

Obligatory Essay

On

**CONTEMPT OF COURT: A CASE STUDY OF ITS JUDICIAL USE AND ABUSE
IN ZAMBIA**

BY

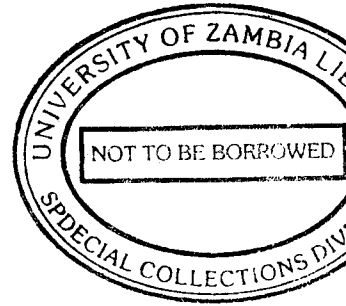
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**Submitted to the University of Zambia in Partial fulfillment of the requirements of
the Bachelor of Laws (LLB) Degree Programme**

**School of Law
University of Zambia
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January 2007

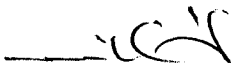


THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the Obligatory essay prepared under my supervision by John Kahande Kuku

Entitled: CONTEMPT OF COURT: A CASE STUDY OF ITS JUDICIAL USE AND ABUSE IN ZAMBIA

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to formant as laid down in the regulations governing Obligatory essays


.....
Mrs. Lillian Mushota
(Supervisor)

Date. 26.01.07

DEDICATION

To my wife Masela Kapasu for her love and inspiration during my long and agonizing stay from home in an effort to successfully complete my LLB degree, for her wise counsel at the time we were making a decision for me to pursue a course as a part time student and not to leave employment despite the fact that the course has been extremely expensive for our means. Indeed you have been magnificent.

ACKNOWLEDGEMENT

I wish to express my gratitude to the following people who assisted me in various ways when I was pursuing this study:

My wife, for affording me an environment conducive to complete my studies and for her support and understanding during those long study hours;

This acknowledgement cannot be complete without mentioning the invaluable inputs of the respondents who answered both my verbal interviews and the questionnaire. In particular, I pay tribute to the learned Judge Phillip Musonda, High Court Judge, for his wise and insightful guidance on the subject of contempt of court. I also thank other legal expert respondents for their contributions to this study.

Lastly I wish to thank my lecturer, Mrs. Lillian Mushota, for sparing her valuable time to read my manuscript, give advice, guidance and providing criticism of the work. Her sentence to sentence check of the work gave me a challenge to work harder.

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Chapter One

Introduction

Background information of Contempt of Court

At common law, contempt of court is a court ruling which, in the context of a court trial or hearing, deems an individual as holding contempt for the court, its process, and its invested powers. Often stated simply as "in contempt," or a person "held in contempt," it is the highest remedy of a judge to impose sanctions on an individual for acts which wantonly or excessively disrupt the normal process of a court hearing.

A finding of contempt of court may result from a failure to obey a lawful order of a court, showing disrespect for the judge, disruption of the proceedings through poor behavior, or publication of material deemed likely to jeopardize a fair trial. A judge may impose sanctions such as a fine or jail for someone found guilty of contempt of court. Typically judges in common law systems have more extensive power to declare someone in contempt than judges in civil law systems.

In civil cases involving relations between private citizens, the intended victim of the act of contempt is the party for whose benefit the ruling was implemented, rather than the court itself.

In English law (a common law jurisdiction) the law on contempt is partly set out in case law, and partly specified in the Contempt of Court Act 1981. Contempt may be a criminal

or civil offence. All courts are protected by the law on contempt, but only courts of record have a power at common law to punish for contempt.

In Zambia, Contempt of court is one of the offences relating to the administration of Justice found in the Penal Code Chapter 87 of the laws of Zambia. These offences are found in Chapter xi of the Penal Code, beginning with the offence of perjury section 104 and ending with the offence of prohibiting the taking of photographs in courts at section 117. In particular the offence of contempt of court is provided for in section 116.

Apart from reviewing the Penal Code, the study involved an analysis of the jurisdiction of the Director of Public Prosecution and analyzed the powers of the Attorney General's position as regards to contempt of court proceedings. In addition, the study investigated the genesis of contempt of court proceedings and attempted to offer a general definition.

The paper ends by outlining the major findings and recommendations (way forward) of the study. This, in particular, focuses on suggesting the necessary constitutional strategies and other institutional systems that can be used to accommodate the judicial use of the offence of contempt of court so that it does not result into abuse and violation of fundamental human rights of citizens.

There has been a marked concern on the administration of justice in the way contempt of court is prosecuted. In so far as Common Law is concerned in the proceedings for criminal contempt, there is no requirement that a prosecutor or even a representative of the state or the injured party initiate the proceedings. The judge is entitled to proceed on

his/her own motion. There is no summons or indictment nor is it mandatory for any written account of the accusation made against the accused to be furnished to the contemnor neither is the system adversarial in character. The judge himself enquires into the circumstances so far as they are within his personal knowledge. He/she identifies the grounds of complaint, selects the witnesses, investigates what they have to say, decides on the guilt and pronounces the sentence. This summary procedure, which by its nature is to be used quickly, if it has to be used at all, omits all the safeguards to which an accused is entitled and thus is open to abuse, and for this reason some jurists and legal commentators¹ have repeatedly stated that the judge should adopt it only in need. The statement of the problem of this study was to analyse the judicial use and abuse of the contempt of court offence in common law jurisdictions and Zambia in particular.

The study aimed at highlighting the deficiencies in the legislation which deals with offences relating to the administration of justice and which opens up ways for possible abuse by those who prosecute these offences. It also restated the abuses which have hitherto taken place and recommend what should be done to remedy the possible perpetuation of such abuses and uses.

In the subsequent paragraphs the paper will examine the effectiveness of the Penal Code provisions of law regarding offences relating to the interference in administration of justice, namely section 104 to 117 of the Penal Code and the possibility of interference by the state at the independence of the judiciary. In addition, the paper will examine case law on contempt of court in Zambia. Furthermore it will examine the summary procedure

¹ Archibold 1999, p. 2263; *Att.-Gen. v. Times newspapers Ltd, (1974) A..C. 273*

followed and the effect it has regarding the omission of the safeguards which an accused is entitled to such as a right to be heard and the adequateness of provisions of the Penal Code in regard to offences relating to administration of justice and other related laws. Finally, the paper compares and contrasts contempt of court in civil and criminal cases.

This study is occasioned by an upsurge in contempt of court cases that are being resorted to by courts. This research seeks to consider or study the mischief which the enactment of the contempt of court legislation sought to solve. The knowledge generated would persuade the law maker and the interpreter of the law that punitive jurisdiction founded upon this is for the good, not of the plaintiff or any party to the action but for the public. The current outcry has merely consisted isolated commentaries, there has been nothing in the form of analytical research that can make parliament to revisit the law. There is a need to revisit this law given the current situation. As noted by some legal commentators, justice is not a cloistered virtue, she must be allowed to suffer the respectful criticism and that judges and courts are live and open to criticism, and if reasonable argument is offered against any judicial act as being contrary to law or public good, no court could or would treat that as a contempt of court, but with due regard that the law should not be seen to sit by limply while those who seek its protection lose hope. It is, therefore, anticipated that this study will bring a new approach to the understanding of the current upsurge in cases of contempt of court.

