IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL CAUSE NO 02 OF 2014

THE REPUBLIC

-VERSUS-

OSWARD LUTEPO

CORAM: HON. JUSTICE PROF. R.E. KAPINDU

For the State: Mrs. M. Kachale, Director of Public Prosecutions;
Mr. R Matemba, Deputy Director,
Anti-Corruption Bureau

For the Defence: Mr. O. Mtupila

Official Interpreter: Mr. A. Nkhwazi

Court Reporter: Mrs. L. Mboga

JUDGMENT ON SENTENCE

KAPINDU, J

A. INTRODUCTION

1. In September 2013, gates to what was meant to be a clandestine and non-detectable criminal syndicate of fraudsters and money launderers were flung open. Information revealing an unprecedented fiscal scandal gradually unfolded in a manner an unsuspecting observer would have been forgiven to think was a masterfully scripted piece of fiction. Yet, and very sadly for Malawi, this was no fiction. It was a shocking reality. Billions of Malawi Kwacha had been embezzled from the national fiscus by some unscrupulous people.

2. The facts led by the State, as well as the confession statement of the convict herein, Mr. Oswald Flywell Gideon Lutepo (hereafter referred to alternatively as Mr. Lutepo or the convict), dated 5 June 2015 suggest two categories of plunderers of State funds that the convict collaborated with in 2013. First were politicians, described by the convict as "highly placed politicians". He proceeded to name these "Highly placed politicians" in his Statement made to the State dated 28 July 2015, and his "Declaration of Beneficiaries of Bank Transactions" dated 3rd September 2015.

3. I must immediately mention that I am mindful that such politicians and other persons mentioned by the convict as the masterminds and main beneficiaries of the laundered money are not before this Court. Proof of their involvement and role, in point of law, can only be established if they are charged, tried and convicted by a competent Court of law. Given the facts laid bare before me however, I would wish to make an observation of principle. If indeed it be proven that such highly placed politicians were the ultimate masterminds of this plunder of State resources and primarily

so for purposes of "cash-rolling" a political campaign, this would represent a major governance catastrophe that befell this nation. It would entail that such politicians thought that the best way to garner the sustained trust of the people of Malawi in order to gain or remain in power, was to fundamentally breach the very trust those people had reposed in them in the first place. The governance trust reposed in the political leadership of the State includes being custodians and good stewards of national resources. Section 12(1)(c) of the Constitution of the Republic of Malawi makes it clear that "the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and **that trust can only be maintained through open, accountable and transparent Government** and informed democratic choice" (Emphasis supplied). This sacred governance principle must never be twisted to entail that sustained governance trust can be maintained through clandestine, fraudulently unaccountable and opaque Government.

4. The second category of plunderers, the facts suggest, were collaborators with those in the first category. This was a group of very greedy people, business persons and civil servants, who apparently had a get-rich-quick mentality. They seem to have had no sense of shame in wallowing in the luxuries of embezzled tax payers' money, whilst the greater lot of Malawian taxpayers were drowning in the misery of acute lack of essential service delivery. These are the type of people who somehow derive pride in reaping where they did not sow. I take judicial notice that several of them have now been convicted and are either serving prison terms or are awaiting sentence and other concomitant processes.

5. What this case has shown, as have the several other concluded related cases before it, is that in collaboration and in systematic fashion, these unscrupulous people embezzled State funds – tax payers' money – with reckless abandon. They had no regard for the exceptional hardship that

reaping-off such huge sums of money from the public purse would cause on the ordinary people of Malawi, particularly the poorest among us. Worse still, this was happening at a time when, as this Court would take judicial notice, poor Malawians had already been hit by rising socioeconomic hardships caused by ever-rising consumer prices and dwindling essential service delivery.

6. The convict herein, Mr. Lutepo, is one of these unscrupulous people. He stands convicted upon his own plea of guilty, on charges of conspiracy to defraud, contrary to section 323 of the Penal Code (Cap 7:01 of the Laws of Malawi) and Money Laundering, contrary to Section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (Cap 8:07 of the Laws of Malawi). This is the decision on his sentence.

B. THE FACTS

7. According to the statement of facts by the State, to which the convict agreed without qualification, some highly and strategically placed politicians, and public/civil servants conspired to defraud the Government of Malawi ("GoM") of large sums of money (in what has now popularly known as "cashgate"). The State suggested, and the convict agreed, that most likely due to their high and strategic positions in Government, these politicians and public/civil servants managed to recruit onto their 'team', Information Technology (IT) personnel with excellent knowledge of the operations of the 2005 GoM procured EPICOR-based Integrated Financial Management Information System (IFMIS) and how it could be compromised and breached to perpetrate the fraud.

8. In order to conceal their identities and for purposes of creating appearances of legitimacy to the fraudulent payments that would be generated, these politicians and public/civil servants, according to the

prosecution, decided to recruit either by themselves or their agents, business persons to use as suppliers to receive the resultant fraudulent GoM cheques. One of the business persons that were recruited into the conspiracy, according to the narrated facts, was the convict herein.

9. According to the uncontested facts led by the State, the use of such businesses created an immediate appearance of "legitimacy" as the IFMIS generated (and generates) payments to suppliers who are entered onto the system. According to the State, in accordance with check and control procedures, the procurement process involves cheques being raised for payment to suppliers and others, which are printed on Reserve Bank of Malawi (RBM) cheques. Thus, such payments ultimately debit Government Account No. 1 (the Consolidated Fund).

10. According to the State, before "cashgate", Mr. Lutepo had been a successful entrepreneur with a number of businesses. He had won contracts to supply goods to the Malawi Defence Force ('MDF'), without any reported problems. Along with other suppliers, however, he experienced delays in payment of invoices for completed contracts. According to the State, in an interview under caution, Mr. Lutepo described how he came to be recruited by one Pika Manondo as an agent of some of those highly and strategically placed persons, to the conspiracy to defraud the Government of Malawi of large sums of money.

11. According to the State, and this is clearly borne out by the convict's confession Statement dated 5 June 2015, even though Mr. Lutepo was not aware of the complete membership of the conspiracy, he came to know that the conspiracy included highly placed politicians, strategically placed senior and junior public/civil servants in many institutions, ministries, departments as well as business people. Mr. Lutepo decided to join in the conspiracy to defraud apparently based on the belief which was created by

the principals (the masterminds) of the conspiracy, that as a consequence of their high and strategic positions, they would be able to pull the strings without leaving a trace of who the conspirators and fraudsters were, and also to frustrate investigations by auditors and law enforcement agencies against participants in the criminal enterprise.

12. Thus lured into a false sense of assurance of non-detection, Mr. Lutepo dishonestly accepted to receive fraudulent Government of Malawi Cheques in favour of two of his businesses International Procurement Services and O & G Construction Limited, when he had delivered no goods or services in consideration. To that end, he accepted to have his businesses bank accounts to be used to process the fraudulent payment of cheques and in turn handing over almost equivalent sums of cash to some of the principals operating the conspiracy. According to the prosecution, Mr. Lutepo asserts that he was made to believe that his co-operation in this criminal enterprise would serve to expedite the payment of his outstanding legitimate invoices delivered to MDF.

13. Besides having some genuine contracts with the MDF, the prosecution stated, Mr. Lutepo or his businesses had no contracts whatsoever with the Office of the President and Cabinet ('OPC') and Ministry of Tourism, Wildlife and Culture ('TWC') against whose votes most of the fraudulent GoM cheques were drawn.

14. The convict stated in his confession Statement that "after clearance of the said cheques, I drew or caused to be drawn from my business accounts sums of cash representing the greater part of their combined face value **and, for my personal benefit I used or retained a portion of the balance**." (Court's emphasis). He stated that "At the direction of the politicians, I delivered or caused to be delivered to other persons the bulk of the cash proceeds of the said cheques and retained a portion for my own

personal use. **So I wish to confess that I dishonestly received and retained for personal use a portion (more than 10%) of the combined face value of the said cheques. And I sincerely acknowledge that I agreed to the acquisition, possession and use of the cheques…knowing that they had been fraudulently obtained**." (Court's emphasis)

15. The fraudulent cheques, according to the State's facts, were drawn against votes of the OPC, TWC and MDF, and Mr. Lutepo's total fraudulent receipts and participation in fraudulent conversion came to MWK 4,206,337,562. The proceeds of the GoM cheques were either withdrawn as cash or otherwise disbursed. The State states that **Mr. Lutepo accepted that he personally gained no less that MWK 400,000,000 (Four hundred million Kwacha) as a result of the illicit transactions**. (Court's emphasis)

16. I must reiterate that these are facts which the convict herein, Mr. Lutepo, has accepted without any qualification whatsoever.

C. SUBMISSIONS BY THE PARTIES ON SENTENCE

I. Submissions by the defence

17. Counsel Mtupila began by advancing what he believes are three cardinal considerations that this Court should take into account in sentencing the convict. First and foremost, argues Counsel, the convict wasted no court's time and State's resources.

18. Secondly, Counsel argues that the Convict has "throughout the period of this matter in this court" cooperated with the State through the office of the Director of Public Prosecutions and the Anti-Corruption

Bureau by disclosing the criminal activities and the identities of those involved. He thereby put has himself, his family and even his lawyer at risk.

19. Thirdly, Counsel Mtupila urges that the Court should to take notice of the apparent and not just academic physical health of the Convict who has developed physical incapacity and is now confined to a wheelchair.

