



# IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO 3571 OF 1999

IN THE MATTER OF THE INTERPRETATION OF THE  
*CONSTITUTION* OF MALAWI

and

IN THE MATTER OF THE VALIDITY OF SECTIONS 30(1), 156  
AND 157(a)(iv) OF THE *CUSTOMS AND EXCISE ACT*

## BETWEEN

MUSSA AMBONISHE

PLAINTIFF

AND

CONTROLLER OF CUSTOMS AND EXCISE

1<sup>ST</sup> DEFENDANT

AND

ATTORNEY GENERAL

2<sup>ND</sup> DEFENDANT



## PLAINTIFF'S SUBMISSIONS

### 1.0 BACKGROUND

#### 1.1 Facts

The applicant was on 21 October 1999 charged with the offence of importing and concealing goods with intent to evade duty contrary to Section 134 (a) of the *Customs and Excise Act*. He was also charged with the offence of submitting to an officer of Customs and Excise an untrue document contrary to Section 135 (a) of the *Customs and Excise Act*.

The particulars of the first Count allege that the applicant imported 18,200 cases of canned beer and concealed them in order to evade duty worth K5, 984 ,453.10. The second count avers that instead of submitting invoices for 18,200 cases to Customs, he submitted invoices for 3,422 cases which invoices are untrue because 18,200 cases had been imported.

The two counts are closely connected because if the State proves that 18,200 cases were imported by the accused and that he submitted an entry for less , then it would follow that the entry for 3,342 cases was not true. From the two counts it is clear that the department of Customs and Excise is alleging that the accused did the following:

- 1) imported 18200 cases of beer worth K5,984, 453.10
- 2) concealed them
- 3) with intention to evade duty
- 4) submitted an entry to a Customs officer for 3342 cases of beer
- 5) thereby evading duty worth K5,984,453.10
- 6) did not pay proper duty or that the duty paid was not proper.

Importation is one of the key elements of the offence created by Section 134 (a) whilst submission of an untrue or incorrect declaration or bill of entry or other document is a key element of the offence created by Section 135 (a).

In terms of Section 2 of the *Customs and Excise Act*, to "import" is to bring or cause to be brought into Malawi by any means. Goods are deemed to have been imported into Malawi if

shown in any document as having been consigned to Malawi from a foreign port (section 30 of the Customs and Excise Act).

## **1.2 Burden of Proof**

Sections 30 (1) ,156 and parts of Section 157 of the same *Act* shift the burden of proof on an importer or an accused person once the Department of Customs and Excise establish a basic fact and dispense with the calling and cross- examination of the Controller's witnesses. The case has been set down for trial and the applicant is of the view that his rights to a fair trial, including the right to (a) be presumed innocent (b) to remain silent during trial (c) not to testify during trial and (d) to challenge evidence and not to be a compellable witness against himself as guaranteed by the *Constitution*, are under threat. He therefore seeks the intervention of the Court pursuant to Section 46 of the *Constitution*.

## **2.0 THE REPUBLIC OF MALAWI CONSTITUTION AND THE RIGHTS OF THE ACCUSED**

Prior to May 18, 1994 the burden of proving any particular fact in criminal proceedings generally lay on the person who wished the Court or Jury to believe in the existence of the particular fact; (Section 187 of the CP & EC). Further unless any written law provided otherwise, the burden of proving that an accused is guilty of any offence lay on the prosecution. Section 187 of the C.P.& E. C. is a codification of the Common Law principles enunciated in *Woolmington v Director of Public Prosecution* [1935] AC 462 at 481-482 in which Viscount Sankey said:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*



The *Customs and Excise Act* was enacted in 1968 to enable Government collect revenue and to provide for penalties against those who evade duty levied by the Department of Customs and Excise. In conformity with Section 187 of the C.P. & E.C. the Customs & Excise Act shifted the burden of proof on to the person being prosecuted as provided in Sections 30, 156 and 157 (a) (vi), (d) and (e).

