



**REPUBLIC OF MALAWI**

**IN THE HIGH COURT**

**Revenue Division**

**Lilongwe District Registry**

**Criminal Cause no. 02 of 2022**

**The Republic**

**and**

**Mahmed Shafee Ahmed Chunara**

**Norman Paulosi Chisale**

**Peter Mukhito**

**Roza Madalo Mbilizi**

**Ahmed Mohammed Chunara**

**Coram : JUSTICE MATAPA KACHECHE**  
**Dr. S Kayuni Director of Public Prosecutions**  
**Ms S Kajumi Senior State Advocate**  
**Ms F Francisco for the State**  
**Mr. G Khonyongwa, for the first and fifth accused person**  
**Mr. MG Chipeta for the first and fifth accused person**  
**Mr. F. Maere for the second and fourth accused person**  
**Mr. S Mhango for the third accused person**  
**Mrs Chijere for the third accused person**  
**Ms E Chimang'anga Court Clerk**

**RULING**

1. The accused persons herein are charged with various offences. The bill of indictment has 18 counts. Some charges are against all accused persons while others are against various combinations of the accused persons.
2. When the matter came for plea and directions before my brother Judge Professor Kapindu in the Criminal Division, some of the accused persons raised objections on the charge sheet. They were directed that the objections be raised formally.

3. Subsequently, issues arose as to which Division was the right one to try the accused persons with regard to the offences charged herein. It was held that the correct Division is the Revenue Division. The Judge ordered that the file be transferred as such and directed that the preliminary issues including the objections be handled in the Revenue Division.
4. When I took over the matter I was under a mistaken belief that the preliminary objections had already been dealt with. It was when the matter was about to proceed for plea and directions that the Director of Public Prosecutions, supported by Counsel for the accused persons brought to my attention the issue of preliminary objections. I therefore adjourned to consider the objections. This is my ruling on the objections.
5. Before I go to the substance of the objections let me state that, having filed the original indictment, the Director of Public Prosecutions subsequently applied for and was granted permission to add the fifth accused person who was not in the original draft indictment. This necessitated that a new bill of indictment be prepared and the State not only added the fifth accused person but also increased the number of charges.
6. The actions on paragraph 5 in turn necessitated that the second and third accused person refile their notices of objection, obviously to correspond to the new charges. For the purposes of this ruling I will only refer to the latest objections as they appear on my file. I emphasize "as they appear on my file" just in case a certain notice of objection slipped off the file in the process of movement. This is so because when I was looking at the file I found it confusing with several charge sheets and notices of objection which had not been placed in the proper chronological order. In the case of the third accused person, the last notice of objection and skeletal arguments were filed by the KD Freeman and Associates but the first two notices were filed by Kalekeni Kaphale Lawyers.
7. For the purpose of this ruling therefore the notices involved were filed on 20<sup>th</sup> June, 2022 on behalf of the second accused person and 15<sup>th</sup> June 2022 on behalf of the third accused.

8. On her part the fourth accused person did not file her own objections but joined the objections filed on behalf of the second accused person. She, however, filed submissions to support the said objections. The submissions were filed on 29<sup>th</sup> June, 2022.
9. Since, as pointed out earlier, the accused are joined on some but not all charges I will outline the charges as they relate to each of the accused persons who is objecting to some of the charges.
10. In respect of the second accused person, he is answering to the following charges:
  - a. Count one - fraud other than false pretences contrary to section 319A (d) of the Penal Code (Cap 7:01) of the Laws of Malawi;
  - b. Count two – conspiracy to commit customs offences contrary to section 132(j) as read with section 142(1)(a) of the Customs and Excise Act (Cap 42:01) of the Laws of Malawi;
  - c. Count Four – Aiding and abetting smuggling contrary to section 133(c) as read with Section 142(1)(a) of the Customs and Excise Act.
  - d. Count six – uttering a false document contrary to section 360 of the Penal Code;
  - e. Count seven - uttering a false document contrary to section 360 as read with section 356 of the Penal Code;
  - f. Count eight - uttering a false document contrary to section 360 as read with section 356 of the Penal Code;
  - g. Count nine – making a false document contrary to section 353(a) of the Penal Code;
  - h. Count ten – making a false document contrary to section 353(a) of the Penal Code;
  - i. Count eleven – making a false document contrary to section 353(a) of the Penal Code;
  - j. Count eighteen - abuse of office contrary to section 95(1) as read with Section 95(2) of the Penal Code;
11. In respect of the third accused person, he is answering to the following charges:
  - a. Count one - fraud other than false pretences contrary to section 319A (d) of the Penal Code (Cap 7:01) of the Laws of Malawi;