Chapter Two

Analysis of Concepts, Definition, Study Cases in Contempt of Court

Broadly speaking, contempt of court refers to disobedience of, or disrespectful or disorderly conduct in the presence of any court or tribunal.

According to Archbold (1999), contempt of court may arise in a myriad and variety of forms. There is a substantial overlap between this offence and other offences against public justice and between various species of contempt. Contempt of court may occur in relation to particular legal proceedings or the administration of justice as a continuing process. Archbold further notes that “the starting point in any attempt to identify what constitutes contempt of court is the common law; this is the primary source²”. He adds that the effects of the *Contempt of Court Act* 1981³ do not affect the basic concept of contempt as established at common law.

At common law, a contempt of court is an act or omission calculated to interfere with the due administration of justice. Conduct is calculated to prejudice the due administration of justice if there is a real risk as opposed to remote possibility that prejudice will result⁴. Lord Diplock outlined that various ways in which the due administration of justice might be prejudiced as follows:

² Archibold 1999, p. 2263

³ Ibid. p. 2263

⁴ Ibid. p. 2264

“The due administration of justice requires first all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with procedures adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to the law. Conduct that is calculated to prejudice these requirements or to determine public confidence that they will be observed is a contempt of court” (at p.309).

From the above, it is easy to see that the definition is very wide. According to Archbold, the definition is wide enough to embrace improper interference with negotiations between parties to a pending cause as in the case of *Att.-Gen. v. Times newspapers Ltd*, *ante* and improper interference with persons who have been engaged in litigation after it is concluded as was held in the case of *Att.-Gen. v. Butterworth [1963] 1 Q.B. 696, CA*.

A contempt of court is an act or omission calculated to interfere with the due administration of justice. Lord Diplock in *Attorney-General v Times Newspaper [2]* outlined the various ways in which the due administration of justice might be prejudiced. According to Lord Diplock, the due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or

civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly that they should be able to rely upon obtaining in the courts arbitrament of a tribunal which is free from bias against any party whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these requirements or to undermine the public confidence that they would be observed is a contempt of court.⁵

Definitions, Use and Application of Contempt of Court Provisions

Contempt of court is usually divided into criminal and civil contempt. Criminal contempt is conduct committed in the presence of the court; it may consist of disorderly behavior, disrespect, or disobedience of a judge's orders. According to the learned authors of Halsbury's Laws of England, 4th ed., vol. 9, "although the boundaries of this kind of contempt have not been precisely defined, a contempt in the face of the Court may be broadly described as any word spoken or act done in, or in the precincts of, the Court which obstructs or interferes with the due administration of justice or is calculated to do so". In case law in Zambia, in the case of **Zulu v The People**, the learned trial judge noted as follows:

"Contempt of court includes any word spoken or act done calculated to bring a court into contempt or to lower its dignity and authority. Further, contempt of court may be shown either by language or manner. Whether particular words or behaviour amount to

⁵ *Att.-Gen. v. Times newspapers Ltd, (1974) A.C. 273*

contempt is a question of fact in any particular case. Language which might be perfectly proper if uttered in a temperate manner may be grossly improper if uttered in a different manner”⁶.

Examples of criminal contempt committed during a trial are as follows: an advocate’s persistence in pursuing a line of questioning that the judge has ruled improper and the refusal of a witness to answer a question despite the judge’s direction. Criminal contempt may also include disorderly acts occurring sufficiently near the courtroom for example, in the corridors or on the courthouse steps to interfere with court proceedings. Criminal contempt may be summarily punished by the court through the imposition of a fine or imprisonment or both; to prevent abuse of this power, however, the laws of some jurisdictions permit appeals from findings of criminal contempt⁷.

Civil contempt of court is the disobedience of a court order designed to grant relief to a party to a lawsuit. Such orders, often called decrees, stem from the equitable powers of courts. Common examples of equitable decrees are the injunction and the order for the payment of alimony. Civil contempt of court offences are punished by fine or imprisonment as a result of proceedings brought by the aggrieved party, for example, by a person who has not received overdue alimony payments.

⁶ ZULU v THE PEOPLE (1990-1992) ZR 62 SC

⁷ Encarta ® Encyclopedia 2004

Both criminal and civil contempt of court may be purged in many cases by obeying the order of the court or by apologizing for the misconduct. The person in contempt is often held in jail until the contempt is purged⁸.

According to Archbold (1999), there was widespread acceptance of the classification of contempt of court as being either civil or criminal until in the case of **Att.-Gen. v. Newspaper Publishing plc**⁹. This seems not to be the case any longer. Referring to **Att.-Gen. v. Newspaper Publishing plc [1988] Ch. 333, CA (Civ.Div)**, Sir John Donaldson M.R. noted:

“Despite its protean nature, contempt has been classified under two heads, ‘civil contempt’ and ‘criminal contempt’. Whatever the value of this classification in earlier times, I venture to think that it now tends to mislead rather than assist, because the standard of proof is the same, namely the criminal standard and there are now common rights of appeal. Of greater assistance is the reclassification as (a) conduct which involves a breach or assisting in the breach, of a court order and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a characteristic common to all contempts”: **per Lord Diplock in Att.-Gen. v. Leveller Magazine Ltd [1976] A.C. 440 at 449**. What distinguishes the two categories is that in general conduct which involves a breach, or assisting in the breach, of a court order is treated as a matter for the parties to raise by complaint to the court, whereas other forms of

⁸ Encarta ® Encyclopedia 2004

⁹ Ch. 333, CA (Civ.Div) [1988]

contempt are in general considered to be the matter for the Attorney General to raise. In doing so he acts not as a government minister or legal advisor, but as a guardian of public interest in the due administration of justice” (at p. 362).

According to Archibold (1999), Sir John Donaldson M.R. also referred to the decision of **Balcombe J. Re x (a minor) (wardship: Injunction¹⁰)**, in which an order was made prohibiting publication of information about the ward by the News of the World, which was a party, and any other newspaper who should have notice of the order.

Nature of proceedings and Standard of Proof

According to Archbold, at common law, civil contempt is not a criminal offence was held in the case of **Cobra Golf Ltd. v Rata.**¹¹ Nonetheless, the standard of proof in all forms of contempt is the criminal standard as was the case in **Dean V Dean (1987) 1 F.L.R 517, CA (Civ.Div)** and also in the case of **Att.Gen. v. Newspaper Publishing plc, ante.**

Mens rea

It was firmly established at common law that the publication of matter calculated to prejudice the fair trial of a pending cause was an absolute offence as in **R.v. Odham's Press Ltd. Ex p. Att. Gen. 91968) 1 WLR , D.C.** This is known as the strict liability

¹⁰ [1984] 1 W.L.R. 142

¹¹ (1998) Ch. 109 Ch.D (Riner J)

rule and it has been modified by the contempt Act 1981¹². The Act does not restrict liability for contempt in respect of conduct intended to impede or prejudice the administration of justice: s.6(c) (post 28-86).

