case or it must have erred in principle before this Court will interfere. We are satisfied that the sentence was wrong in principle. We also think that a total sentence of 2 years imprisonment with hard labour was manifestly excessive. The offence of importation of seditious publications in S. 51 (1) (d) of the Penal Code is a more serious offence than the offence of possession of seditious publications in S. 51 (2) of the Penal Code and yet the learned trial Judge imposed a more severe sentence on the latter count. It must also be remembered that the documents in both counts were the same. We have considered the facts as they were when the appellant was arrested and the facts as they are now and, in the circumstance, we are satisfied tht the sentences on both count cannot stand. They are set aside and in lieu thereof the appellant will now serve a sentence of 9 months imprisonment with hard labour on the first count and a sentence of 6 months imprisonment with hard labour on the second count to run concurrently with effect from the date of his conviction.

DELIVERED at Blantyre this 29th day of March, 1993.

Signed…………………………

R.A. BANDA, CHIEF JUSTICE

Signed…………………………
M.P. MKANDAWIRE, J.A.

Signed…………………………
R.P. MBALAME, J.A.