- b. Count two – conspiracy to commit customs offences contrary to section 132(j) as read with section 142(1)(a) of the Customs and Excise Act (Cap 42:01) of the Laws of Malawi;
- c. Count Four – Aiding and abetting smuggling contrary to section 133(c) as read with Section 142(1)(a) of the Customs and Excise Act.
- d. Count six – uttering a false document contrary to section 360 of the Penal Code;
- e. Count seven - uttering a false document contrary to section 360 as read with section 356 of the Penal Code;
- f. Count eight - uttering a false document contrary to section 360 as read with section 356 of the Penal Code;
- g. Count nine – making a false document contrary to section 353(a) of the Penal Code;
- h. Count ten – making a false document contrary to section 353(a) of the Penal Code;
- i. Count eleven – making a false document contrary to section 353(a) of the Penal Code;
- j. Count seventeen - money laundering contrary to section 42(1)(d) of the Financial Crimes Act;
- k. Count eighteen - abuse of office contrary to section 95(1) as read with Section 95(2) of the Penal Code;

12. In respect of the fourth accused person, she is answering to the following charges:
- a. Count one - fraud other than false pretences contrary to section 319A (d) of the Penal Code (Cap 7:01) of the Laws of Malawi;
  - b. Count Four – Aiding and abetting smuggling contrary to section 133(c) as read with Section 142(1)(a) of the Customs and Excise Act.
  - c. Count seventeen - money laundering contrary to section 42(1)(d) of the Financial Crimes Act;
  - d. Count eighteen - abuse of office contrary to section 95(1) as read with Section 95(2) of the Penal Code;

13. The second accused person's objections are as follows:
- a. Count 1 of fraud other than false pretences under section 323 of the Penal Code is not sufficiently particular as to who was deceived;

- b. The second accused is discharged from prosecution of count 2 of conspiracy to commit customs offence contrary to section 132 (j) as read with section 142(1)(a) of the Customs and Excise Act, Count 4 of aiding and abetting smuggling contrary to section 133(c) as read with section 142 (1)(a) of the Customs and Excise Act) Cap 42:01) of the Laws of Malawi and count 18 of abuse of office contrary to section 95 (1) as read with section 95(2) of the Penal Code in terms of section 302A of the Criminal Procedure and Evidence Code.
  - c. Count 6, 7, and 8 of uttering a false document contrary to section 360 as read with section 356 of Penal Code Cap 7:01 of the Laws of Malawi and counts 9,10 and 11 of making a false document contrary to section 353 (a) of the Penal Code (Cap 7:01) of the Laws of Malawi are unfair as they are based on a general statute namely the Penal Code when the Customs and Excise Act prescribes similar offences in relation to customs related documents.
14. The 3<sup>rd</sup> accused person's objections are as follows:
- a. Lack of sufficient particulars
    - i. there is lack of particulars on count 1 in relation to the actual conduct which the 3<sup>rd</sup> accused person is alleged to have committed which amounts to deceit and caused pecuniary detriment to the Malawi Government;
    - ii. there is lack of sufficient particulars on count 4 in that there is no information as to what the 3<sup>rd</sup> accused person did which amounts to aiding and abetting smuggling;
    - iii. there is lack of sufficient particulars on count 17 in that there is no information relating to what the 3<sup>rd</sup> accused did which amounts to aiding and abetting the acquisition of the proceeds of tax evasion by the 1<sup>st</sup> and 5<sup>th</sup> accused persons;
    - iv. there are insufficient particulars on count 18 in that there is no information relating to what rule, procedure, practice, agreed rules or arrangements were breached by the 3<sup>rd</sup> accused so as to make the alleged act or omission an arbitrary one;
    - v. there is lack of particulars in relation to the actual number of bags which the 3<sup>rd</sup> accused person is alleged to have imported which did not fall within the

duty free status of the former president and how many bags fell within the duty free status of the former president;