On 18 May 1994, Malawi adopted a new *Constitution*. This *Constitution* is the Supreme law of the Republic and thus its provisions supercede the provisions of any law inconsistent with it (see section 10 of the *Constitution*). Included in its provisions dealing with human rights is a section relating to the rights of an accused. These rights are enumerated in section 42 of the *Constitution* and provide, amongst other things, for the right to be presumed innocent, to remain silent during trial and not to testify, the right to challenge evidence brought against him and the right not to be a compellable witness against oneself.

Since "in the interpretation of all laws... the provisions of the *Constitution* [are to] be regarded as the supreme arbiter and ultimate source of authority" (see section 10 of the *Constitution*) provisions of section 187 of the C.P. & E.C. and of sections 30(1), 156 and 157(a)(iv) of the *Customs & Excise Act* must now be read against this new constitutional background.

### **3.0 CONSTITUTIONAL ISSUES**

Several key questions arise from the facts discussed above and these are:

(a) whether sections 30(1), 156 and 157(a)(iv) of the *Customs & Excise Act* are consistent with section 42 (2) of the *Constitution*.

(b) whether, in terms of section 44(2), (3) and section 45(1) of the *Constitution*, sections 30(1), 156 and 157(a)(iv) of the *Customs & Excise Act* constitute an allowable limitation, restriction or derogation from the rights provided for by section 42(2)(f)(iii) and (iv) of the *Constitution*.

(c) whether the principles of interpretation involved in construing the *Constitution* would allow the limitations and restrictions imposed by sections 30(1), 156 and 157(a)(iv) of the *Customs & Excise Act* on the rights guaranteed by section 42(2)(f)(iii) and (iv) of the *Constitution*.



(d) whether sections 30(1), 156 and 157(a)(iv) of the *Customs & Excise Act* are invalidated by section 5 of the *Constitution* by reason of their incompatibility with sections 42(2)(f)(iii) and (iv), 44(2) and (3); and section 45(1).

### 3.1 Issue Number One

#### ***Whether sections 30(1), 156 and 157(a)(iv) of the Customs & Excise Act are consistent with section 42(2)(f)(iii) and (iv) of the Constitution.***

Section 42 of the Malawi *Constitution* tabulates the rights of an accused person as regards arrest, detention and trial. Section 42(2)(f)(iii) and (iv) provides that *"every person arrested for, or accused of, the alleged commission of an offence shall in addition to rights which he or she has as a detained person, have the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify ...[and] to adduce and challenge evidence; and not to be a compellable witness against himself or herself;..."*.

Further afield, the *Canadian Charter of Rights and Freedoms* contains a similar provision at section 11 where it stipulates that *"[a]ny person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"*.

The Supreme Court of Canada had occasion to consider this section in the case of *R v Oakes* (1986)19CRR308. In that case the Crown appealed from a decision of the Ontario Court of Appeal holding that section 8 of the Canadian *Narcotic Control Act* was unconstitutional as it infringed the presumption of innocence in section 11(d) of the *Canadian Charter of Rights and Freedoms*. In prosecutions contrary to section 4(2) of the *Narcotic Control Act*, section 8 provides that if the court finds the accused in simple possession of a narcotic, the accused must establish that he or she did not have the narcotic for the purpose of trafficking in order to be acquitted of the more serious offence. It was held that the appeal be dismissed since section 8 indeed contravened section 11(d) of the *Canadian Charter of Rights and Freedoms*. At page 310, Dickson CJC set out the principle as follows:

*"In general one must I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in Section 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite*

*the existence of reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the Jury on a balance of probabilities that the presumed fact was untrue."*

This principle was applied with approval in *Attorney General v Lee Kwong Kut (1992)* LRC (Criminal Law Reports) 100. In that case the question before the Court was whether section 30 of the *Summary Offences Ordinance* of Hong Kong was consistent with section 8, article 11 of the *Hong Kong Bill of Rights Ordinance*.