Apart from cases to which the strict liability rule applies, the common law requires proof of an intent to impede or prejudice the administration of justice; this applies whether the case is one of publication contempt or any other conduct constituting a contempt of court. This has been held in various decided cases. In the case of **R v. Almon** publication of matter scandalizing court was held to be contempt of court.¹³ In this case it was held that it is a contempt to publish matter scandalising the court only if the publication is intended to have that effect. It is a contempt to publish matter so defamatory of a judge or a court as to be likely to interfere with the due administration of justice by seriously lowering the authority of the judge or court.¹⁴

In **Att. Gen. v. Butterworth**, hostile action against a witness done with intent to punish him for giving evidence was held to constitute contempt of court.¹⁵ It is contempt to take or threaten revenge upon a person for what he has done in the discharge of his duty in the administration of justice. So it is a contempt to threaten a judge or juror with revenge, or to assault a man for what he has done in a court of law as was held in **Re Johnson (1887) 20 Q.B.D. 60**; **Moore v. Clerk of Assize, Bristol (1971) 1 W.L.R. 1669**. Acts which are otherwise lawful may be a contempt if done with intent to punish a man for what he has

¹² (post 28-60 et seq

¹³ (1770) 20 St. Rt. 8-3 at 839

¹⁴ Ibid.

¹⁵ (1963) 1 Q.B. 696, C.A

done in court, as for an employer to dismiss a man who has given evidence against his interest (**Bowden v. The Universities Co-operative Association, 25 S.J. 886**); or for a landlord to punish a tenant for evidence he has given against him (**Chapman v. Honig**) honorary office as a punishment for evidence he has given which is considered against the interests of the association or union. This was the case in **Att.Gen. v. Butterworth (1963) 1Q.B. 696, C.A.** It was further held that an intention to punish must be shown¹⁶

Furthermore, in the case of **Att. Gen. v. Judd** harassment of former juror was held to be contemptuous of court.¹⁷ In this case it was held that Improper interference with jurors is the offence of embracy (see post, 28-151), though it may be treated as contempt of court in a similar way as an attempt to pervert the course of public justice. Likewise, it is contempt to seek to influence the outcome of a pending case by interfering with those involved in it, including the judge as was held in the case of **Martin's case (1747) 2 Russ. & My. 674.**

The case of **R. v. Schot and Barclay** juror's stubborn refusal to return a verdict was also held to be contempt of court¹⁸. Furthermore, misconduct by a juror may be a contempt, as for instance by seeking to sway the minds of his fellows jurors corruptly or improperly as was held in the case of **Re M.M. and H.M. (1933) I.R. 299.** It is a contempt of court for a juror to refuse to deliver a verdict unless it be to state that he or they cannot agree.¹⁹ In addition it is contemptuous to refuse to deliver a verdict which the presiding judge directs

¹⁶ *ibid*

¹⁷ (1995) C.O.D 15, D.C

¹⁸ (1997) 2 Cr. App. R. 383, CA

¹⁹ 2 Hawk. P.C. c. 22, s.17

them to return as a matter of law as was held in **Bushell's case (1670) Vaugh. 135 at 152**. It is not a contempt for a jury to return a preserve verdict but a contumacious refusal to reach a verdict because of a reluctance to judge another might establish the actus reus of contempt as was held in **R. V Schot and Barclay (1997) 2 Cr. App. R. 383, C.A.** It is a contempt of a jury to reach their verdict capriciously as by tossing a coin as in the case of **Langedell v. Sutton (1737) Barnes 32: Foster V. Hawden (1677) 2 Lev. 205**. As to the confidentiality of a jury's deliberations, see the Contempt of Court Act 1981, s.8 post, 28-90.

Finally, in **Att. Gen v. News Group Newspapers, PLC (1989) Q.1 110, D.C. Re Lonrho plc**, the publication of matter calculated to prejudice the fair trial of a pending cause was held to be contempt of court.²⁰ As to proving the necessary intent, in **Att.Gen. v. Newspaper Publishing plc (1988) Ch. 333 CA (Civ.Div)** Lloyd L.J. had this to say:

"I would therefore hold that the mens rea required in the present case is intent to interfere with the course of justice. As in other branches of the criminal law, that intent may exist, even though there is no desire to interfere with the course of justice. Nor need it be the sore intent. It may be inferred, even though there is no overt proof. The more obvious the interference with the course of justice, the more readily will the requisite intent be inferred²¹".

²⁰ (1990) 2 A.C.

²¹ Att.Gen. V Newspaper Publishing plc (1988) Ch. 333 CA (Civ.Div), p.383

According to Archbold, liability under the strict liability rule is now regulated by the Contempt of Court Act 1981, ss. 1-7. Liability at common law will now depend on proof of a specific intent to impeded or prejudice the administration of justice. At common law it must be established: (a) that publication of the material created a real risk of prejudice to the due administration of justice in a cause which is pending or imminent; and (b) that the material was published with the specific intent of causing such a risk as was held by Bingham L.J. in the case of **Att.Gen. v Sport Newspapers Ltd (1991) 1 W.L.R. 1194**. It has also been established that publication may be in any form, but to publish to one person or to a small group of persons would not ordinarily be calculated to cause sufficient prejudice to constitute a contempt as was held in **McCleod v. St. Aubyn (1899) A.C. 549; R. v. Griffith (1957) 2 Q.B. 192**.

In addition, Archbold notes that a jury is more likely to be swayed by prejudicial matter than a judge. So it is always a serious matter to publish material which may prejudice a jury against an accused. This was held in the case of **R. V. Bolam, ex p. Haigh (1949) 93 S.J. 220; R. v Odham's Press Ltd, ex p.** and also in the case of **Att.Gen. v (1957) 1 Q.B. 73, C.A.** To publish a photograph of a person charged with an offence where it is reasonably clear that the identity of the accused has arisen or may arise, may also amount to a contempt as was held in the case of **R. v Daily Mirror Newspaper, ex p. Smith (1927) 1 K.B. 845**.

In the case of **Howitt v. Fagge** it was held that a cause is pending as soon as it has been formally commenced. (1896) 12 T.L.R 426; *Re Crown Bank* (1890) 44Ch.D. 649. However, it may be a contempt to publish prejudicial matter knowing or having good reason to suppose that criminal proceedings are imminent even if they have not been commenced. An authority on this is **R v Savundranayagan and Walker (1968) 1 W.L.R 1761 at 1765**. Technically a cause remains pending until all possibilities of appeal have been exhausted as illustrated in **R. v Davies, ex p. Delbert-Evans (1945) 1K.B 435, D.C.** However, as appeals are conducted by judges without the aid of juries the possibility of real prejudice arising at that stage is slight. However it should be borne in mind that a retrial is not pending until it is ordered.