- vi. there [are] insufficient particulars on time of the alleged commission of the offence in that the period 2018 to 2020 (in respect of all counts, except for counts 6, 7, 8, 9, 10 and 11) is too wide and general to enable the accused person ably defend himself. The charge sheet needs to specify the period to include the dates and months when the offences are alleged to have been committed.

b. Multiplicity of counts in the bill of indictment

- i. There is multiplicity of counts in the bill of indictment in that the 3<sup>rd</sup> accused person is being charged with a total of 11 counts in one indictment;
- ii. Although the 11 counts which the 3<sup>rd</sup> accused person is being accused of are charged under various legal provisions the alleged offences are all founded on the same facts.

15. As for the fourth accused person the following is a summary of her submissions on her objections:

- a. Fraud other than false pretences contrary to section 319A(d) of the Penal Code (Cap 7:01) of the Laws of Malawi – this is not sufficiently particularized as to who was deceived;
- b. Count 4- Aiding and abetting smuggling contrary to section 133(c) as read with section 142(1)(a) of the Customs and Excise Act (Cap 42:01). According to the fourth accused person these are statute barred under section 302A of the Criminal Procedure and Evidence Code (CP and EC).
- c. Count 17- Money Laundering contrary to section 42(1)(d) of the Financial Crimes Act. The fourth accused argues that the provision under which the accused person is charged is vague and uncertain thereby going against the one of the ingredients of the Rule of law – that there must be certainty in the law.
- d. Count 18 – abuse of office contrary to section 95(1) as read with section 95(2) of the Penal Code. According the fourth accused this is statute barred under section 302A of the CP and EC.

16. In general terms the objections can be classified into four categories. Therefore, I will deal with objections following the said categories:

- a. Lack of sufficient particulars of the offence in some of the charges;
- b. Multiplicity of counts.
- c. Limitation of prosecution time;
- d. The use of a general law instead of the specific statute for charging the accused persons.
- e. Lack of certainty in section 42 of the Money Laundering Act for purposes of charging an accused person under that section;

#### A. LACK OF SUFFICIENT PARTICULARS

17. The starting point is Section 42 (2)(f)(ii) of the Constitution of the Republic of Malawi. It provides as follows:

*"Every person arrested for, or accused of, the alleged commission of an offence shall in addition to the rights which he or she has, have the right, as an accused person, to a fair trial which shall include the right to be informed with sufficient particularity of the charge."*

18. Section 128 of the CP and EC outlines the rules to be followed when framing charges. The provision is rather long, but the following paragraphs will suffice for the purposes of determining this issue:

*"(a)(iii) - after the statement of the offence, particulars of such offence shall be set out in ordinary language, giving reasonable information as to the commission of the offence and avoiding as far as possible the use of technical terms.*

*(f) subject to any other provisions of this section it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to.*

*(g) it shall not be necessary in stating any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person, where the written law creating the offence does not make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence".*

19. Both the State and counsel for the accused persons have cited a number of authorities some of which I have had time to look at. I am grateful for the assistance and, although I may not cite them here I have considered them in coming up with this ruling.
20. What I can say is that what comes out of these provisions and authorities is that when framing a charge, the prosecutor is under an obligation to as much as possible state the particulars of the offence to reflect the demands of the written law creating the offence.
21. The particulars of the offence must disclose facts fairly covering all the elements of the offence to help the accused person easily understand the charge and plead and, if he has any defences, prepare his or her defence. They must be sufficient and clear.
22. However, they need not be detailed. They must be brief and to the point. They are not necessarily an outline of the facts in the manner that a statement of claim is in civil actions. It is only a synopsis of the facts as alleged by the State. As such it is not necessary that the Prosecutor include every minute detail in the charge sheet.