20. Counsel Mtupila then proceeded to elaborate on several specific considerations that he invites this Court to take into account.

21. To foreground his representations in this regard, Counsel Mtupila sought to remind this Court that:

> "1. The offence of conspiracy to defraud aforesaid attracts a maximum of two years imprisonment.
> 2. [T]he offence [sic] to money laundering is punishable by a maximum of ten (10) years and a fine of K2,000,000.00"

22. I must immediately make a comment here. Conspiracy to defraud carries a maximum of three years imprisonment and not two years imprisonment as stated by Counsel in his submissions.

23. On the specific considerations, Counsel Mtupila first invited this Court to consider that the offender herein, Mr. Lutepo, is a first offender. Counsel argued that Section 340(1) of the CP & EC is emphatic that where a person is convicted by a court of an offence and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment, not being imprisonment to be undergone in default of the payment of a reasonable fine, unless it appears to the court, on good grounds, which shall be set

out in the record, that there is no other appropriate means of dealing with him.

24. Counsel then proceeded to cite the full text of Section 339 of the CP & EC which is in the following terms:

> (1) When a person is convicted of any offence the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding three years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the order.
>
> (2) When a person is convicted of any offence, not being an offence the sentence for which is fixed by law, the court may, if it is of the opinion that the person would be adequately punished by a fine or imprisonment for a term not exceeding twelve months, fine the person or sentence the person to a term of imprisonment not exceeding twelve months but the court may, as the case may be, order the suspension of the payment of the fine or operation of the sentence of imprisonment on condition that the person performs community service for such number of hours as the court may specify in the order.

25. Counsel cited the case of **Republic v Manyamba** [1997]2 MLR 39, where the learned Judge held that:

> "A sentence[r] faced with a first offender must first decide whether a prison sentence is appropriate. To arrive at that conclusion, the court must by a process of elimination, decide that the other non-custodial sentences are not the appropriate way of dealing with the offence. The court must rule out non-custodial sentences such as a fine, probation, absolute or conditional discharge and the like.... Once the court concludes that a prison sentence is deserved, it must pass a prison sentence that fits the crime, the offender, the victim and the public interest".

26. Defence Counsel also cited the case of **R v Chiboli** [1997] 2 MLR 89, where, likewise, the Court held that:

> Section 340 of the Criminal Procedure and Evidence Code provides that for a first time offender a custodial sentence should be suspended. Where it is not suspended, the sentence should give reasons.

27. Counsel proceeded to argue that court's consideration for non-custodial sentences for first time offenders is even more strongly recommended where the accused is a youthful person and one who can positively contribute to national development. In support of this proposition, Counsel cited the cases of **Chidzanja v. Republic** [1997] MLR 440 per Mtambo, J, and **Tambala v. Republic** [1998] MLR at p. 400 per Justice Tembo. Counsel in this regard stated that Mr. Lutepo, at the age of 37 years, remains a youthful man and that prior to his arrest, he was contributing positively to national development. Counsel informed the Court that the convict was running a number of businesses that were not tainted with proceeds of crime such as Woget Industries, Woget Ginnery,

Naming'omba tea estates and others. He stated that in running these businesses, Mr. Lutepo was employing a lot of people, including a lot of young people who will be rendered jobless due to his incarceration. Counsel contended that when the Court bears this matter in mind, it should and will arrive at the conclusion that the convict's contribution to national development is beyond dispute.

28. All in all on this point, it was Counsel Mtupila's submission that this court should invoke its powers under Sections 339 and 340 of the CP & EC and impose a suspended (non-custodial sentence) on the accused person.

29. Next, Counsel Mtupila moved to the point that the maximum penalty is reserved for the worst offender. He argued that the principle applicable is to the effect that the worst offender is yet to be born. In support of this proposition, Counsel cited the case of **R v. Carroll** (1995) 16 Cr App R (S) 488 where the Court of Appeal said that maximum sentences should be reserved for the most serious example of the offence and that an appropriate discount (such as for a guilty plea) should be made from the sentence which was commensurate with the seriousness of the offence.

30. Counsel moved on to address the effect of the convict's guilty plea in this case. Counsel argued that as a general principle, an offender who pleads guilty deserves some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted after full trial. Counsel argued that in general, the maximum sentence should not be imposed where the accused has pleaded guilty. In support, he cited the case of **R v Greene** (1993) 14 Cr App R (S) 682, where the maximum sentence of five years' imprisonment for violent disorder was reduced to three years on the ground that the accused had pleaded guilty. He also cited **R v. Barnes** (1983) 5 Cr App R (S) 368 in support.

31. Counsel also urged that a guilty plea is indicative of some remorse as was noted in ***R v Hussain*** [2002] 2 Cr. App. R (S) 59 (CA) and ***R v Boyd*** 2 Cr. App. R (S) 234 (CA); and as such ought to attract some credit.

32. Counsel reminded the Court that guilty pleas give rise to significant benefits, including a saving of court time and public money and the sparing of witnesses from having to attend trial to give evidence.

33. Counsel cited the case of **Republic v Kachingwe** [1997] 2 MLR 111 where it was held that guilty pleas should be encouraged with a meaningful reduction in sentence of up to a third of the possible sentence.

34. It was therefore Counsel Mtupila's submission that in the instant case, the convict's guilty plea alone should, by itself, trigger a one third reduction of the total sentence.

35. Defence Counsel also placed emphasis on the effect of the convict's cooperation with the State as a ground upon which the Court should exercise leniency in sentencing the convict. He argued that there is much credit to a convict who demonstrates remorse and resultantly cooperates with the state in providing information connected to the offence(s). Counsel cited. **R. v Sinfield (Frederick James)** (1981) 3 Cr. App. R.*(S.) 258* CA (Crim Div) the defendant was allowed a discount on account of the assistance he had rendered to the State. Counsel argues that a two thirds discount was applied in **R v King** (1988) 7 Cr. App. *R*(S) *227* (CA) for the convict's cooperation with the State.

36. On the domestic front, Counsel Mtupila cited the case of **Naison and others v Republic** [1997]2 MLR 163, where it was held that cooperation with the police at the stage of investigation and trial is a mitigating factor which should warrant a reduction in the sentence.

37. In the circumstances of the present case, Counsel stated that the convict has cooperated throughout the investigation and trial proceedings and has given them information as to how "cashgate" offences were committed, who sanctioned them and the players, that he knows of, who took part in the commission of the offences. He argues that the convict has done so at great risk to himself, his family and his lawyer.

38. Specifically, Counsel Mtupila pointed out that the convict herein voluntarily presented himself before the state through the Anti-Corruption Bureau and the office of the Director of Public Prosecutions; and gave a statement disclosing information relating to the offences herein. The said statement was exhibited in court and marked **EX P1.** He stated that the State further visited the convict at prison and further obtained more information on the 28th day of July 2015 to which he loyally complied. Even more, counsel argued, the convict has made further declarations in a sworn Witness Statement, dated 31 August 2015 and has also presented a further one to the Court dated 3rd September 2015 in which he elaborately details the names of the specific beneficiaries of the convict's proceeds of crime (i.e the huge sums of money herein), and the amounts of money that they derived from the convict's laundered money.

39. Mr Mtupila therefore argues that an imposition of a heavy or custodial sentence on him will thus not be in order as it will fail to recognize his assistance.

40. Defence Counsel proceeded to address the issue of restitution as another factor that ought to be taken into account in mitigating the convict's sentence. Counsel reminded the Court that the State, in its narration of facts on the date that the convict took the guilty pleas herein, informed the Court that the convict's benefit from the criminal enterprise was in terms of a 10% commission which translated to about K400,000,000.00.

41. In this connection, Counsel stated that the convict has restituted to the State his company and all its asset at Woget Industries at Lunzu in Blantyre, valued at MK 370,000,000 (Three Hundred and Seventy Million Kwacha) which the State has accepted. He is also stated that he was ready and willing to forfeit the sum of K412,171,697.00 which the Malawi Defence Force owes him in contracts which were already executed prior to the commission of the offences herein. He claimed that the Audit report at National Audit for the Malawi Defence Force for the year 2012 will confirm this. However, the State did not accept this aspect of his intended restitution, arguing that there was a dispute as the Director of Logistics at MDF had made a Statement disputing the claim and stating that all money due to the convict was duly paid and in full. There is therefore a dispute on the issue of contractual liability which is a civil matter that ought to be pursued through a civil claim against the Attorney General and this Court was ill-suited to determine the same in the context of criminal proceedings. The Court agreed with the State's argument on this point.

42. Thus the total restitution that the convict has made is MK 370,000,000 (Three Hundred and Seventy Million Kwacha), and defence Counsel argued that this was very close to the full MK 400,000,000 (Four Hundred Million Kwacha) that the convict benefitted from the laundered money herein.

43. It was therefore Counsel Mtupila's submission that the Court should take into account the convict's significant restitution and accordingly discount his sentence in respect thereof.

44. Counsel Mtupila also invited this Court to take into account the personal circumstances of the convict. In support of this proposition, he cited the case of **R v Tomasi** [1997] MLR 70, the court stated that,

> the matter to look at when opting for any of the non-custodial sentences including unconditional discharge are the youth, old age, character, antecedents, home surroundings, health or mental conditions of the defendant, the fact that the defendant has not previously committed an offence or the exculpatory circumstances in which the offence was committed.

45. Counsel submitted that, in the present case, the accused is 37 years old and has mobility problems as he is confined to a wheelchair regardless of the fact that psychiatrists found him fit to stand trial.