In **Att.Gen. v. News Group Newspapers plc (1989)**, it was held that where a prosecution was virtually certain to be commenced, it was proper to describe such a prosecution as imminent. The court further held that a criminal contempt at common law could be committed even if the conduct did not relate to pending or imminent proceedings. In the instance case, the newspaper intended proceedings should be commenced at its expense as soon as possible and actively pursued that goal because it was determined to see the intended defendant charged, tried and convicted. Where, therefore, the news paper published material about the person, whom it was intended should be prosecuted, which could only serve to and was intended to prejudice the fair trial of that person, the newspaper had engaged in conduct which amounted to contempt of court at common law. In **Att.Gen v Sport Newspaper Ltd**, two judges of the Divisional Court disagreed on the point when contempt at common law arose. Bingham

L.J said that the court would not be justified in departing from the recent and unambiguous decision in **Att.Gen. v News Group Newspapers**, which had extended the boundaries of contempt as previously understood. If a publication created a real risk of prejudice to the due administration of justice and the alleged contemnor published with the specific intent of causing such risk, contempt might be committed even though proceedings were either in existence or imminent. Hodgson J. said that the News Group decision was wrong and the summary procedure for publication contempt should not be widened. It should only be a contempt when the relevant proceedings were pending. In **Coe v Central Television**, the Court of Appeal did not seek to resolve the above conflict, but did recognize that contempt at common law could occur where criminal proceedings “had not been begun”. However, one of the reasons for holding that the necessary intent had not been proved was that no one had yet been charged with an offence

Two matters must therefore be proved: (a) that the act created a real risk of prejudice to the administration of justice; and (b) that it was done with the specific intent of creating such a risk. This was held to be the case in **Att.Gen. v. Sport Newspapers Ltd. (1991)**²².

This principle was also emphasized by the House of Lords in **Att.Gen. v. Times Newspaper Ltd (1974) A.C 173** and in the case of **Golder v. United Kingdom, 1E.H.R.R.524, ECHR** it was decided that access to a court was a right protected by **Article 6 of the European Convention**. It was reasserted by the House of Lords in

²² 1WLR 1194 at 1200, CA (Civ.Div.).

Raymond V. Honey (1983) 1 A.C 1, that even a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication²³.

In Re martin (P.) The Times, April 23, 1986, D.C. it was held that a solicitor committed a contempt of court when, in correspondence with a barrister who had brought criminal proceedings against the solicitor's clients, threatened to report the matter to the inner Temple authorities. His Lordship Glidewell, L.J. accepted that there was a distinction between putting pressure on a witness and dissuasion of a litigant: the ambit of what was proper in relation to the latter was wider. A party could take proper steps to defeat his opponent but the pressure had to be fair, reasonable and moderate.

His Lordship further pointed out that the reference to: "unlawful threats" by Lord Diplock in **Att.Gen. v, Times Newspapers Ltd**²⁴, was used there to mean improper threats. The threats did not have to be unlawful or illegal. A threat to bring an action for malicious prosecution was near the boundary of what was or was not proper pressure but, in the circumstances, did not amount to contempt of court²⁵.

It has also been established at common law that to disobey an order of the court properly made is a contempt of court. In the following instances, orders have been held properly made and disobedient to them a contempt of court.

²³ *R. v Board of Visitors of Hull Prison, ex p. St. Germain* (1979) Q.B. 425 at 455, 68 Cr. App. R. 212 at 229, CA (Civ. Div) and *Solosky v. R* (1979) 105 D.L.R (3d) 745 at 760.

²⁴ *Att.Gen. v Times Newspapers Ltd* (1991) 1 W.L.R. 1194. p.332.

²⁵ *Ibid.*

(a) an order to a person hindering or interrupting proceedings to leave as was the case in

R.v Webb ex.p Hawker;

(b) an order to a person to desist from introducing matter ruled irrelevant into a trial or from acting in a manner offensive to the court.

(c) an order that specified documents be not removed from court;

(d) an order that part of the evidence given in a trial, which may prejudice another trial then pending be not published until the conclusion of the second trial;

(e) an order forbidding publication of the name of a complainant in a blackmail trial as was held in the case of **R v. Socialist Worker Printers and Publishers exp**²⁶.

Contempt of Court: The Case of Zambia

In addition to common law, in Zambia, contempt of court is one of the offences under the umbrella of offences relating to the administration of justice, found in panel Cap 87 of the Laws of Zambia. These offences are found in Chapter xi of the Penal Code, beginning with the offence of perjury section 104 and ending with the offence prohibiting the taking of photographs in courts at section 117. Contempt of court is provided for in section 116 which provides as follows:

²⁶ Archibold, 1999. p.45. (1995) C.O.D 15, D.C

“(1) Any person who-

(a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being had or taken; or

(b) having been called upon to give evidence in a judicial proceeding, fails to attend or, having attended, refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room; or

(c) causes an obstruction or disturbance in the course of a judicial proceeding; or

(d) while a judicial proceeding is pending, makes use of any speech or writing, misrepresenting such proceeding, or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or

(e) publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private; or

(f) attempts wrongfully to interfere with or influence a witness in a judicial proceeding either before or after he has given evidence, in connection with such evidence; or

(g) dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or

(h) retakes possession of land from any person who has recently obtained possession by a writ of court; or

(i) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken; is guilty of a misdemeanor and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units.

(2) When any offence against paragraph (a), (b), (c), (d) or (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding six hundred penalty units or, in default of payment, to imprisonment without hard labour for one month.

(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court²⁷.

Other offences relating to the administration of justice found in Chapter ix of the Penal Code are:

²⁷ (As amended by No. 26 of 1940 and Act No. 13 of 1994)."

104. (1) Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then pending in that proceeding or intended to be raised in that proceeding, is guilty of the misdemeanour termed "perjury"

(2) It is immaterial whether the testimony is given on oath or under any other sanction authorised by law.

(3) The forms and ceremonies used in administering the oath or in otherwise binding the person giving the testimony to speak the truth are immaterial, if he assent to the forms and ceremonies actually used.

(4) It is immaterial whether the false testimony is given orally or in writing.

(5) It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place, or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.

(6) It is immaterial whether the person who gives the testimony is a competent witness or not, or whether the testimony is admissible in the proceeding or not.

(7) Any person who aids, abets, counsels, procures, or suborns another person to commit perjury is guilty of the misdemeanour termed "subornation of perjury".