**Specific objections on lack of sufficient particulars**

23. On Count 1, fraud other than false pretences contrary to section 319A(d) of the Penal Code (Cap 7:01) of the Laws of Malawi, the provision is as follows:

*“Any person who by deceit or other fraudulent means causes a detriment, pecuniary or otherwise, to any person, shall be guilty of an offence and shall be liable to imprisonment for seven years.”*

24. The particulars of the offence in this case are as follows:

*Mahmed Shafee Chunara, Paulosi Norman Chisale, Peter Mukhito and Roza Mbilizi between November 2018 and June 2020 in the cities of Lilongwe and Blantyre by deceit, namely, that the former head of State, Professor Arthur Peter Mutharika, had imported 1,250,770 bags of cement, duty free, caused a pecuniary detriment to the Malawi Government thereby defrauding the Malawi Government of revenue amounting to three billion two hundred and thirty two million, one hundred and fourteen thousand one hundred and thirty seven kwacha twenty nine tambala (MK3, 232, 114, 137.29).*



25. The second, third and fourth accused persons argue that these particulars are not sufficient to offer them a fair opportunity to respond.
26. The second and the fourth accused persons have premised their objection on the fact that the particulars are not clear as to who was deceived, or lied to. In my view this objection cannot be sustained. The elements of the offence require only proof of deceit and that the same has to be to the detriment of someone. The identity of the person deceived is irrelevant. In any event this is a matter of importation using a duty free status. Clearly, the accused persons would reasonably be aware that duty is paid to the Malawi Government through Malawi Revenue Authority, and for a person to be said to have deceived someone in relation to duty, such a person cannot be any other than officials involved in clearing goods.
27. On his part, the third accused person says that there is a lack of particulars as to the actual conduct which the third accused person is alleged to have committed which amounts to deceit. In my opinion the deceit in question has been clearly identified in the particulars – that the former President had imported cement, thereby allowing that cement to be cleared duty free.
28. The third accused person also argues that there is lack of sufficient particulars on count 4 in that there is no information as to what he did which amounts to aiding and abetting smuggling. For reasons appearing later in the ruling the accused person has been discharged from this offence. I will therefore not deal with the objection on this aspect.
29. The other aspect of lack of particulars, according to the third accused is on count 17. He submits that there is no information relating to what the 3<sup>rd</sup> accused did which amounts to aiding and abetting the acquisition of the proceeds of tax evasion by the 1<sup>st</sup> and 5<sup>th</sup> accused persons.
30. The particulars of the offence are as follows:

*Peter Mukhito and Roza Madalo Mbilizi between 2018 and June 2020, in the cities of Lilongwe and Blantyre having reasonable belief that three*

*billion two hundred and sixty nine million three hundred and four thousand eight hundred ninety two kwacha eighty six tambala (MK 3, 269, 304, 892.86) wholly and indirectly represented proceeds of crime namely tax evasion from unremitted customs duties, income tax, and VAT aided and abetted Mahmed Shafee Ahmed Chunara and Ahmed Muhammed Chunara in the acquisition of the said proceeds of crime.*

31. The State in reply says that the third accused authored letters addressed to the MRA that cement should be cleared duty free as it was the then State President, His Excellency Professor Arthur Peter Mutharika. In my view, the third accused person is justified to ask for these particulars to be included in the charge sheet for him to properly plead. The State therefore must amend the charge sheet to reflect this allegation. The accused cannot be obligated to go through the whole set of disclosures just to find out what it is that he allegedly did that amounted to aiding and abetting. The charge should be amended to include the nature of the act or omission amounting to aiding and abetting.
32. The third accused person submits that there are insufficient particulars on count 18 in that there is no information relating to what rule, procedure, practice, agreed rules or arrangements were breached by the 3<sup>rd</sup> accused so as to make the alleged act or omission an arbitrary one. The accused person has been discharged, as such I will not deal with this objection.
33. The third accused further submits that there is lack of particulars in relation to the actual number of bags which the 3<sup>rd</sup> accused person is alleged to have imported which did not fall within the duty free status of the former president and how many bags fell within the duty free status of the former president. The State argues that the allegation is that all bags were not for the personal use of the former President. In my view even without this explanation there is nothing wrong with the particulars of the charge. The State has put the number of bags of cement involved. It is up to them to prove that the bags were not for the personal use of the President. If they fail so to do, it is to the advantage of the accused person.