46. He also argued that considering the age of the accused person, which is quite youthful, he can very positively contribute to the national development of the country. In this respect, Counsel Mtupila argued that in fact, the convict was already an accomplished entrepreneur running a wide range of companies which speak to the contribution that he was making to national development. Counsel also argued that the convict's state of health and the prevailing conditions in our prisons where medical care is not up to standard are factors that should also occupy this Court's mind as it considers the sentence to impose.

47. All in all, Counsel Mtupila is of opinion that the accused person should not be given a custodial sentence, and he prayed as such.

48. Counsel Mtupila raised another issue. This is on whether the sentences on the two counts, should the Court impose prison terms, should run concurrently or consecutively. In this regard Counsel argued that offences arising from the same transaction do not attract a consecutive terms. He cited in support of this proposition, the case of **R v. Lawrence** Cr. App. R. (S) 580 (CA). It was Counsel's submission that the

offences herein cannot be disjoined. The conspiracy and the laundering arise from the same transaction in that the former led to the latter.

49. In conclusion, Counsel stated that the Court should consider broad policy issues to encourage further pleas of guilty, restitution and cooperation with the State by imposing a considerate sentence. Counsel invited the Court to consider that there are a lot of "cashgate" cases to be prosecuted. He stated that a lot of accused persons are waiting with baited breath to see what level of sentence will be imposed on offenders who will have pleaded guilty, would have rendered full restitution and would have chosen to cooperate with the police.

50. Counsel pleaded that if a very heavy sentence is imposed on the present convict who has pleaded guilty, has rendered substantial restitution and has also chosen to cooperate with the State; then other accused persons will not see the need or any benefit in having to plead guilty or render full restitution or cooperate with the State

51. He urged that this court should seize the moment to impose a light non-custodial sentence not only to honour the accused persons' remorsefulness and bravery in pleading guilty, rendering substantial restitution, and cooperating with the State; but also as deliberate move to encourage other accused persons to follow his example by pleading guilty to save the court's and witnesses' time and money, restituting to enable government recover its loss, and also cooperating with the investigations to enable the State to bring to book all those that played a part in the "cashgate" activity. He argued that a heavy sentence on the present convict would be counter-productive as a policy tool

52. Counsel concluded by praying that in view of the circumstances surrounding this case, any sentence less than one year (twelve months) but suspended, would be appropriate.

II. Submissions by the State

53. The State began by pointing out that Section 321J of the Criminal Procedure and Evidence Code (CP & EC) empowers the court to receive evidence in order to arrive at a proper sentence to be passed on a person convicted of an offence. The State submits that this evidence may be from the prosecution or the defence; and that it may also include evidence from the victim and any relevant reports to enable the court to assess the gravity of the offence. The State stresses that although this provision was reviewed during amendments made in 2010 (Act 14 of 2010), in arriving at a punishment that suits the crime and the accused, the emphasis remains on the assessment of the gravity of the offence. The State argues that this assessment of the gravity of the offence is based on the accused's culpability and on the harm caused by the crime.

54. The State then moved on to the next point which was on the principles governing the applicability of consecutive or non-consecutive sentences. It is the State's argument that over the years, practice on sentencing has created some misconception on the law. The State contends that the law according to Section 17 CP & EC is that where in a trial an accused is convicted of several distinct offences and punished for each offence, "such punishments, when consisting of imprisonment, [are] to commence the one after the expiration of the other in such order as the court may direct". This, according to the State, is the law. The State argued that even though this is the clear position of the law, our courts have often used the exception. It was the State's submission that because the Court under that section has been given discretion to order the punishments to run either consecutively or concurrently, many times Malawian courts have ordered sentences to run concurrently, even where, in principle, the sentences were, strictly, supposed to run consecutively. As an illustration,

the State cites the case of **Republic v Matiki** [1997] 1 MLR 159 (HC) where the accused person was convicted on two counts of theft of a bicycle and one count of resisting arrest. He was sentenced to two years' imprisonment with hard labour on the theft charge and one year for resisting arrest. The sentences were ordered to run concurrently. On review Mwaungulu, J (as he then was), held that a sentence for resisting arrest should run consecutively with other crimes in order to emphasise the importance of protecting the execution of public duty.

55. The State argues that the law does not provide that sentences shall be concurrent, it rather says sentences shall be consecutive (s. 17 CP & EC) or cumulative (s.35 Penal Code) but that the court can direct that the sentences run concurrently. The State reiterates the argument that ordering sentences to run concurrent is therefore an exception to the general rule. The State further argues that even if it is common practice to impose concurrent sentences, the court should record reasons where it departs from the general principle of law and orders sentences to run concurrently. The idea, argues the State, is that if there are, for instance three counts in a charge on which the accused has been tried, the accused needs to be punished, in real terms on the three counts. The State contends that when this is considered against the backdrop of Section 127 CP &EC the argument for consecutive sentences becomes persuasive.

56. The State argues that the orders for sentences to run concurrently without giving reasons, have created the impression that when offences are charged in different counts they should run concurrently because they are in the same charge and for no other reason. Yet, according to the State, the argument against duplicity and multiplicity is meant to ensure that different counts of the charge should contain different offences. An offence under section 329 of the Penal Code, argues the State, is not the same offence as that under section 35 of the Money Laundering, Proceeds of

Serious Crime and Terrorist Financing Act. These offences, according to the State, target different evils, they have different elements and they must therefore be punished one after the other.

57. The State then moved to the issue of the consideration of the convict herein as a first offender. I did not see much difference of substance between the approach of the State and the approach of the defence in this respect. The State referred to numerous cases, from South Africa and elsewhere, which were all very useful, but they were all focused on buttressing the well-known principle that in sentencing and offender, the Court has a triad of considerations to take into account namely the seriousness of the crime, the circumstances of the offender, and the interests of society.

58. The State observed that the sentencing of first offenders under section 340 of the CP &EC is linked to suspended sentences under section 339 CP & EC. The two sections therefore must be read together. Indeed, this was the same approach adopted by the defence. Just like the defence, the State set out Sections 339 and 340 of the CP & EC in full. The State argued that Section 339 is not only for first offenders, but it is for all offenders and that it precedes section 340 even in terms of application. The State contended that all that Section 340 of the CP & EC does, it to impose a duty on the court, in the event that it finds that all the eight options are not appropriate, to set out on the record the grounds showing that the only appropriate means of dealing with the accused is a custodial sentence.

59. It was the State's submission that the court must consider the mitigating and aggravating circumstances with regard to the accused person, the offence for which he has been convicted and the interests of the society in a balanced manner, not necessarily in equal measure. Criminal cases will be different. In support of this proposition, the State

cited the case of **DPP v Ryan** [2014] IECCA 11). The State stated that the triad of factors may not have equal weight, but that the weight attached to each factor must be appropriate on a balance of all the factors in mitigation and aggravation. In light of all the circumstances, the State argued, the court must judiciously determine whether in the particular case the accused can adequately be punished with a non-custodial sentence, community service, payment of a fine, a suspended sentence with or without conditions or a custodial sentence. The State agreed that being a first offender is a factor that the Court will take into account in evaluating these factors. The State conceded that it is indeed a factor in favour of the accused that goes to mitigate the severity of the sentence to be imposed.

60. The State then took the Court through its analysis of the triad of considerations. First was consideration on the seriousness of the offence. The State argued that the seriousness of the offence should be determined in terms of a measure of the convict's culpability and the harm caused by the crime. The State argued that the level of **culpability** is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out. On the other hand, the State stated that **harm** is initially assessed by the value of the money laundered.

61. The State suggested a three tier analysis of the level of culpability as follows:

A. High culpability
    a. A leading role where offending is part of a group activity
    b. Involvement of others through pressure, influence
    c. Abuse of position of power or trust or responsibility
    d. Sophisticated nature of offence/significant planning
    e. Criminal activity conducted over sustained period of time

B. Medium culpability
    a. Other cases where characteristics for categories A or C are not present
    b. A significant role where offending is part of a group activity

C. Lesser culpability
    a. Performed limited function under direction
    b. Involved through coercion, intimidation or exploitation
    c. Not motivated by personal gain
    d. Opportunistic 'one-off' offence; very little or no planning
    e. Limited awareness or understanding of extent of criminal activity

62. I find this three tier analysis useful for purposes of sentencing in cases of this nature.

63. It was the State's submission that, with regard to culpability and harm occasioned, the court would consider the benefit that the commission of the crime afforded the accused person (whether or not the accused has made voluntary restitution), the value and nature of the property involved in the criminality, and the disposal or dealing with the property. In the case before the court, it was the State's contention that there is nothing in the culpability of the accused persons that would mitigate their punishment in these offences. The amount involved, by Malawi standards, is significantly high, the accused did not make any restitution.

64. On the convict's personal circumstances, the State observed that the convict can be said to be still young, at 37 years old, and that this would weigh in his favour. The State also stated that of importance is the fact that the accused has pleaded guilty. The learned DPP however emphasized that even though the convict pleaded guilty, the Court should remind itself that he put the Court through various processes, including being subjected to psychiatric assessment which she said cost the State

so much resources as it had to hire the psychiatrists and that one of them had to be flown in from the United Kingdom at great expense to the State.

65. On the third factor in the triad which is the interests of society, the State argues that there is nothing in the circumstances of this case that could offer the accused any mitigating factor. By contrast, the State argues, there are many aggravating factors in this case which the Court should take into account in arriving at an appropriate sentence. The State submits that for the case of money laundering, most of the factors for high culpability and serious harm are present in this case, making it a serious money laundering offence.