Section 8, article 11 of the *Hong Kong Bill of Rights Ordinance* provided that

*"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

And section 30 of the *Summary Offences Ordinance* stipulated that :

*"Any person who is brought before the Magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the Magistrate, how he came by the same, shall be liable to a fine of 1000 dollars or to imprisonment for three months."* (Compare with section 329 of the *Penal Code*)

In holding that section 30 of the *Summary Offences Ordinance* was inconsistent with section 8, article 11 of the *Hong Kong Bill of Rights Ordinance*, the Court observed that section 30 of the *Summary Offences Ordinance* was premised on the presumption that the subject matter would have been unlawfully obtained and that it was therefore up to the respondent to satisfy the magistrate that the subject matter was not stolen and thus converting the presumption of innocence into one of guilt. Kempster JA stated the position in the following words at page 106:

*"If the section indeed comprises presumptions adverse to an accused they are apt to render him liable to imprisonment or fine when brought before a magistrate unless he successfully avails himself of the opportunity to rebut them. This is an important procedural element in the offence and the reasoning for this court in relation to s. 10(1) (b) of the Prevention of Bribery Ordinance (Cap 201). Ho shing-tuen v R (Crim App*



*No5/1979, unreported) does not persuade me to the contrary. Accordingly I would go on to find that the magistrate was entitled to hold, as in effect he did, that the repeal of s 30 on 8 June 1991 precluded him, on 2 September following, from relying upon and therefore affording Lee Kwong-Kut the opportunity to rebut the presumptions."*

It can thus be noted that reverse onus provisions are inconsistent with provisions guaranteeing the right to be presumed innocent.

Let us now analyze the case under consideration. Section 30(1) of the *Customs and Excise Act* provides that:

*"All goods declared under this part or **shown in any document as having been consigned to Malawi from a foreign port** shall be deemed to have been imported unless it is proved to the satisfaction of the proper officer that they were not imported."*

And further section 156 of the *Customs and Excise Act* stipulates as follows:

*"In any proceedings under the customs laws-*

- a) it shall not, unless it is expressly so provided, be necessary to prove guilty knowledge.*
  - b) the burden of proving-*
    - i. the place of origin of any goods*
    - ii. the payment of proper duties***
    - iii. the lawful permission or authority; or*
    - iv. **the lawful importation**, carriage coastwise or in transit, loading, unloading, removal, possession, disposal, use or conveyance of goods,*
- Shall be on the **person prosecuted** or on the claimant of any goods seized under the customs laws."*

Further section 157 (a) (vi), (d) and (e) states that:

*"In any proceedings under the customs laws-*

*(a) an averment –*

- vi. **that the Controller, or any other Officer, is or is not satisfied as to any matter as to which he is required to be satisfied under the customs laws...**shall be prima facie evidence thereof;...*



*(d) any certificate or copy of an official document purporting to be certified under the hand and seal or stamp of office of any public office or **of an Officer of the Customs and Excise of any country** shall be receivable in evidence of the matters recorded therein.*

*(e) any invoice or other document submitted or used by any person for any purpose under the customs laws, and any copy thereof, may be produced as evidence by or on behalf of the Controller or the prosecution in any proceedings without calling the person who prepared or signed it."*

It should be observed that section 30 (1) presumes that that goods were imported if they are shown in any document as having been consigned from a foreign port. It is up to the alleged importer to satisfy the Controller or an authorized officer that the goods were not imported. The only time that such an issue may arise is when customs officers come across a document that bears the alleged importer's name or a name similar to his and the document bears a Malawi address. At that point the burden of proving that the goods were not imported shifts to the person accused of the importation. If the alleged importer fails to satisfy the Controller or an officer then it is open to the Controller to take any of the measures prescribed under the *Act* including prosecution of the person concerned. At the trial the prosecution (i.e. the Department) is entitled to rely on the presumption created by section 30.

Put differently , at the commencement of the trial where the accused is charged under section 134 (a) he would be presumed guilty unless he proves himself innocent. It matters not how the document is obtained by the Controller. Further to that, in criminal proceedings, an averment by the Controller that he is not satisfied with the accused's explanation is prima facie evidence of his dissatisfaction (section 157(a)(iv)) so that if the Controller or his officer states that he was not satisfied with an accused persons explanation as he is required to be satisfied under Section 30 then the Court has to accept his statement as prima facie evidence of his dissatisfaction. The burden of proving that the controller has no reason for being dissatisfied rests with the accused. What this means is that the Controller to prove his case under section 134(a) need only a) produce an invoice or other document bearing the accused's name and Malawian address and the accused will be deemed to have imported the goods described therein b) reject the accused explanation and state in Court that he is not satisfied with the accused's explanation; c) where applicable dismiss any payment of duty by the accused as being not proper duty. When that is done, the accused has to prove to the satisfaction of the Court that he did not import the goods described in the invoice or document or that the Controller has no reason for being dissatisfied or

where applicable that he paid proper duty. If he fails to do so he will be convicted. He is, thus, presumed guilty until he proves himself innocent.