34. The third accused further submits that there are insufficient particulars on time of the alleged commission of the offence in that the period 2018 to 2020 (in respect of all counts, except for counts 6, 7, 8, 9, 10 and 11) is too wide and general to enable the accused person ably defend himself. The charge sheet needs to specify the period to include the dates and months when the offences are alleged to have been committed.
35. It is unnecessary in my view where it is alleged that acts or a series of acts or omissions amounting to an offence took place over a period of time for the State to specify each date such an act or omission happened. An offence can be committed on a specific date, in which case the State can mention the specific date.
36. However, where an offence comprises a series of acts or omissions, part of a single transaction or connected transactions, over a period of time, requiring that each particular conduct be stated separately may prejudice the accused person in the mind of the Court in the same manner that too many counts in relation to the same set of facts would. As long as the accused person is aware of the series of conduct allegedly amounting to the offence being charged and the period in which such a series of conduct was committed, the accused person should be able to plead. This objection is thus overruled.

#### B. MULTIPLICITY OF COUNTS

37. The third accused person has argued from two angles in relation to the objection on the grounds of multiplicity. First he argues that there are too many counts against the accused person on one bill of indictment. Secondly he argues that there are many counts in relation to the same facts.
38. The starting point is section 127 of the CP and EC. The section provides as follows:
- (1) *Any offences, whether felonies or misdemeanours may be charged together in the same charge if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or similar character.*
  - (2) *When more than one offence is charged in a charge, a description of each offence so charged shall be set out in a separate paragraph of a charge called a count.*

(3) *Where, before trial, or at any stage of the trial, the Court is of the opinion that-*

(a) *an accused may be prejudiced or embarrassed in his defence by being charged with more than one offence in the same charge; or*

(b) *for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a charge, the court may order a separate trial of any count or counts of such charge.*

The provision goes on in subsection 4 to outline the persons who may be joined in one charge and may be tried together.

39. Section 129 provides as follows:

*"Where an omission constitutes an offence under two or more written laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under any one of such laws, but shall not, while a conviction or acquittal of an offence by a court has not been set aside, be liable to be tried again on the same facts for substantially the same offence:*

*Provided that a person convicted or acquitted of an offence may afterwards be tried for any distinct offence with which he might have been charged under Section 127 at the trial at which he was convicted or acquitted."*

40. I need to State at the outset that the DPP and his officers enjoy an independence in the conduct of their work. They have a discretion, subject to section 127 and 129 of the CP and EC, to decide how many offences and how many persons to be charged in one charge.

41. Having said that, I am well aware of the additional rules as have been developed from case law as to how the prosecution can exercise that discretion without in anyway trying to undermine the prosecution's general powers.

42. The third accused person argues that a maximum number of 6 counts would be reasonable. The State argues that there is no legal basis why, in a situation where distinct offences have been committed there should be no more than six charges

against an accused person even in situations where such offences are based on the same facts.

43. The State responds that section 127(1) allows them to include different offences in one charge sheet if the charges are based on the same facts. They argue that in this indictment there were a number of transactions, on different dates spanning through a period of two years. The mode of commission of the offences was similar but the facts are not the same. Therefore, the charges cannot be said to be based on the same facts.
44. The reading of section 127, in my view, does not seem to suggest that there is any legal impediment to the number of charges that the State can prefer against an accused person in one indictment, whether based on the same facts or not. Indeed, there are situations where an accused person may have committed distinct offences within the same set of facts.
45. The only allowable exception within the provision is that the court may order separate trials if it is of the opinion that the accused person may be embarrassed by being charged with more than one offence or, if for some reason, it is desirable to direct that the accused person be tried separately on some charges.
46. Case law seems to suggest that preferring a large number of charges against an accused person *per se* is undesirable. Counsel has cited the case of *Republic v Bondo* 7 MLR 194. In that case the learned Judge cited *R v Gonwe* (1923-60) ALR Mal 444 which itself cites *R v Hudson* (1952) 36 Cr. App. R 94.
47. My reading of these case authorities, however, does not suggest to me that their Lordships were pronouncing a rule of law. They were clearly expressing a general desirability for a fewer number of counts to be preferred by the prosecutor against an accused person especially in the subordinate courts. In my view they were not departing from the general prescriptions of section 127. It is only if, in the opinion of the Court, the accused may be embarrassed with the number of charges or there is some other reason for ordering separate trials, that the court should do so and try the accused person on a lesser number of offences.