66. The State forcefully argued that the crimes in which Mr. Lutepo participated have led to grave socioeconomic consequences for Malawians. The State cited lack of drugs in hospitals which spiked during and immediately after the revelations of the fraudulent offences committed by the convict herein.

67. The State referred me to certain newspaper reports, such as *The Nation Newspaper*, dated November 5, 2013, on page 2, under title "KCH Breathes a sigh of relief". I observe however that the State did not present to the Court the said Newspaper cutting as evidence. I cannot take judicial notice thereof and will therefore be unable to make reference to, and use it.

68. The State further argued that "cashgate" has also had a negative impact on the economy of the country. During the "cashgate" period, it was the State's submission that the Government's fiscal deficit worsened to K40.4bn in August, 2013 from K15bn in the previous month. This prompted the government to start borrowing from banks and non-banking sectors. Again, regrettably, the State just made this assertion without any

supporting evidence for purposes of proof. Again I am unable to adopt such figures as presented to the Court as facts in the absence of proof.

69. The State went on to argue that the Reserve bank of Malawi had released a Report in its Economic Review that in August, 2013, which coincidentally was the month in which "cashgate" started (or was at its peak), revealing that there was a rise in the fiscal gap (the difference central Governments expenditure and Revenues) which prompted the borrowing of K28.8 billion from the bank system through treasury Bills (T-Bills) and while the non-banking sector lent government K8.3bn.

70. The report, according to the State, further showed that owing to the financial mismanagement, the International monetary Fund (IMF) had decided to delay approval of an K8bn facility under the 3 year extended Credit Facility (ECT) while the Norway withheld $24m budgetary support which compelled others to withhold their aid as well.

71. Again, as significant as these facts would have been to the Court, the said Report was not produced, as evidence in aggravation, to the Court. It is not Report in respect of which the Court can take judicial notice. The evidence had to be led by the State, and the burden of proof in that respect could not be successfully discharged by merely making an assertion of fact and expecting the Court to adopt it as the truth. The State only cited *The Nation Newspaper*, dated Tuesday November 5, 2013 under the title "Government Increases expenditure by 28.9 percent", which newspaper was not produced as evidence before the Court. The Court is likewise unable to make reference to such document as evidence before it.

72. The State went further to State that "Not long enough after that, donors under CABS withheld $150m after being disappointed with the revelations of the plunder of public resources at Capital hill." Once again the State provided no evidence to prove this fact. I am sure that there were

various ways in which this fact could have been established including perhaps having the Minister responsible for Finance or the Secretary to the Treasury, or the Director responsible for Debt and Aid Management, or any other responsible authority in Government to swear an affidavit deposing to this important fact. Resultantly, the withholding of this specific amount as budgetary support has not been proven.

73. The State proceeded to argue that Malawi as a nation, has suffered great deal following the pulling out of aid by the donors. Specifically, it was the State's contention that last year's fiscal year was based on a zero aid budget which means that there was less emphasis on the little available resources, with the obvious result that the budget was not enough. The Court was referred to *The Daily Times Newspaper* dated 1 September, 2014 under the title "It's Zero Aid Budget- APM." The Court's position remains the same. The Newspaper was not produced before the Court as evidence. The State went further to state that the 2014/15 budget for example had a deficit of K107bn which but for the pulling out of the donors that could not have been an issue. The Court was referred to *The Nation Newspaper* dated 3rd September 2014 on page 1, under the title "compromise Budget" which newspaper was once again regrettably not produced as evidence before the Court. Thus the Court is unable to make reference to all these newspaper reports for their non-production.

74. The State proceeded to emphasise the impact of the offences that the convict herein participated in on the 2015/2016 National Budget. The State argued that two years down the line after Cashgate, the nation has not recovered yet. Again the nation has adopted the Zero Aid budget. The economy is still struggling. Of greater concern is the funding to ministries that has been cut down because there is nowhere else that government can get the funding. There are no signs of the rainbow in the sky and it is obvious that the impact will still be felt in many years to come. It was

argued that looking at the funding for the whole year in 2015/16 budget for all the justice sectors; ACB, Legal Aid, Administrator General, DPP, the same totals K3 998 935 996 which is below the K4.2 billion that was laundered by the convict in the present case, in 2013. The State pointed out that such is the seriousness of this case, and cited the 2015/16 Budget Document NO.4 as evidence of the fact. The 2015/16 Budget Document NO.4 is a document that was part of Parliamentary proceedings of which this Court is entitled, under Section 182(2)(c) of the CP & EC, to take Judicial Notice. In addition, this Court was referred by the State to, among others, to the National Assembly (Malawi), *Daily Debates (Hansard), Fourth Meeting – Forty–Fifth Session, Thirteenth Day Friday*, 22nd June, 2015, Serial No. 013 (The Budget Statement), and the National Assembly (Malawi), *Daily Debates (Hansard), Fourth Meeting – Forty–Fifth Session, Twenty Fourth Day Monday*, 22nd June, 2015, Serial No. 024 (Statement by the Minister responsible for Finance). Again, this Court takes judicial notice of Parliamentary proceedings.

75. In the National Assembly (Malawi), *Daily Debates (Hansard), Fourth Meeting – Forty–Fifth Session, Twenty Fourth Day Monday*, 22nd June, 2015, Serial No. 024, at pages 1035-1036, referring to general budgetary challenges resulting from the withholding of budgetary support by donors and their increasing resort to off-budgetary assistance, the Finance Minister stated in the National Assembly that "I wish to indicate that until government financial systems are strengthened to the point where more donors can trust and use them, this modality may have to continue to be a preferred one by donors…although the [Ministry] of Finance has expressed its reservations to this increasingly preferred mode of delivery by donors, it cannot be denied that off- budget support continues to be helpful to the country. Without it, in the wake of "Cashgate", donor aid to

a number of government ministries, departments and agencies would have dwindled to a halt."

76. Indeed, going through Parliamentary proceedings generally, one gets the clear picture that the offences popularly referred to as "cashgate", of which the instant one is one of the major ones, have had a perilous effect on the national economy and adversely affected the socioeconomic configuration of this country.

77. Thus this Court accepts that these offences have led to heightened suffering by ordinary Malawians; but is unable to accept the specific factual assertions made by the State which were unsupported by relevant evidence as pointed out above.

78. The State proceeded to highlight what so far have been the sentences handed down by the High Court in money laundering offences.

79. The State observed that so far, the High Court has only given two sentences in money laundering cases the first one being **The Republic v Tressa Senzani Namathanga**, criminal case No. 62 of 2013 (HC, LL), where the accused was charged with Theft and Money Laundering of K63 million using her company. She pleaded guilty to the Charge and restituted the entire amount in respect of which she had been charged. The court sentenced her to 3 years imprisonment for money laundering and 1 year for theft.

80. In another case The **Republic v Maxwell Namata and Luke Kasamba** Criminal case number 45 of 2013. The first accused was charged with theft and Money Laundering of K24 million whilst the second accused was charged of Money laundering of the same amount. They pleaded not guilty and on full trial were found guilty and the first accused was sentenced to 3 years of theft and 4 ½ years for Money Laundering that

were to run consecutively and the second accused was sentenced to 5 years for Money Laundering.

81. The State argued that the difference between the above cases and the present one is that in this case K4.2 billion was laundered – a figure much higher than the two previously decided cases.

82. At this stage the State reminded the Court that the Prosecution will proceed with a confiscation application under section 48 of the Money Laundering Act at a later date, but that the Prosecution submits that the two have no bearing on each other. I already pronounced the Court's decision on the relationship between these on the 3rd of August 2015.

83. All in all, the State prays that the convict herein be sentenced to one year imprisonment on the first count of conspiracy to defraud, which carries a maximum of three years, and nine (9) years imprisonment for the second count, and that the sentences should run consecutively.

84. Such were the arguments before me. It now falls on this Court to determine the appropriate sentence which the convict herein should receive.

D. ANALYSIS OF ARGUMENTS AND ORDER ON SENTENCE

85. I must begin by pointing out that the sum of money which the convict herein conspired with others to defraud the Malawi Government of, and which he actually laundered, at MWK 4,206,337,562 (Four Billion, Two Hundred and Six Million, Three Hundred and Thirty Seven Thousand, Five Hundred and Sixty Two Kwacha), is unquestionably so huge. I have gone to the lengths, breadths, and depths of jurisprudential research – carefully going through all the available African Law Reports (Malawi Series), the Malawi Law Reports from the initial volume of 1923 to present,

decisions published online, and I have also gone through a panoply of unreported decisions of superior courts in Malawi, both old and new. I could find no single case where a person was ever convicted for conspiring to defraud, defrauding and/or laundering, or otherwise embezzling, sums of money of such huge proportions as in this case. None of the cases of this genus or species could come even close. This case therefore stands out as unprecedented in Malawian economic crimes law for its seriousness. Its seriousness, in the view of this Court, falls into the category of the worst instances thereof. It is emblematic of the fiscal scandal I have referred to earlier, popularly referred to in this country as "cashgate".

86. At the sentencing stage, when it comes to mitigation, the burden of proof is on the defence to satisfy the judge on a balance of probabilities. **Guppy v R** (1995) 16 Cr App R (S) 25.