Further, the Controller need not call any witnesses to tender in evidence documents collected by him from customs officials abroad because Section 157 (d) and (e) allows him to tender in evidence without calling witnesses, any certificate or document issued by a customs official abroad and/or any document submitted by any person under custom's law. Thus the Controller can easily secure a conviction with only the evidence of a customs officer. An accused person on the other hand would have no opportunity to cross-examine the maker of the invoice or document referred to in section 30; would not be in a position to cross examine the author of the certificate or other documents referred to in section 157 (d) and (e). Because of section 158, the accused would not be able to cross-examine the lone officer (prosecution witness) on the source of his documents or information. The Controller is thus guaranteed a conviction.

Further to that, section 156 of the *Customs & Excise Act* like section 30 of the same *Act* shifts the burden of proof on the person being prosecuted to prove, amongst other things, the payment of proper duties and, the lawful importation etc of goods. It further renders it unnecessary for the prosecution to prove guilty knowledge. Moreover under section 156 the importer or accused is presumed not to have paid proper duty or imported lawfully so long as there are proceedings against him under the customs laws. The sections with which the plaintiff stands charged imply that no proper duty was paid. Read with section 30 its ramifications are very serious. An accused is required to prove himself innocent contrary to section 42 of the *Constitution* which clearly provides that an accused is to be presumed innocent . Whilst section 42 of the *Constitution* places the burden of proof on the prosecution , section 156 of the *Customs and Excise Act* shifts that burden onto the accused.. Section 156 as phrased compels an accused to disprove an element of the offence created by section 134 and yet importation is one of the key elements in offences with which the applicant stands charged. A possibility thus exists that an accused might be convicted while a reasonable doubt exists. . In the words of Dickson CJC in *R v Whyte* (1988) CCC (3d) 97 at 109:

*" The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.*

*The exact characterization of a factor, as an essential element, a collateral factor an excuse or a defence should not affect the analysis of the presumption of innocence. It is*



*the final effect of a provision of the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."*

Furthermore section 157 (a) (vi), (d) & (e), to the extent that it allows the Controller of Customs and Excise to raise a prima facie case by merely stating that he is not satisfied is probably worse than sections 30 and 156. The Controller need not have any basis for saying he is not satisfied but an accused would nevertheless be required to embark on the uphill task of proving that the Controller had no reason to be dissatisfied. The section denies an accused the opportunity to cross-examine a public officer from within or without the Country on certificates issued by that officer. The section permits the Controller to prove his case by the mere production of a certificate or document or copy thereof. The section therefore makes it difficult for the accused to defend himself thereby violating his right to challenge evidence. At the same time the section compels the accused to give evidence in order to exculpate himself. Any attempt to exercise his right to remain silent and not to testify would result in a conviction.

It is, therefore, the plaintiff's submission that the sections of the Customs and Excise Act discussed above are similar to section 8 of the Canadian *Narcotic Control Act* and also section 30 of the Hong Kong *Summary Offences Ordinance*; and that they infringe section 42 (2)(f) (iii) and (iv) of the *Constitution* which clearly provides that an accused is innocent until proven guilty. By shifting the burden of proof in the manner that the sections do, the presumption of innocence is turned into one of guilt. It is submitted that sections 30, 156, and 157 of the *Customs and Excise Act* in so far as they reverse the onus of proof are inconsistent with the plaintiff's constitutional right to be presumed innocent until proved guilty.