48. Additionally, I do not think that the said judgments ever prescribed a specific number of counts that may be preferred against the accused person. In *R v Gonwe* the learned Chief Justice said in a subordinate Court the accused should never be charged with “*more than five or six counts*” and in *R v Hudson* the Judge said “*quite a reasonable number of counts can be proceeded on say three, four, five or six.*” Such statements, in my view cannot be said to be prescriptive of a specific number of offences to be charged.
49. On the question of multiplicity of offences on the same facts, the accused person cites Edmund-Davies LJ in *R v Harris* [1969]2All ER 599 where he said:
- “It does not seem to this court right or desirable that one and the same incident should be made the subject matter of distinct charges so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted a single offence could give rise to a multiplicity of charges and great unfairness could ensue.”*
50. Indeed, although section 127 seems to suggest that the Prosecution can prefer as many charges as possible on a given set of facts, it must be read in the light of section 129. The provision in my view seems to suggest that the Prosecution must elect one law or provision under which to charge the accused person where the accused person may have violated a number of statutes. It does not have freedom to find as many offences as possible disclosed by a certain set of facts and charge the accused with all of them.
51. Indeed, in the case of *Rep v Kambalame, Criminal Cause 108 of 2002* [2003] MWHC 6, Kapanda J, as he then was, had this to say:
- “the stipulation in section 129 of the CP and EC is also instructive on the observation that it is wrong to charge a defendant twice under two different sections, on the same factual premise. The State should instead, on one set of facts, make up their mind as to which charge stands the greatest chance of success and proceed accordingly.”*

52. However, it is not in all cases where acts or omissions seemingly emanating from one set of facts would lead to multiplicity. In my view, for there to be multiplicity in this sense, it must be shown that the proof of the same facts will amount to proof of the elements of all the offences charged. If in one count the State will be required to prove the same facts as in the other (regardless of the capacity in which the accused committed the offence) then there would be multiplicity in my view. However, if each offence requires the proof a different set of facts, although they may have been committed at the same time, then the State will be properly entitled to charge the accused persons with the charges although it may seem that the transactions were the same as long as the joinder will not prejudice the accused person in the trial.

53. As pointed out above, the State is arguing that there were various transactions, as such it cannot be said that offences are charged on the basis of the same set of facts. In my view, if that is the case, then the State needs to clearly show in the charges which set of facts relate to which offences. I direct that the State amends the charge sheet to that effect.

#### C. DISCHARGE FOR COUNTS 2, 4 AND 18

54. It has been submitted on behalf of the second and third accused person that the accused persons are discharged from these counts as they are now statute barred. This, according to the accused persons, is because under section 302 A of the CP and EC trial should have been commenced within twelve months from the date the complaint arose and trial should have been completed within 12 months from the date the trial commenced.

55. In its reply the State submits that this being a situation where misdemeanours or less serious offences have been charged jointly with more serious offences, therefore the accused must not be discharged. The State further argues that the accused persons have not elaborated the basis on which the stated charges should be discharged. The accused have not stated whether the prosecutions are the cause for such delays, and whether such delay cannot be attributable to anything else other than the delay by the prosecutions as required by Section 302A (3).