87. The first point raised in the convict's mitigation was that he is a first offender and that he should be considered for a non-custodial sentence. Plainly put, Counsel for the convict was forthright to pray for a one year suspended sentence for the convict. I was referred to Sections 339 and 340 of the CP & EC in this regard.

88. I am indeed mindful that the convict herein is a first offender, which, under ordinary circumstances, entitles a convict to leniency by the Court. I must mention, however, that having admitted to committing these crimes (i.e having pleaded guilty), I was rather astonished by the convict's prayer for a suspended sentence, given the unprecedented magnitude of the amount of money laundered which speaks to the gravity of the crime. The Court was left to wonder whether indeed the convict acknowledges the damage that he has caused to society, and whether the assertions of remorse expressed by his Counsel on his behalf should be regarded as

meaningful at all. I wish to state here, for purposes of sections 339 and 340 of the CP & EC that given the gravity of the crimes committed by the convict herein, no other form of punishment other than a custodial prison term would be appropriate.

89. The State argued that imposing such an extreme lenient sentence as prayed for by the defence, would be a mockery to Malawians who have suffered much as a consequence of the offences the convict herein participated in. The impression that one gets from the State's representations is that it is in the public interest that the convict herein should receive a stiff penalty. The question is: what effect should this Court place on the interests of society in sentencing the convict? Two South African case authorities provide us with a classic description of the role of the interests of society when punishing a convict. In the case of **S v Pistorius** (CC113/2013) [2014] ZAGPPHC 793, Masipa, J stated that:

> The interests of society demand that those who commit crimes be punished and, in deserving cases, that they be punished severely. As counsel for the defence correctly submitted, we ought to differentiate between what is in the public interest and what society wants. Members of society cannot always get what they want as courts do not exist to win popularity contests, but exist solely to dispense justice.

90. Masipa J's remarks however ought to be contextualized and understood in the light of Schreiner JA's remarks in **R v Karg** 1961 (1) SA 231 (A), where he stated at 236A-C that:

> It is not wrong that the natural indignation of interested persons and of the community at large should receive

some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute.

91. Indeed our courts have equally emphasized the importance of court's being mindful to pass sentences that are meaningful, reflecting the gravity of the offence. Chombo J observed in the case of **Republic vs Masula & others**, Criminal Case No. 65 of 2008, that if courts do not do that, members of the public could start asking themselves whether "something has gone wrong with the administration of justice." By meaningful sentences, the Court does not necessarily suggest "harsh" sentences, but rather sentences that are meaningfully proportionate to all the relevant circumstances of and surrounding the offence. This is no easy task.

I. The circumstances of the Offender

92. Mr. Lutepo has pleaded guilty. Both the State and the defence agree that this should count in his favour for purposes of mitigation. It was Counsel Mtupila's submission that the convict, by pleading guilty, demonstrated bravery and boldness, that he did not waste the Court's time or the State's resources. The State, whilst acknowledging the guilty plea and the credit it deserves, observed that it was not entirely correct that the convict did not waste the State's resources as, for instance, the State had to hire psychologists at great expense. Counsel Mtupila countered this by stating that at that stage, the convict still enjoyed the presumption of innocence and it was the State's obligation to incur that expense.

93. Guilty pleas are encouraged by the courts. By avoiding the need for a trial, such as in the instant case where numerous witnesses could have

been called, a guilty plea enables other cases to be disposed of more expeditiously, it shortens the gap between charge and sentence, it saves considerable cost for all the parties involved and the Court, and, in the case of an early plea, it also saves witnesses from the concern of having to testify in a court of law, going through the vagaries of examination and cross examination, among other benefits.

94. It has been stated though, that "in determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account— (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given."[1] The level of reduction should be a proportion of the total sentence imposed, with the proportion calculated by reference to these two criteria. Wasik paints a vivid picture of the current practice in England:

> There is a sliding scale, with the greatest reduction (a recommended one-third off the sentence) given where the plea was indicated at the 'first reasonable opportunity'. This drops to a recommended one-quarter (where a trial date has been set) to a recommended one-tenth (for a guilty plea entered at the 'door of the court' or after the trial has actually started.[2]

95. Thus if made very early, and on the offender's own initiative, the offender may be allowed some reduction for personal mitigation based on remorse as well as being entitled to the full reduction for plea.[3] The Court

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1 Martin Wasik, *A Practical Approach to Sentencing*, 5th Edition (Oxford: Oxford University Press, 2014) 72

2 Ibid, Page 73.

3 Ibid.

in **Caley v R** [2013] 2 Cr App R (S) 305 stated that, leaving aside the rare cases where the defendant simply did not know whether he was guilty or not before receiving legal advice or disclosure of evidence from the prosecution, there was nothing to stop the great majority of defendants from admitting guilt (or at least admitting what they had done) before receiving legal advice. The point therefore is that it is open to the vast majority of offenders to plead guilty at the earliest opportunity.

96. This scale of up to one third reduction also applies in Malawi, as the case of **Republic v Kachingwe** [1997] 2 MLR 111 ably cited by defence Counsel shows. It is not a fixed reduction. The extent depends on the circumstances. In the instant case, it seems to me that the offender appreciated from the outset that he was guilty. He is a man of good education and previously held a senior political leadership position in the Peoples Party. As his Counsel stated during arguments in mitigation, he was a successful businessman with a well established business empire. He was not the naïve type of a businessman. He knew what he was doing, and that it was criminal. He could have chosen to plead guilty at his first opportunity to make plea which was on 4th September 2014 during the Plea and Directions hearing. He decided to plead not guilty. He did not stop there, the Court had to go through a lengthy process of addressing the issue of Call Detail Records of the former President, Her Excellency Dr. Joyce Banda, which process lasted for months. Trial had initially been scheduled for the 1st of October 2014 but could not proceed as there were back and forth applications between the convict and the former President, and all this was at the convict's instance. The Court should not be misunderstood as accusing the convict for having made these applications: it was within his rights. The point though is when a claim is made that his conduct should be distinguished from the conduct of someone who pleads not guilty, these factors must be taken into account

as they were the consequences of his initial plea of not guilty which subsisted until 15 June 2015.

97. Then came the rather controversial issue of the convict's application to be subjected to mental competence evaluation by psychiatrists. The psychiatrists findings were very clear. I wish to reproduce my findings in my Order of 16 April 2015 on the convict's mental assessment in order to contextualise this matter. I stated at paragraph 38 of the ruling that:

> Reading both [psychiatric] reports, which were compiled independently of each other by two highly qualified and experienced mental health specialists, probably the best this country could have locally identified, working with completely separate teams, in two separate hospitals and locations, with each team giving a very detailed account of the daily routine assessment tools, and tasks and the respective general assessment methodologies, the inescapable conclusion that one draws is that the accused person does not have any form of mental disorder and that he is indeed malingering. The accused person is feigning mental illness. He is consciously feigning psychotic and other symptoms of mental disorder for secondary gain. In other words, to put it more plainly, Mr. Lutepo, according to the psychiatric experts, is pretending to be mentally ill, and I so find.

98. Thus the Court had to go through that process, and the State had to commit its limited resources for purposes of this exercise, simply because the convict herein pretended to be mentally ill. Surely, that was a waste of the Court's time which even most accused persons who go through the trial process on a plea of not guilty do not engage in. The Court

notices that it was only after that Order was made that the convict decided to indicate his willingness to change his plea.

99. All I can therefore say is that the convict herein would not, in any event, in the circumstances of this case, qualify for a full one third discount of his sentence.

100. Another issue raised in the convict's mitigation is that he has demonstrated remorse. It has been said that this remorse is reflected not only by his plea of guilty, but also the willing cooperation that he has provided to the State which will help in its investigations and getting to the heart of who really was behind "cashgate".

101. It has been observed that when considering remorse as a mitigating factor, the difficulty that the court is presented with is whether such remorse is genuine or, what purports to be a demonstration of remorse, is actually underlain by other calculated and strategic motivations intended to hoodwink the Court into sympathy for the convict.[4] Professor Wasik puts it eloquently when he states that:

> Clearly a guilty plea may sometimes reflect remorse, but offenders who plead guilty are often doing so for pragmatic reasons and may not be remorseful at all.[5]

102. There are instances however, where the demonstration of remorse is clear and unquestionable. For instance in the English case of **R v Claydon** (1994) 15 Cr App R (S) 526, the Court held that the defendant, who had handed himself up to the Police without being reported by anyone, had demonstrated great courage, "considerable remorse and repentance for

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4 Martin Wasik,(note 1 above), 67.
5 Ibid.

what he had done".[6] Resultantly, the Court of Appeal discounted his sentence on this account.

103. Difficulties arise though in instances where an accused person upon being caught, still vigorously denies guilt, in other cases even insisting on his or her innocence, and then subsequently suggests that he or she has had a change of heart. No doubt, such change of heart can be and does tend to be genuine in a number of cases. The point here is that courts have to proceed with caution on the matter of remorse, and in the end, it is up to the discretion of the sentencing court upon a careful consideration of the facts and peculiar circumstances of each case.

104. I wondered earlier in my analysis whether the convict herein is truly remorseful, considering his urging this Court that he should be given a one year suspended prison term for laundering over MK4.2 billion. I get the impression that the convict does not truly appreciate the magnitude of the damage that he has caused to society. It seems he views himself more as a victim who was used by other people to commit these crimes, and he is not fully reconciled to accepting that he personally caused great harm to the Malawian society. I can only classify him as marginally remorseful based largely on the cooperation he has provided to the State which is the next point I get to.