104A. (1) Where a witness in any judicial proceeding, other than a person accused of an offence in a criminal proceeding, makes a statement on oath or affirmation on some fact relevant in the proceeding contradicting a material detail in a previous statement made on oath or affirmation by the same witness before any court or tribunal and, the court or tribunal is satisfied that either of the statements whether false or not was made with intent to deceive, shall be guilty of an offence and liable to imprisonment for two years.

(2) At the trial of any person for an offence under this section, the record of a court or tribunal containing any statement made on oath or affirmation by the person charged shall be prima facie evidence of such statement.

(3) A person shall be liable to be convicted of an offence under this section notwithstanding that any statement made by him before a court or tribunal was made in reply to a question which he was bound by law to answer, any such statement shall be admissible in any proceeding under this section²⁸.

105. Any person who, having been lawfully sworn as an interpreter in a judicial proceeding, willfully makes a statement material in that proceeding which he knows to be false, or does not believe to be true, is guilty of the misdemeanour termed "perjury".

²⁸ (As amended by Act 3 of 1990)

106. Any person who commits perjury or suborns perjury is liable to imprisonment for seven years. Punishment of perjury and subordination of perjury

107. A person cannot be convicted of committing perjury or of subordination of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false.

108. Any person who, with intent to mislead any tribunal in any judicial proceeding-

(a) fabricates evidence by any means other than perjury or subordination of perjury; or

(b) knowingly makes use of such fabricated evidence; is guilty of a misdemeanour and is liable to imprisonment for seven years.

109. Any person who swears falsely or makes a false affirmation or

declaration before any person authorised to administer an oath or take a declaration upon a matter of public concern under such circumstances that the false swearing or declaration if committed in a judicial proceeding would have amounted to perjury, is guilty of a misdemeanour.

110. Any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, is guilty of a misdemeanour.

111. Any person who, knowing that any book, document, or thing of any kind whatsoever, is or may be required in evidence in a judicial proceeding, willfully removes or destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour²⁹.

²⁹ (As amended by No. 26 of 1940)

112. (1) Any person commits a felony who-Conspiracy to defeat justice and interference with witnesses

(a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert, or defeat the course of justice; or

(b) in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

(c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal.

(2) Any person guilty of a felony under sub-section (1) is liable to imprisonment for seven years³⁰.

113. Any person who asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a felony, or will abstain from, discontinue, or delay a prosecution for a felony, or will withhold any evidence thereof, is guilty of a misdemeanour.

³⁰ (As amended by Act No. 29 of 1976)

114. Any person who, having brought, or under pretence of bringing, an action against another person upon a Penal Act or Statute in order to obtain from him a penalty for any offence committed or alleged to have been committed by him, compounds the action without the order or consent of the court in which the action is brought or is to be brought, is guilty of a misdemeanour.

115. Any person who-

(a) publicly offers a reward for the return of any property which has been stolen or lost, and in the offer makes use of any words purporting that no questions will be asked, or that the person producing such property will not be seized or molested; or

(b) publicly offers to return to any person who may have bought or advanced money by way of loan upon any stolen or lost property the money so paid or advanced or any other sum of money or reward for the return of such property; or

(c) prints or publishes any such offer; is guilty of a misdemeanour.

And finally,

117. Prohibition on taking photographs, etc., in court

(1) No person shall-

(a) take or attempt to take in any court any photograph, or, with a view to publication, make or attempt to make in any court any portrait or sketch, of any person, being a Judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the provisions of this subsection or any reproduction thereof; and if any person acts in contravention of this subsection, he shall be liable to a fine not exceeding one thousand five hundred penalty units in respect of each offence; Provided that this section shall not apply to photographs being taken on any occasion with the consent of the Chief Justice, or where the occasion is the opening of any session of the High Court, with the consent of the Judge holding that session.

(2) For the purposes of this section-

(a) "court" means the High Court, any subordinate court, juvenile court, court of a coroner or a local court as defined in the **LOCAL COURTS ACT; CAP.29**

(b) "Judge" includes registrar, magistrate, coroner and officer of such local court;

(c) a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court-room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or

sketch taken or made of the person while he is entering or leaving the court-room or any such building or precincts as aforesaid. (As amended by No. 53 of 1957, Act No. 3 of 1990 and No. 13 of 1994)

Case Law on Contempt of Court in Zambia

In this section, the essay reviews two cases involving contempt of court in Zambia. The study focuses on **ZULU v THE PEOPLE (1990 - 1992) ZR 62 (SC)** and **ELIAS KUNDIONA v THE PEOPLE (1993 - 1994) ZR 59 (SC)** and **David Masupa v. the People (1977) Z.R. 226 (H.C.)**.

ZULU v THE PEOPLE (1990 - 1992) ZR 62 (SC)

This was an appeal against conviction and sentence for contempt of court, under order 52 of the Rules of the Supreme Court of England, as read with s 116(3) of the Penal Code cap 146.

During a criminal trial the appellant, who was appearing as counsel for the defence, made an application for the trial Judge to recuse himself, supported by an affidavit on which the deponent made allegations against the impartiality of the Judge. The Judge found the actions of the appellant to be in contempt of Court, but proceeded to call witnesses over a number of days. The Court then convicted the appellant of contempt and sentenced him to a period of imprisonment. On appeal it was contended that the trial Court had been

obliged, in terms of s 116 of the Penal Code, to either deal with the matter summarily or to refer it to the Director of Public Prosecutions, that the appellant had not received a fair trial as the trial Judge had not been impartial and independent, and that the appellant's conduct did not amount to a contempt to Court.

The appeal court held, that the trial Judge had derived his power to punish for contempt of Court from the Rules of the Supreme Court of England (as they applied to Zambia). These powers were wider than s 116 in that there was no limitation on the Court to dispose of a contempt of court on the same day as it arose. He further held that the enquiry the trial Judge had instituted was unnecessary, as he had already made his finding of contempt as it arose. It was also held that, while it was generally improper for a Judge to deal summarily with a contempt, as it was undesirable for him to appear to be both prosecutor and Judge, where a contempt was committed in the face of the Court there was nothing illegal or unfair in holding an enquiry by the Judge before whom it was committed. In this case the contempt consisted of the allegation that the trial Judge was not impartial and, unless the application for recusal was substantiated by reliable evidence, it amounted to contempt in itself. In this case the application was based on a flimsy affidavit of a man who was not even within the Court's jurisdiction.

The judge accordingly held that the appeal against conviction had to be dismissed.

Held, further, that, although the trial Court was not limited in the sentence it could be imposed, there were mitigating factors which justified a suspended prison sentence being imposed.

ELIAS KUNDIONA v THE PEOPLE (1993 - 1994) ZR 59 (SC)

The appellant was convicted on two counts of contempt and sentenced to two terms of six months' imprisonment to run concurrently. He appealed against both conviction of sentence arguing that the matter should have been heard by a different court. As a result of his absence from the country, it was not heard until a year after the alleged contempt took place. He also alleged bias on the part of the Court and raised the defence of compulsion.