56. The State then goes on to submit that we should follow *Rep v Zimba [2008] MWHC 52* which refused to discharge an accused person on the grounds, among others, that the offence that was being tried was serious. The State has also cited *Republic v Azem Aqbar and others Criminal Appeal Case no. 10 of 2021* and *Republic v Abdul Rehman Abdulla and others Criminal Case no. 4 of 2017* where an application to discharge the accused persons on the grounds of limitation of time was dismissed.
57. Section 302A of the Criminal Procedure and Evidence Code provides as follows:
- (1) *Subject to subsections (2) and (3) the trial of any person accused of an offence triable by the High Court, other than any other offence punishable by imprisonment of more than three (3) years, shall-*
    - (a) *be commenced within twelve months from the date the complaint arose; and*
    - (b) *be completed within 12 months from the date the trial commenced.*
  - (2) *.....*
  - (3) *Where the cause of the failure or delay to complete the trial within period prescribed by subsection (1) is not attributable to any conduct on the part of the prosecutions, the court shall order [such extension] of time as it considers necessary the completion of the trial.*
  - (4) *A person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence if his trial is not commenced or has not been completed within the period prescribed by subsection (1), and in such case the accused shall stand discharged of the offence at the expiry of such period."*
58. In my view this provision requires nothing other than to show that the trial has not commenced within period of twelve months from the date the complaint arose and/or that trial has not been completed within 12 months after commencement. Actually subsection (3) does not seem even to apply to the scenario at hand. Subsection 3 applies the period after commencement of trial. Herein trial has not yet commenced.
59. In this case it is not being disputed by the prosecution that trial has not been commenced within 12 months after the complaint arose. The State is simply asking the accused persons to show that the delay is attributable to the conduct of the prosecutions. In my view there is no basis for this demand. If anything, it was for the State to show that the delay was not attributable to their conduct.



60. *Rep v Zimba* does not apply either. The issue in that case was undue delay not limitation of time for prosecution. Here the law is clear as to what happens when there is no commencement of trial. Whether the offence is very serious or not is not up to us to decide. The Legislature decided that already. I will sustain the objection and order that the accused persons be discharged on counts 2, 4 and 18.

**D. On the Use of a general law instead of specific law**

61. The second accused person's submission on this objection relate to Counts 6 to 11 in the bill of indictment. Counts 6 to 8 are based on section 360 as read with section 356 of the Penal Code while counts 8 to 11 are based on section 353(a) of the Penal Code.

62. Section 360 of the Penal Code provides as follows:

*"Any person who knowingly and fraudulently utters a false document shall be guilty of an offence of the same kind and shall be liable to the same punishment, as if he had forged the thing in question."*

63. Section 356 of the Penal Code provides as follows:

*"Any person who forges any document shall be guilty of an offence which, unless otherwise stated, is a felony and he shall be liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years."*

64. Section 353(a) of the Penal Code provides as follows:

*"Any person makes a false document who makes a document purporting to be what in fact it is not."*

65. It is submitted on behalf of the second accused person that there are equivalent provisions under Custom and Excise Act which it would have been fair for the State to use. The argument is that where a specific statute prescribes an offence. It is unfair for the State to prefer a charge under a general statute. The equivalent provision under the Customs and Excise Act are reproduced below:

66. Section 135 (1) (d) of the Customs and Excise Act provide as follows:

*Any person who knowingly uses or attempts to use for any purpose of the Customs laws any book or document or computer records and other electronic data which has been forged, falsified or framed so as to deceive shall be guilty of an offence.*

67. Section 135 (2) of the Customs and Excise Act as far as is relevant to this point, provides as follows:

*For the purposes of this section, the forgery of a document or computer records and other electronic data is the making of a false document or computer records and other electronic data, knowing it to be fake with the intention that it shall in any way be used or acted upon as genuine whether within Malawi or not.*

68. The unfairness, it has been submitted, emanates from the fact that, in this case, the punishment under the Customs and Excise Act is less than the punishment under the Penal Code and there is a limitation to prosecution under section 155 of Customs and Excise Act in relation to offences against customs laws. By charging him under the Penal Code the State is taking away the advantages afforded to the accused person under the Customs and Excise Act. It has been further argued that by creating specific offences under the Customs and Excise Act, the intention of parliament is that the accused person should be charged under the specific Act and not the general statute.

69. To this submission the State has responded to say that it has discretion to charge the accused under any of the statutes prescribing the offence.

70. Indeed, the section 53 of the General Interpretation Act seems to give the State such a discretion and it does not distinguish between a general statute and a specific statute. The most important part of that section is that it gives an exception where a contrary intention appears. In my view such contrary intention must appear in the law itself. The intention of Parliament cannot be implied from the mere fact that the statute creating a similar offence deals with the specific subject matter. In my view the objection is without basis and I dismiss the same.