105. In the case of **Caley v R** [2013] 2 Cr App R (S) 305, Hughes LJ stated that those convicts who cooperate with the State merit recognition for that. Professor Wasik explains the idea behind cooperation and how a good scheme thereof works. He states that:

> It has long been accepted that some reduction in sentence is appropriate where an offender has disclosed

[6] At page 528.

information to the authorities which has led to the apprehension of others and the bringing against them of serious charges. The extent of the discount varies, depending upon the degree of assistance given, the seriousness of the offender's offence, and the seriousness of the other offences cleared up. An example is **Saggar v R** [1997] 1 Cr App R (S) 167, where sentence was reduced from seven years to four-and-a-half years because of the help given by the offender, including testifying for the prosecution in related matters. On the other hand, in **Debbag v R** (1991) 12 Cr App R (S) 733 no discount at all was appropriate. The offender only offered up information to the police after he had vigorously contested his own trial and been convicted and sentenced. The information, when eventually produced, was already known to the police in any event.

The judge will be invited by the prosecution to read this material in chambers, in advance of the sentencing hearing. Normally the defence advocate will also be fully aware of the content of the text, but very occasionally difficulty can arise where the offender does not wish his lawyer to know about the information he has provided to the police lest this might somehow be discovered by those against whom he has given information, which might include former co-defendants. This written material is retained and kept secure in its 'brown envelope' for the future. The judge may then choose to make no reference to the matter at all when passing sentence on the offender, or perhaps make some guarded remark in reference to the unexpectedly lenient

> sentence, such as 'taking into account all the information which I have received about your case', before imposing sentence. Any reduction on this ground is separate from, and additional to, the appropriate discount for a plea of guilty. This was made clear in **Wood v R** [1997] 1 Cr App R (S) 347.[7]

106. This approach incidentally, is the approach that has been followed in this Court. The convict has made a declaration that outlines all those that benefitted from the laundered money, and this was disclosed to the Judge in chambers. Defence Counsel was equally aware and appropriately advised his client on the approach and the consequences. I must quickly state that as described by Professor Wasik in respect of the process where the convict offers information to the State that is relevant for sentence, the Court will not make detailed reference to the disclosures, as they relate to persons who have not had a chance to make their representations before a competent Court. The information provided will be quarantined from the public record, and it is up to the State to take further steps on it. All this Court wishes to point out is that it has taken note of the disclosures made by the convict to the State which in all likelihood would be very helpful in the State's further investigations relating to the conspiracy to defraud and the money laundering activities herein, which the State has indicated to the Court that it wishes to pursue. I am satisfied that the convict has provided the State with helpful cooperation and he has to receive credit for it.

107. Another point that defence Counsel sought for this Court to consider in mitigation was what he said was the physical condition of the convict. He invited this Court to take notice of the apparent and not just academic

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[7] Wasik (note 1 above) 76.

physical health of the Convict who has developed physical incapacity and is now confined to a wheelchair. I must say that I was rather surprised that Counsel brought this issue up again during mitigation without supporting physiological analysis by an appropriately qualified physician. On the day the convict took his plea of guilty, defence Counsel raised a similar issue and I had advised that if the convict sought special consideration based on his apparent condition, he had to be properly certified by an appropriately qualified physician because as it was, there was , and still is, an opinion from psychiatrists that suggests that he is not necessarily physically challenged. Perhaps, since this point is being brought up again and again, I should bring to light what Dr. Felix Kauye, PhD, FC Psych, MBBS, B. Med.Sc, opined about the fact of Mr. Lutepo being confined to the Wheel Chair. He began by noting, at page 25 of his "Forensic Pyschiatry Report for Mr Oswald Lutepo" dated 26 March 2015:

> He was brought on a wheel chair and subjectively he portrayed that he did not have power in both legs and arms to even attempt getting up from the Wheel Chair. He was assisted by nursing staff and patient attendants who lifted him from the Wheel Chair and put him in one of the chairs.

108. The learned psychiatrist then proceeded to state his objective analysis at page 27, thus:

> Mr. Lutepo was able to use the toilet by himself, bath himself and dress himself. When Mr. Lutepo wanted to use the toilet, he was taken off the Wheel Chair and put on the toilet seat fully clothed. He was able to remove his shorts and pants by himself without asking for any assistance. For one to remove the shorts and pants

while seated on the toilet seat, you need to have power in both legs and arm to lift your body from the seat in order to pull off your shorts and pants down.

109. Dr. Jennifer Ahrens, MB ChB, MRC Psych, observed at page 5 of her "Psychiatric Report" dated 1st April 2015, that "Although he was not walking without assistance, Mr. Lutepo was able to turn himself over in bed at night while asleep and was noted to be able to move his legs at other times during his admission."

110. On account of these findings, whilst not affirmatively suggesting that the convict is also pretending to have a mobility disorder, I am not satisfied on a balance of probabilities that he has a genuine condition of mobility. This Court is therefore unprepared, absent contrary specialist information, to contradict the psychiatrists' clinical findings. I should also say that these were clinical and practical findings, not just academic opinions as suggested by Mr. Lutepo's Counsel.

II. The Interests of Society

111. The second consideration the Court must take is on the interests of society. I have already expressed the Court's sentiments as I commented on the State's submissions in this respect, above. I only wish to reiterate that the offences which the convict herein committed have caused bad damage to society. The negative effects and impact of these offences have perfused almost if not all corners of the Malawian socioeconomic fabric. The public purse had been severely squeezed following the withdrawal of budgetary support to the Government by cooperating partners on account of expressed concerns about the integrity of government's financial systems.

112. There is also some informative scholarly literature that suggests some of the general major ills that money laundering entails for the economy. According to Professor Brigitte Unger, a leading global scholar in the area of money laundering:

> Money laundering has significant short-term and long-term economic effects...these include losses to victims and society due to money laundering related crime, distortion of consumption, savings and investment and effects on output and employment. Furthermore, monetary variables such as interest rates, money demand and exchange rates can be affected. Also prices can be deterred and whole sectors affected. The latter is especially evident in the real estate sector. A considerable amount of money ends in real estate. This sector is less transparent than financial markets, legal persons can act instead of physical persons and value gains are high involving the placement of large volumes of wealth.[8]

113. One can easily appreciate how this resonates with the Malawian circumstances in view of the economic crimes we are dealing with herein. The convict for instance has indicated that a significant portion of his share of the laundered money indeed ended up in the real estate sector. Money laundering of such huge proportions would therefore likely have a distorting effect on the real estate market and other sectors of the economy, affecting and skewing prices, among other things. The victims of

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[8] Brigitte Unger, *The Scale and impacts of Money Laundering*, (Edward Elgar: Chelterham, UK, 2007), 12-13.

such economic distortions are the innocent people of Malawi whilst the beneficiaries are the launderers.

114. Likewise, Professor Michael Levi eloquently states that fraud and indeed crime in general comes with much detrimental costs and effects on the economy and society. He instructively posits that:

> The costs of fraud (and crime in general) are sometimes disaggregated as **losses**, **resource costs**, and **externalities**. Resource costs may relate to expenditures both in anticipation of and in response to fraud (e.g. On fraud prevention systems, on reactive investigative teams), though these distinctions were difficult. Externalities refer to side effects from an activity which have consequences for another activity but are not reflected in market prices.[9] (Court's emphasis)

115. Again, one can easily contextualise "cashgate" premised from this typology. **The State incurred losses**, represented by the actual sums of money, in billions of Malawi Kwacha, embezzled from the Consolidated Fund. Resource costs in response to the fraud are clearly evident. **The State has had to devote so much resources** in investigating and prosecuting these offences. In addition the State has had to invest so much money in order to ensure that Government financial systems are strengthened to the point where both Malawians and Malawi's cooperating partners can trust and confidently use them,[10] among other costs. **The**

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9 Michael Levi, The Costs of Fraud, in Brigitte Unger and Daan van der Linde, *Research Handbook on Money Laundering*, (Chelterham, UK: 2013) 68 at 70.

10 See National Assembly (Malawi), *Daily Debates (Hansard), Fourth Meeting – Forty–Fifth Session, Twenty Fourth Day Monday*, 22nd June, 2015, Serial No. 024, at pages 1035-1036

externalities include the negative consequences Malawians are having to go through as a result of the massive fraud, including the loss of confidence by cooperating partners who have withheld their usual support to the Malawi Government, thus having a direct impact on service delivery by the State for its citizens.

116. All in all, the offences herein have had a very adverse impact on Malawian society and it is in the public interest that those responsible must be appropriately held to account and properly punished for the same.

117. Mr. Lutepo was a major player in "cashgate" although he claims that he was used as a conduit rather than a principal. That notwithstanding, even if he might have been used largely as a conduit, it is clear that he was a major player and the punishment meted out on him must reflect the socioeconomic damage to society that the offences he has committed have caused, in a manner that does not bring the administration of justice into disrepute.

III. The Seriousness of the Offences and Order on Sentence

118. I have already pointed out that the offences committed by the convict herein were serious and grave economic crimes against the people of Malawi. The figures involved were unprecedented. I remind myself that prior to the revelations of the financial scandal in issue in the present case, it was inconceivable to hear of a case of emblezzlement of funds to the proportions generally characterizing cashgate. Yet, when one considers such amounts, for instance the MK63million referred to by the State in respect of the case of **Republic v Senzani Namathanga**, those amounts seem almost negligible in comparison to those in the instant case. MK 63 million in the **Senzani Namathanga case** was a huge amount of money, yet it was just a small fraction (about "one sixty-seventh") of the amounts

that we are dealing with in this case. Such is the magnitude of the crime that Mr. Lutepo committed.