The appeal judge had the following to say:

- (i) Lapse of time has no impact on the continuance of proceedings which were initiated promptly and were only delayed by the accused's own actions.

- (ii) No specific procedure is provided for summary contempt provided basic principles of fairness such as the right to be heard are observed. It is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent.

- (iii) It is misdirection for the trial Court to deal with the defence of compulsion under the Penal Code without taking into account the 1990 amendment which includes future threats.

- (iv) It is wrong in principle for a lower court to criticise the sentence of the higher court.

The People v David Masupa (1977) Z.R. 226 (H.C.)

The accused was arrested on a bench warrant issued by a magistrate, who thereupon charged the accused with contempt of court contrary to section 116 (1) (i) of the Penal Code and dealt with the matter summarily; the allegation was that the accused had implied, after the conclusion of the case and not in the presence of the court, that he had been unfairly dealt with in a case of overcharging when another man charged a similar offence was found not guilty.

On review-

Held:

- (i) Contempt of court under section 116 (1) of the Penal Code, Cap. 146, if not committed in view of the court, should not be dealt with summarily. The proper course is for the State or for the aggrieved party to institute criminal proceedings, even where it is separated by distance of time or space from the actual judicial happening.
- (ii) Mere criticism of a judicial decision does not amount to contempt; where the criticism becomes an attack or abuse on the partiality of a judge or magistrate in relation to his conduct in a judicial proceeding or when there is an express or implied allegation of bias on the part of a judicial officer then such conduct could amount to contempt.

The Court of appeal reviewed the case as follows:

This is a review of proceedings for contempt of court instituted against one David Masupa by a magistrate of the first class at Chingola. The case record was called for in terms of section 337 of the Criminal Procedure Code, Cap. 160. On the 10th August, 1977, the learned magistrate had caused a warrant to be issued for the arrest of David Masupa for contempt of court. The warrant was duly executed on the same day and on the 11th August, 1977, the accused was produced before the learned magistrate. Thereupon the learned magistrate purported to charge the accused for contempt of court under the provisions of section 116 (1) (i) of the Penal Code, Cap. 146. The particulars of the offence alleged that the accused had shown some intentional disrespect to judicial proceedings, to which he implied that he was unfairly dealt with in a case of overcharging when one J.M.Tembo was also charged with the same offence and was not found guilty of that offence. The learned magistrate then explained the nature of the offence to the accused who said: "It is not true that I had shown some disrespect to judicial proceedings as I talked to nobody. I know that all the people here in Chingola are against me. They say anything because of the elections which are due at anytime. I realise that there could have been malicious reports against me. I could not go round and tell people that your judgment was wrong; any such reports were malicious. In future when any such reports are made I would request that such persons be arrested. Because of provocation I always retire to bed earlier than usual. With those few words I would thank you very much for calling me to appear before you to clear the air." The court's finding reads as follows: "I have listened to what you said; it may or it may not be that the reports so received are baseless. It seems that there could be something in what you said. For that reason I do not find it necessary to hold you guilty for contempt of court, and excuse you."

Section 116 (1) of the Penal Code, inter alia, provides as follows: "Any person who . . . (i) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken; is guilty of a misdemeanour and is liable to imprisonment for six: months or to a fine not exceeding fifty Kwacha." Section 116 (2) reads "When any offence against paragraph (a), (b), (c), 20 (d), or (i) of sub-section 1 is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding forty Kwacha or in default of payment, to imprisonment without hard labour for one month " It would appear therefore that if an offence under section 116 (1) of the Penal Code is not committed in view of the court, then such an offence should not be dealt with summarily. The proper course in such circumstances s for the State to institute criminal proceedings against the offender for committing an of fence under section 116 (1) of the Penal Code A conviction for an offence under section 116 (1) is a misdemeanour However, sub-section (2) provides that if certain offences, namely, those in paragraph (a), (b), (c), (d) or (i) of sub-section (i) are committed in view of the court then the court is empowered to deal with the offenders summarily.

A contempt of court is an act or omission calculated to interfere with the due administration of justice: **Attorney-General v Butterworth**³¹ Lord Diplock in **Attorney-**

³¹ Attorney-General v Butterworth, (1963) 1 Q.B. 696

General v Times Newspaper³² outlined the various ways in which the due administration of justice might be prejudiced. He said "The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly that they should be able to rely upon obtaining in the courts arbitrament of a tribunal which is free from bias against any party whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these requirements or to undermine the public confidence that they would be observed is a contempt of court."

The categories of criminal contempt of court in this country are set out under section 116 (1) of the Penal Code. It should be said that subsection (3) provides that these categories should be deemed to be in addition to and not in derogation from the power of a court to punish for contempt of court. In the instant case the learned magistrate had purported to act under the provisions of section 116 (1) (i) of the Penal Code which makes it a contempt for any person to commit any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceeding is being had or taken. It should be observed that an act of "intentional disrespect" must be committed. **In R. v Almon [3]** it was held that it is a contempt to publish matter scandalising the court only if

³² Attorney-General v Times Newspaper, (1974) A.C. 273.

the publication is intended to have that effect. It is a contempt to publish matter so defamatory of a judge or a court as to be likely to interfere with the due administration of justice by seriously lowering the authority of the judge or court: **R v Gray [4]**; **R v Editor of the New Statesman [5]**. It would seem that an intention to bring the judge or court into disrepute must be shown: **R v Almon [1]**; **McCleod v St Aubyn [6]**. It is only in a clear case that this jurisdiction will be exercised for any man may criticise a decision of a court even in an outspoken manner: **Ambard v Attorney-General** for Trinidad and Tobago [7] *Re a special reference from the Bahama Islands* [8], **McCleod v St Aubyn [4]**, (see Archbold, 39th ed.). The mental element need not be an ingredient in cases of contempt other than those which bring a court or judge into disrepute. In **R v Odhams Press Ltd [9]** it was held that mere *rea* was not a necessary constituent of a contempt of which the court would take cognizance and punish, and that lack of intention or knowledge was only material in relation to the penalty which the court would inflict; the test was whether the matter complained of was calculated to interfere with the court of justice, not whether the authors or printers intended that result.