#### E. VAGUENESS OF SECTION 42 OF THE FINANCIAL CRIMES ACT

71. It seems that the second accused person abandoned the objection based on the vagueness of section 42(1)(d) of the Financial Crime Act. However, the fourth accused pursued it in her skeleton arguments and I think it is proper that I deal with it. According to her, the provision is vague and this runs contrary to the principle that the law must be clear.

72. Section 42 of the Financial Crimes Act provides as follows:

*(1) A person who knowingly or who has reasonable grounds to believe that any property, including his own property, in whole or in part, directly or indirectly represents proceeds of a predicate offence-*

*(a) Converts or transfers property with the aim of concealing or disguising the illicit origin of that property, or of aiding any person, including himself, involved in the commission of the offence to evade the legal consequences thereof;*

*(b) Conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property;*

*(c) Acquires, possesses or uses that property; or*

*(d) participates in, associates with or conspires to commit, attempts to commit and aids, abets and facilitates the commission of any act or omission referred to in paragraph (a)(b) or (c), commits an offence.*

*(2) for the purposes proving an offence under Subsection (1) it is not necessary that the predicate offence be committed.*

73. The gist of the argument is that subsection (1) and subsection (2) are contradictory, therefore the provision is vague and uncertain. This is so because, for there to be predicate offence under subsection (1), that offence must have been committed. Subsection (2) seems to negate the predicate offence part. Due to this apparent contradiction, the charge under this provision ought to be struck off.

74. In my opinion, subsection (1) is clear on the elements of the offence that the accused person ought to know what acts or omissions he must have involved himself/herself in to constitute an offence. The addition of section 2 is of no consequence as it is inherent in that provision that a predicate offence be committed and the prosecution

has to prove and the court be satisfied that that element has been proved. In the circumstances I dismiss the objection.

75. Before closing let me state that the third accused person also raised a pertinent issue on joinder of offences in relation to Counts 12 to 15. Those charges relate tax issues of the first and fifth accused persons. There is no nexus to the particulars of the offence in any of the other charges. Nor is there any allegation that the other accused persons participated in alleged offences.
76. Although the State has not responded as there is no formal objection, I think the concern is genuine, the inclusion of those charges would simply lengthen the period of the trial yet the other accused persons seem not to be connected. Further, this is an example where the accused persons, specifically the first and the fifth may be prejudiced when being tried as the facts in those charges may unduly influence the Court when deciding on the charges where they are co-accused with the others.
77. When amending the bill of indictment, the State must consider taking those charges out and charging the first and 5<sup>th</sup> accused persons separately in relation to them unless the State can show a nexus between them and the rest of the charges.

### **Summary**

78. The following is the summary of the ruling on the objections:
- a. On lack of particularities:
    - i. Count 1 - fraud other than false pretences contrary to section 319A (d) of the Penal Code (Cap 7:01) of the Laws of Malawi – the objections are overruled. The charge stands.
    - ii. Count 17 - money laundering contrary to section 42(1)(d) of the Financial Crimes Act- the charge must be amended to show the particularities of the acts that amounted to aiding and abetting.
    - iii. Lack of particulars in relation to the period in which the offences were committed – the objection is overruled.
    - iv. Lack of particulars in relation to the number of bags involved – the objection is overruled.

- b. On multiplicity of counts – the objection is overruled in as far as the number of counts is concerned but the State should properly review the facts and come up with separate charges where the facts are clearly the same.
  - c. Discharge of accused persons on Counts 2, 4 and 18 for being statute barred – the objection is sustained. The accused persons are discharged.
  - d. On the use of general law instead of specific law – the objection on this ground is overruled.
  - e. Vagueness or uncertainty of section 42(1)(d) for purposes of charging an accused person – the objection is overruled.
  - f. The State must show the nexus between Counts 12 to 15 with the rest of the charges and accused persons.
79. I therefore direct the State to amend the bill of indictment according to this order before the accused persons can be called upon to plead. The amended bill of indictment to be served by close of business on 11<sup>th</sup> January, 2023.

Delivered this 30<sup>th</sup> day of November, 2022.



CC Matapa Kacheche

Judge