119. In criminal cases, the Court has discretion to decide that the mitigating factors are eclipsed by the seriousness of the offence such that little or no weight at all should be attached to such factors. Thus, for instance, in **R v Inwood** (1974) 60 Cr App R 70 Scarman LJ was faced with a first time offender who, among various other mitigating factors, cited his youth as a mitigating factor to count towards being given a more lenient sentence. The learned Judge stated that:

> [I]n the balance that the court has to make between the mitigating factors and society's interest in marking the disapproval for this type of conduct, we come to the irresistible though unpalatable conclusion that we must not yield to the mitigating factors. The sentence was correct in principle when measured against the gravity of the offences.

120. This principle was affirmed in the Malawian case of **Mussa v Republic,** Criminal Appeal No 44 of 1995 [1996] MWHC 2, where Mwaungulu J, (as he then was) citing with approval the above passage in **R v Inwood**, stated that "The Court can very well ignore pertinent mitigating factors."

121. In **R v Murray**,[11] the Court of Appeal of Northern Island, applying **R v Inwood** in a case of manslaughter, stated that: "We consider that this was a case of such gravity that the trial judge was fully entitled not to

[11] http://www.jsbni.com/Publications/sentencing-guidelines/Pages/Decisions/R-v-Murray-%2816-07-93%29.aspx (accessed 4 September 2015)

reduce the sentence because of the physical and mental illness suffered by the applicant in the years prior to the killing."

122. In this regard, on careful consideration of the issues herein, it occurs to me that actually the question we have to ask ourselves is whether the convict does not deserve the maximum penalty in the circumstances of this case, regard being had to the gravity of the crime.

123. I am reminded at this point that Counsel Mtupila for the convict stated that the principle of law is that the worst offender is yet to be born, suggesting that practically a Court should never impose the maximum penalty. This Court holds the view that this proposition is incorrect. In the case of **Funsani Payenda v Republic**, Homicide (Sentence Rehearing) Cause No 18 Of 2015, I took occasion to make the following remarks, at paragraph 38 of the judgment, upon a similar argument being raised by Counsel:

> I take the view that we must, in this regard, be using the "category of cases" for a test, and not the fictitious individual test of the "worst offender" – who is, according to the common myth, "yet to be born" – which individual test effectively makes it illogical for the maximum penalty to ever be imposed. Parliament did not prescribe the maximum penalties in legislation for decorative purposes, or as conceptual fictions, or as mere illusory punishment signposts. Parliament means what it says and it meant what it said in Section 210 of the Penal Code. It meant for those penalties to be applied in appropriate cases and not to be theorised into non-existence.

124. I find that when one examines the jurisprudence from whence this principle has developed over time in this country, reference has indeed been to the "worst instances" or "worst examples" rather than the individualized abstraction of "the worst instance" of the offence in question. In the case of **Isaac v R** 1923-60, ALR Mal. 724, Spencer Wilkinson, CJ stated that "It has been laid down time and again that the maximum sentence should be reserved for **the worst examples of the kind of offence** in question" (Court's emphasis). Similar reference to the "worst instances" of the offence as the test for deciding on deserving cases for the imposition of the maximum sentence was made by the Court in **Jafuli v Republic** 9 MLR 241, by Justice Dr. Jere, at page 248.

125. In **Namate v Republic** 8 MLR 132, Skinner, CJ agreed with the principle stated in **Isaac v R**, citing several others decisions of similar import. In this case, the appellant had been charged with theft by servant contrary to Section 278 as read with Section 286 of the Penal Code. He was sentenced to the maximum allowable sentence of 7 years by the High Court. On appeal, the Supreme Court of Appeal reduced the sentence from 7 years to 6 years. He had stolen K9,709.92 between August 1973 and June 1974 which was a significant amount of money at the time. The CJ said:

> The maximum sentences permitted by the legislature should be **reserved for the worst instances of the offence** and it is, indeed, a very grievous example of the crime which calls for the imposition of such sentence on a person of previous good character. It is necessary for the court to compare the seriousness of the circumstances of the particular offence in relation to the worst type of circumstances which could attend a contravention of the penal section. The question which

> we have to consider is whether the circumstances of this case are so grievous as to fall within the very worst examples. We think it was a very bad case. The amount of money stolen was great. There was a considerable breach of trust. But we do not think that it was so grievous an example as to justify the imposition of the maximum sentence on a first offender. It is not easy in cases of dishonesty as in cases of violence to weigh the gravity of the particular offence against the worst examples of offences of the same nature.

126. Whilst **Isaac v R**, and **Namate v Republic**, among other decisions, lay down the general principle that a first offender should, as a general rule, not be given the maximum sentence; that principle is not cast in stone and Courts are entitled to depart from it in appropriate and deserving compelling cases. The decision of the Malawi Supreme Court of Appeal in **Kamil & Yaghi v Republic**, [1973-74] 7 MLR 169 (MSCA) illustrates the point. Mr. Kamil and Mr. Yaghi had hijacked a South African Airways plane from Salisbury to Chileka Airport in Malawi demanding, among other things, money of not less than five (5) million US Dollars as ransom, or else they threatened to blow up the aircraft. Malawi's security detail, through their ingenuity, managed to resolve the crisis and arrested the hijackers, but there was no legislation dealing directly with hijacking at the time. Consequently they were charged with various offences such as "demanding property with menaces". Two of the offences carried maximum terms of five years imprisonment and one had a maximum of one year imprisonment. Mr. Morgan who appeared on behalf of the accused persons argued, in the trial court, among other things, that the Court had to exercise leniency because they were first offenders. He further argued that the Court had to consider that there was no brutality, no battery, no thuggery in the sense of assault, and indeed that there was no

injury to anybody. In the High Court, Skinner CJ who tried the matter (**Republic v Kamil & Yaghi** [1971-72] 6 ALR (Mal) 358), fully aware of the principle laid down in **Isaac v R** and a chain of succeeding decisions, was still of the view that the case was so serious, that the seriousness eclipsed all mitigating factors advanced, and handed down maximum and consecutive sentences. He stated that " I bear in mind that they are men of previous good character, but people who do desperate things like this are likely to do it again, and the public must also be protected from others who may be tempted to emulate their example."

127. The accused persons were shocked with the maximum consecutive terms imposed, in the light of the chain of mitigating factors put up on their behalf before the learned Chief Justice in the High Court. In the Supreme Court of Appeal, Chatsika JA, confirming the maximum and consecutive sentences imposed by the High Court, stated at page 180:

> It has been stated already that the offences which were committed in this case by the two appellants were of a most serious nature and justified the imposition of the maximum sentences although they arose from the same transaction. It is observed that if the sentences are made concurrent, the appellants would serve an aggregate term of only five years. It was the view of the High Court that an effective term of five years imprisonment only for offences of this magnitude and seriousness would err seriously on the side of inadequacy and would fail to protect the public. The purpose of sentence is not only to punish the offender but to deter others who may be influenced to commit similar offences and to protect the public. An aggregate sentence of only five years for offences of this

> seriousness would fail to reach that objective. In the circumstances, we are in agreement with the reasoning advanced by the learned Chief Justice for holding that this was an exception to the general rule…It was therefore proper to order the sentences on the three counts, which are by no means heavy in comparison with the seriousness of the offences, should run consecutively. The result is that each appellant will serve a total of 11 years imprisonment.

128. The SCA affirmed the High Court decision to impose the maximum sentence on each count and to make them run consecutively.

129. This Court has also consulted the decision of the East African Court of Appeal in the case of **Mavuta v. Republic** [1973] EACA 89 (K). In that case, the charge made against the accused appellant, Jacob Mbutu Mavuta, had been that "between 20 December 1971 and 30 December 1971 at Nairobi conspired with other persons unknown to defraud Standard Bank, Kenyatta Avenue, of K. Shs. 230,103/- by false representations and other false and fraudulent devices." The appellant was convicted of conspiracy to defraud the bank on evidence that was upheld on appeal. Among the grounds of appeal that he advanced against the imposition of a maximum sentence by the lower Court was that he was a first offender and should not have been sentenced to the maximum of 3 years imprisonment. The EACA held that indeed generally the maximum sentence should not be imposed on a first offender, but having regard to the amount involved and the prevalence of bank frauds, the maximum sentence was justified. Simpson J, reading the judgment of the Court, stated that the prevalence of such conspiracies and frauds were undermining the whole structure of banking in Kenya and the maximum

imposed by the legislature was actually manifestly inadequate in the circumstances of the case.

130. This takes me to the facts of the present case. I opine that this was a very bad case of money laundering – certainly an example of the worst forms of the offence ever envisaged. The amount of money defrauded from the Government and laundered, at over four billion Malawi Kwacha was so great and clearly without a matching precedent. It was an invasion of the national treasury at source. The offences were carefully planned, deliberate, and concerted.

131. The legislature set the maximum sentence for money laundering at 10 years imprisonment and for conspiracy to defraud at 3 years imprisonment. The maximum sentence under the MLA is particularly strange considering the possibilities of very serious crimes that may be committed contrary to that Act. I am not sure why the maximum penalty was pitched so low. Perhaps the framers of the legislation might not have envisaged that offences under the Act might assume huge proportions of the magnitude encountered in the present case. Today we are dealing with unprecedented amounts of money laundered. Tomorrow we might be confronted with a very bad and appalling case of terrorist financing. The law makers should seriously reflect on whether the punishments we have on the statute book are sufficient to address the mischief intended to be cured by the legislature through the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act.