In the instant case, an examination of the case record shows that although the accused was formally charged, no plea was taken. The learned magistrate merely explained the nature of the offence to the accused who gave an explanation which was accepted by the court and thereafter the learned magistrate held that it was not necessary to find the accused guilty of contempt of court. The particulars of the offence do not indicate the date and place where the alleged contempt had taken place and the nature of the contempt has not been precisely particularised. The particulars of offence are vague and in my view

do not disclose an offence. The learned magistrate when he caused the warrant of arrest to be issued purported to act on reports, the source of which was not stated. As the record reveals, these reports were not substantiated by concrete evidence. It would appear that the whole purpose of the exercise was to cause the accused to be brought before the court in order for him to show why he should not be found guilty of contempt of court. The accused having given an explanation satisfactory to the court was let off. The procedure adopted in these proceedings was irregular. Had the contempt been committed in the sight of the court then no problem would have arisen since the learned magistrate could have dealt with the matter summarily under the provisions of section 116 (2) of the Penal Code. But where the learned magistrate had received reports of conduct amounting to an alleged contempt of court committed not in the view of the court and subsequent to the completion of judicial proceedings, then he would not be justified in dealing with the alleged contempt summarily.

The learned magistrate appears to have acted on reports that the accused had criticised or complained of a decision by the court against him in a case when another person charged with a similar offence was acquitted. As already stated, mere criticism of a judicial decision does not of itself amount to a contempt. But where that criticism gives over to an attack or abuse on the partiality of a judge or magistrate in relation to his conduct of judicial proceedings or where there is an express or implied allegation of bias on the part of a judicial officer then such conduct could amount to contempt because it tended to scandalise the court by seriously lowering the authority of the judge or court or by bringing the court into disrepute. Lord Donovan in **Attorney-General v Butterworth** [1]

states "The question to be decided here, as in all cases of alleged contempt of court, is whether the action complained of is calculated to interfere with the proper administration of justice. There is more than one way of so interfering. The authority of a Court may be lowered by scurrilous abuse." *McCleod v Aubyn* [6] (*supra*) was a case of publication of a scurrilous attack on a judge as a judge, particularly with reference to his conduct in cases he had tried. This was held to be contemptuous as scandalising the court. The judgment inferred that mere criticism of a judge or jury in respect of a case while it is still pending may amount to contempt but once a trial had taken place and the case was over then legitimate criticism is permissible though not scandalisation. ***R v Gray* [2] (*supra*)** was also a case of scurrilous attack on a judge which was held to be a contempt. *Ambard v Attorney-General for Trinidad and Tobago* [5] (*supra*) was a case of the publication of a virulent attack on a judge. Reference was made in that case to the judgment in *R v Gray* [2] (*supra*) and the following passage was cited from the judgment in that case: "Any act done or writing published calculated to bring a court or judge of the court into contempt or to lower his authority is a contempt of court."

I now come to the more recent case of ***Balogh v Crown Court* [10]**. In considering the powers of summary punishment for contempt of court, Lord Denning, MR, at p. 288 states as follows: "This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity of an authority of the judge and to ensure a fair trial. It is to be exercised by a judge on his own motion only when it is urgent and imperative to act immediately-so as to maintain the authority of the court-to prevent disorder-to enable witnesses to be free from fear-and Jurors from being

improperly influenced-and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt as was held in **R v Gray [2]** by Lord Russell of Killowen, CJ But properly exercised, it is a pourer of the utmost value and importance which should not be curtailed.

Over 100 years ago Erie, C.J., said that these powers, 'as far as my experience goes, have always been exercised for the advancement of justice and the good of the public': see **Ex parte Fernandez [11]**. I should say the same today. From time to time anxieties have been expressed lest these powers might be abused. But these have been set at rest by s. 13 of the Administration of Justice Act, 1960, which gives a right of appeal to a higher court.

As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it on himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in R.S.C. Order 52. The reason is so that the judge should not appear to be both prosecutor and Judge; for that is a role which does not become him well."

Stephenson, L.J., in the same case at p. 293 says "The power which the judge exercised is both salutary and dangerous: salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered generally necessary to secure justice for

him. This appeal gives an opportunity to make clear that it is a ponderer to be used reluctantly but fearlessly when, and only when, it is necessary to prevent justice being obstructed or undermined-even by a practical joker. That is not because judges, juries, witnesses and officers of the court take themselves seriously; it is because justice, Those servants they are, must be taken seriously in a civilised society if the rule of law is to be maintained." Finally Lawton, L J , at p. 295 in the same case states: "In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with by a motion to commit under **R.S.C. Order 52 or even by indictment.**"

The question whether there is any limit to time or space as to when a particular conduct could constitute contempt of court was considered in **Re Johnson [12]** by Lord Esher, M R , who said, *"It may possibly be that I have too much restricted the doctrine on the subject by suggesting that there would be a limit of time or space with regard to the question whether such conduct amounted to a contempt. It may be that there would be no such limit of time or space, provided the acts done or expressions used could be considered an interference with the course of justice. Distance in point of time or space, however, would, I think, at any rate be a matter to be taken into consideration in determining whether there had been an interference with the course of justice."*

Thus a review of the authorities would show that acts done or expressions used by an individual which would appear to be to a scurrilous attack or abuse of a judge (or a magistrate) with reference to the manner in which he has discharged his judicial function or reflected on his partiality as a judge in any case he has tried then such acts or expressions tended to scandalise the court by bringing it into disrepute in the public eye and this would constitute a gross and improper interference with the administration of justice. In such circumstances the acts done or expressions used would amount to a contempt of court. If the contempt was committed in view of the court then it could be dealt with summarily. If, however, it was committed outside the court and even if it is separated by distance of time or space from the actual judicial happening, the proceedings for contempt should be instituted by the State or the aggrieved party.

Coming back to the instant case, the learned magistrate appears to have reacted in a somewhat over sensitive manner when he received what now appear to be unsubstantiated reports of an alleged contempt by the accused. The proper course would have been for the learned magistrate to have referred the reports to the police for investigations and If there was substance in those reports then the matter could have been left to the police to prosecute the accused under the provisions of section 116 (1) of the Penal Code. This is not a case where the learned magistrate should have dealt with the matter summarily since the alleged contempt was not committed in view of the court. The learned magistrate acted in good faith in order to resist what he thought was an improper interference with the administration of justice. Unfortunately, the action he took was based on a mistaken notion of the law. I have already indicated that the proceedings in

this case were irregular since the learned magistrate had acted i excess of his jurisdiction. I should add that no actual injustice has resulted in this case since there has been no finding of guilt or conviction for contempt against the accused. In the result I would merely quash the proceedings for contempt of court in this case.

An Analysis of Cases involving Contempt of Court in Zambia

In both cases of (**ZULU v THE PEOPLE (1990 - 1992) ZR 62 (SC)** and **ELIAS KUNDIONA v THE PEOPLE (1993 - 1994) ZR 59 (SC).**), it was held that no specific procedure is provided for summary contempt provided basic principles of fairness such as the right to be heard are observed. It was further noted that it is an unavoidable corollary of summary contempt that the tribunal is not completely impartial or independent. It was further noted in the case of **ZULU v THE PEOPLE** that while it was generally improper for a Judge to deal summarily with a contempt, as it was undesirable for him to appear to be both prosecutor and Judge, where a contempt was committed in the face of the Court there was nothing illegal or unfair in holding an enquiry by the Judge before whom it was committed. Further, it was held that the trial court is not limited in the sentence it could impose.