132. Having said that, my duty is certainly not to legislate. The sentences I impose must be within the confines of statute. I must clearly state that given the gravity and aggravated form of money laundering in the present case, I would have proceeded to impose the maximum penalty proceeding on the same reasoning as applied in **R v Inwood** and **Kamil & Yaghi v**

Republic (above). The seriousness of the crime in the present case would tend to otherwise eclipse most of the mitigating factors advanced, including that of being a first offender.

133. However, as I have previously indicated, the convict's cooperation with the State, which might help in the further fight and unearthing of the roles of others who might possibly be more culpable than the convict herein, deserves special credit. I have also discounted the convict's sentence on account of the efforts the convict has made in restituting to the State, albeit in kind by way of forfeiting his Woget Industries to the State at an agreed value of MK370,000,000, and to a minor extent, his guilty plea. A combination of these special mitigating considerations has resulted in a discount of two years on the money laundering count. **I therefore impose a sentence of eight (8) years imprisonment for money laundering**, contrary to Section 35(1)(c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (Cap 8:07 of the Laws of Malawi).

134. On the charge of conspiracy to defraud, it occurs to me that as much as the offence carries a maximum of only three years, the circumstances of the crime herein make it very serious. There was careful planning of the offence. It was not a once-off transaction. The convict herein knowingly agreed with others to invade the national treasury at source, purloining huge amounts of money. Even if he might not have benefitted from the total sum of the proceeds of the fraudulent crimes, by his own admission, the convict agreed to get a percentage of not less than 10% of the total sum embezzled from the Government and channeled through his account. To make it clear, a percentage of not less than 10% meant a staggering direct personal financial benefit of not less than four hundred million Kwacha (MK400,000,000). We should note that what he said was that it was not

less than this amount. The Court was never told the full amount of the direct financial benefit.

135. In any event, the convict could clearly have said no to this sinister scheme. He could have walked away. If Government was indeed owing him money that had remained unpaid for a long time, as the State correctly argued, he could have commenced court proceedings against the Attorney General. Did he seriously think that Government would pay him, for his legitimate services rendered, through participation in crime? Even if he strangely thought so, he ought to have known better that in the end, crime does not pay. He chose to collaborate. There is no suggestion that anyone compelled him to join the scheme. He says, he was at the time a very successful businessman. I find no reason why he would then choose to turn to crime as a self-help measure.

136. If the convict was perhaps a desperately poor man lured by the sweet talk of others that there was a get-rich-quick scheme doing the rounds, his involvement could still have been bad, without any defence in law, but perhaps some moralists could have a little understood his involvement and his being used by others. But the convict stated in Court through his Counsel that he was already a successful businessman. He was already rich with a business empire that his Counsel detailed in Court. The impression one gets is that he therefore voluntarily and knowingly joined the conspiring syndicate more out of greed than desperation. He carefully calculated his potential gains out of the scheme. This makes his involvement much worse.

137. The convict therefore turns out to me to be a highly culpable conspirator in a very grave conspiracy to defraud, that falls into the category of the worst forms of fraud, and concomitantly the worst form of conspiracy to defraud this country has ever witnessed. This is a scheme that continued over time in 2013. It seems it only came to a halt following

the revelations that started to emerge in September 2013 which I have referred to at Paragraph 1 above. The seriousness of the offence herein, in my view, eclipses the mitigating factors. The EACA case of **Mavuta v. Republic** (above) is clearly on point and I am highly persuaded by its authority. It will be recalled that that was a case of conspiracy to defraud just like the present one. Just like in the instant case, the amount involved was so huge, although it clearly appears that we are dealing with a much more gargantuan amount in the present case than in the **Mavuta case**. The Court in **Mavuta** observed that such conspiracies to defraud and frauds were undermining the whole structure of banking in Kenya. Similarly in Malawi the conspiracy to defraud herein, the "cashgate" conspiracy as it were, undermined the structure and integrity of the Malawi Government's financial systems. The Court in **Mavuta** observed that the maximum imposed by the legislature was actually manifestly inadequate in the circumstances of the case. The same can clearly be said here. From the evidence, whilst the amount the subject matter of the fraud herein was in the region of MK4.2 billion, the design of the conspiracy was not meant to stop with that amount. The crime was manifestly grave and the maximum penalty of 3 years for such a grave conspiracy is similarly manifestly inadequate, just like the court in **Mavuta** observed. This case therefore, just like the **Kamil case** and the **Mavuta case**, creates an exception warranting a departure from the general principle that maximum sentences are not to be imposed on first offenders who have pleaded guilty. Just like the Malawi Supreme Court of Appeal held in the **Kamil case**, this Court likewise has in mind that the cumulative (aggregate) punishment in respect of the two counts on which the convict was charged must be meaningful. The sentence discount that the convict has received under the money laundering count is sufficient.

138. The idea that the Court should have regard to the cumulative effect of punishment imposed in offences that are closely related in a charge

such as in the present case was eruditely expressed by the Supreme Court of Appeal in **Maseya v Republic** [1993] 16(2) MLR 588 (SCA), where Chatsika, JA stated, at pages 592-593, that:

> Another question which the court takes into consideration in ordering sentences imposed on a number of counts to run either consecutively or concurrently is to assess the appropriate aggregate sentence for all the offences on which the accused has been convicted. The court may impose a sentence on each count and order some of the sentences to run concurrently and the concurrent sentences to run consecutively provided the total aggregate sentence is regarded to be the appropriate aggregate sentence for all the offences committed. If the offences are of the same nature and committed at about the same time, this result may be achieved by imposing a sentence which is considered to be the appropriate aggregate sentence for all the offences on the most serious offence, and lesser sentences on the other offences and then ordering all the sentences to run concurrently.

139. **I therefore impose the maximum penalty of three years imprisonment for conspiracy to defraud** contrary to Section 323 of the Penal Code (Cap 7:01 of the Laws of Malawi) on Mr. Lutepo.

140. Thus, cumulatively, the convict herein will serve an aggregate of eleven (11) years imprisonment which I consider to be cumulatively meaningful in light of my analysis of the aggravating and mitigating factors in the present case.

141. An issue that featured prominently in argument was as to whether the sentences imposed herein should run concurrently or consecutively. The State argued that the general principle of law is that sentences must ran consecutively and that if a Court wishes to make the sentences to run concurrently, it must justify its decision with reasons. This is a correct proposition. On its part, the defence argued that as a matter of principle, offences arising out of the same transaction should attract concurrent rather than consecutive sentences. Again, the proposition by the defence is correct in law. In the case of **Rep v Kayumba** [1997] 2 MLR 117 (HC), Mtambo, J (as he then was), held, at page 118, that when a person is charged with more than one offence:

> Each offence is punishable, which is to say that each sentence passed is to be served one after the expiry of another unless the court, on sound judicial principles, orders that they shall run concurrently. Those principles do not seem to be present in the instant case. The offences were committed separately and distinctly such that it cannot reasonably be argued that they were a perpetration of the same guilt. The sentences, therefore, ought not have been made concurrent

142. As already demonstrated however, the case of **Kamil & Yaghi v Republic** shows that the Court may depart from this general principle in order to ensure that a meaningful aggregate sentence results. The proposition that a Court is, in appropriate cases entitled to depart from the general principle was also expressed by the Supreme Court of Appeal in **Maseya v Republic**.

143. In view of the exceptional gravity of the offences committed, and the view expressed on the weakness of the sentencing regime which seems not

to have envisaged the levels of the magnitude of the fraud and money laundering witnessed in the present case, I find that there is sufficient reason to make the sentences herein **to run consecutively and I so order**.

144. The last question I must address is as to when the sentences herein will take effect. According to Section 329(2) of the CP & EC:

> Subject to section 35 of the Penal Code, every sentence shall be deemed to commence from, and to include, the whole of the day of the date on which it was pronounced except where the court pronouncing such sentence otherwise directs or where otherwise provided in the Code.

145. Thus the cumulative sentences herein would ordinarily have to run from today. The question as to when prison terms take effect was considered in the Supreme Court decision of **Kamil v Rep** (SCA) (above), where Chatsika JA stated, at page 181, that:

> Lastly, on behalf of the first appellant, Mr Wills submitted that the court should have backdated the sentence to the date of the appellant's arrest, pointing out that this again is another general principle of sentencing. The decision to backdate a sentence to the date of the prisoner's arrest is always in the discretion of the trial judge. The discretion, of course, has to be exercised judicially. The considerations in the light of which it is exercised are the length of time the prisoner has been in custody awaiting trial, the seriousness of the offence and the maximum sentence that can be imposed. The appellants were in custody awaiting trial

> for a period of just over three months. The sentence of 11 years effective from the date on which it was imposed does not create any sense of shock in this Court. The considerations mentioned above were considered fully by the trial judge when he decided to make the sentences run from the date of their imposition. Here again we do not find any reason to interfere with that discretion.

146. In the present case, I have considered the factors for consideration laid down in the **Kamil case**. I find it just to order that the convict's sentence runs from the date of his conviction, which is 15 June 2015, and I so Order.

Made at Zomba in Open Court this 4th day of September 2015

RE Kapindu, PhD
JUDGE