From these observations by the Supreme Court, one can infer that there is a chance of abusing the contempt of court in the administration of justice in Zambia. For instance, there is a danger of the trial judge passing a harsh sentence (since the trial court is not limited in the sentence it could impose) because he/she is provoked by the plaintiff. This

tends to contradict the provisions of chapter ix (Penal Code), section 116 (2) of the laws of Zambia.

*There is also a danger that the court may react in a somewhat over sensitive manner as was held in the case of the **People v David Masupa (1977) Z.R.226 (H.C.)**. In this case the accused was arrested on a bench warrant issued by a magistrate, who thereupon charged the accused with contempt of court contrary to section 116 (1) (i) of the Penal Code and dealt with the matter summarily; the allegation was that the accused had implied, after the conclusion of the case and not in the presence of the court, that he had been unfairly dealt with in a case of overcharging when another man charged a similar offence was found not guilty. The appeal Judge had the following to say:*

“The learned magistrate appears to have reacted in a somewhat over sensitive manner when he received what now appears to be unsubstantiated reports of an alleged contempt by the accused. The proper course would have been for the learned magistrate to have referred the reports to the police for investigations and If there was substance in those reports then the matter could have been left to the police to prosecute the accused under the provisions of section 116 (1) of the Penal Code. This is not a case where the learned magistrate should have dealt with the matter summarily since the alleged contempt was not committed in view of the court. The learned magistrate acted in good faith in order to resist what he thought was an improper interference with the administration of justice. Unfortunately, the action he took was based on a mistaken notion of the law. I have already indicated that the proceedings in this case were irregular since the learned

magistrate had acted in excess of his jurisdiction. I should add that no actual injustice has resulted in this case since there has been no finding of guilt or conviction for contempt against the accused. In the result I would merely quash the proceedings for contempt of court in this case”.

As far as common law is concerned, reform of the law of contempt has been in the air for some time. In 1974, the Committee on Contempt of Court, set up by Lord Hailsham when he was Lord Chancellor, produced a report containing a wide range of recommendations³³. Legislation was finally precipitated by a judgment of the European Court of Human Rights which held that the application of the law of contempt to restrain publication of a Sunday Times article was in breach of the European Convention on Human Rights³⁴.

According to James Young, the law of contempt has attracted criticism on three main grounds³⁵. It is distinguished from general criminal law by its curious procedure which deprives an accused of the safeguards normally vouchsafed by British law. It is also uncertain in its application and so runs counter to that aspect of the rule of law according to which no man should be “punishable”...except for a distinct breach of the law”. It is argued that the law of contempt has a broader scope than is strictly justified for its purpose, and that this leads to an unjustified infringement of liberty, most importantly freedom of expression – in particular freedom of the press.

³³ James Young *British Journal of Law and Society* vol. 8, NO. 2, 1981, p.243.

³⁴ *Ibid.*

³⁵ *ibid*

The Contempt of Court Act 1981³⁶, was a response to these criticisms. The Act deals primarily with criminal contempt; it does not deal with civil contempt which is concerned with the enforcement of court orders. It also does little to implement proposals of the Phillimore Committee designed to integrate contempt of court with other areas of the criminal law concerned with the administration of justice. This is the reflection of the tendency of British lawyers to cling to legal classifications which has dubious functional utility; thus reform of offences relating to the interference in the course of justice is currently being considered separately from the issue of contempt of court.

As the Act is so limited, it provides a series of piecemeal reforms; yet two discernible assumptions underlie its method and its particular provisions. First, the common law is regarded as, *ex hypothesi*, fundamentally sound; Secondly, freedom once taken away is not readily to be given back; a restrictive law once established is assumed to be a legitimate infringement of freedom.

This criticism is relevant in the case of Zambia because judges/courts may derive their powers to punish for contempt of court from the rules of the Supreme Court of England (White Book) as in the case of **Zulu v the People**.

³⁶ Ibid.

Chapter Three

Way Forward (Recommendations)

Most of the respondents who were mostly legal experts such as lawyers magistrates and judges felt that sections 104 to 117 of the Penal Code are not effective in dealing with offences relating to the administration of justice. In the words of one learned Judge of the High Court “ ...because the provisions of sections 104 to 117 of the Penal Code are not effective in dealing with the administration of justice, we normally use Order 52 of the Rules of the Supreme (RSC) court at the High Court level”.

In view of this, it is recommended that sections 104 to 117 of the Penal Code be amended to encompass the wider provisions of Order 52 of the RSC. This is because Order 52 of the RSC is much wider than section 116 and as such it allows the contemnor to be afforded a right to be heard and also the right to legal representation as enshrined in the Zambian constitution.

In the case of a judge, reacting to an attack upon himself, reading section 116 with Order 52 of the RSC would allow the judge enough time to reflect on the extent and nature of the attack and as such he may not over react and pass an unfair sentence. Indeed, this would minimize the danger posed by the fact that the judge assumes many roles (i.e. being both the judge and a prosecutor) in the proceedings against a contemnor in summary proceedings.

It is further recommended that an advisory mode of trial be adopted in contempt cases where the contemnor is allowed to respond to allegations of contempt by the judge and is given a chance to bring in legal representation.

It is further recommended that judges avoid using summary trial. This will allow time for the judge to reflect on the nature of the offence and also will avoid the danger of the judge taking on the uncustomary role of being both prosecutor and judge. Summary trial should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment.

In addition, it is recommended that criminal contempt should be reserved for obstructing justice willfully while civil contempt may be committed in less willful circumstances.

Further, the offence of contempt of court should be used sparingly. This is because the more a judge on his own motion holds people in contempt the more he is perceived to act less judiciously.

Chapter Four

Conclusion

While it is not in dispute that the offence of contempt of court is necessary to maintain the dignity of the courts, it should only be exercised for the advancement of justice and the good of the public. In particular, summary procedures which are adopted in contempt of court cases, should only be used to ensure that court proceedings are not frustrated or intruded into rather than for punitive purposes. This is because the more a judge on his own motion holds people in contempt, the more he is perceived to act less judiciously.

It has also been observed that section 116 of the penal code is not sufficient to deal with cases of the administration of justice. That is why at High Court level judges often use Order 52 of the RSC. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with by a motion to commit under R.S.C. Order 52, or even by indictment. This is because Order 52 of the RSC is much wider than section 116 and as such it allows the contemnor to be afforded a right to be heard and also the right to legal representation a constitutional right enshrined in the Zambian Constitution. In view of this, it is recommended that sections 104 to 117 of the Penal Code be amended to encompass the wider provisions of Order 52 of the RSC.

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