### **3.2 Issue Number Two**

***Whether, in terms of section 44(2), (3) and section 45(1) of the Constitution, sections 30(1), 156 and 157(a)(iv) of the Customs & Excise Act constitute an allowable limitation, restriction or derogation from the rights provided for by section 42(2)(f)(iii) and (iv) of the Constitution.***

Not all the rights guaranteed by the *Constitution* are absolute, some may, in a proper case, be limited in a manner provided for by the *Constitution*.



Section 44(2) of the *Constitution* provides that:

*"Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society."*

Further to that section 44(3) emphasizes the point in the following terms:

*"Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application".*

And section 45(1) states that:

*"No derogation from rights contained in this Chapter shall be permissible save to the extent provided for by this section and no such derogation shall be made unless there has been a declaration of a state of emergency within the meaning of this section."*

Thus before any limitation, restriction or derogation is held as allowable under the *Constitution*, it must pass the test prescribed by sections 44(2), (3) and 45(1) of the *Constitution*. This is no doubt a very stringent and taxing test.

A similar test is embodied in the *Canadian Charter of Rights and Freedoms*. Section 1 provides that:

*"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

In *R v Oakes* (1986) 19CRR 308 the Canadian Supreme Court dealt with the effect of this provision on statutory provisions which infringe the right to be presumed innocent which is guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms*. At page 336 Dickson CJC set out the requirements to be met as follows:

*To establish that a limit is a reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures*

*responsible for a limit on a charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom: R v Big M Drug Mart Ltd, supra at p352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a democratic society do not gain Section 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial to a free and democratic society before it can be characterized as sufficiently important*

*Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd. at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*

Further to that, the burden of proving the reasonableness of the restriction or limitation rests with the party wishing to restrict the right and such a party will have to convince the court that the restriction is reasonable by adducing convincing evidence supporting his or her assertions. Dickson CJC puts the position as follows at pages 335 to 336:

*" The onus of proving that a limit on a right or freedom guaranteed by a Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit...*



*Having regard to the fact that section 1 is being invoked for the purpose of justifying a violation of the Constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a section 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit: see Law Society of Upper Canada v Skapinker, supra, at p. 384 SCR, p. 215 CRR; Singh et al. v. Ministry of Employment & Immigration, supra, at p. 900 CRR. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the section 1 analysis are obvious or self-evident."*

In 1948, the General Assembly of the United Nations adopted a *Universal Declaration of Human Rights*. This *Declaration* was incorporated into the law of Malawi by Section 1(iii) of Schedule 2 of the 1966 Constitution and applied by the Malawi Supreme Court of Appeal in *Chihana v The Republic*, MSCA Criminal Appeal No. 6 of 1992 (unreported) and it has the force of law in Malawi by virtue of Sections 200 and 211 of the Constitution. Article 11(1) of the *Declaration* provides that:

*"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."*

The *Universal Declaration of Human Rights* has now been augmented by a human rights instrument of undoubted legal force- the *International Covenant on Civil and Political Rights*. Malawi signed this Treaty in 1992 and it became part of Malawi law by operation of section 211(2) of the *Constitution*. Article 14(2) of the said *Covenant* provides that:

*"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law."*

Furthermore, article 7(1)(b) of the *African Charter on Human and People's Rights* stipulates that:

*"Every individual shall have a right to have his cause heard. This right comprises... the right to be presumed innocent until proved guilty by a competent court or tribunal."*



It is noteworthy that all these international instruments impose no restrictions whatsoever on the right to be presumed innocent.

Furthermore, it is essential to prove that the restriction is necessary in an open and democratic society. The point was considered in *State v Ivory Trumpet Publishing Co Ltd* (1984) 5NCLR 736 (see *Interpretation of Fundamental Rights Provisions* at page 67) where it was said:

*"For a restriction to be reasonably justifiable in a democratic society the restriction itself must be reasonable. But it is not all restrictions that are reasonable that must be of necessity justifiable in a democratic society."*

Thus, it is necessary not only to show that the restriction is reasonable but also that it is necessary in an open and democratic society. It is not all reasonable restrictions that would be justified in an open and democratic society.

Finally, section 44(3) of the *Constitution* states that the restriction or limitation must not negate the essential right in question. If it does, then the restriction or limitation is unconstitutional and invalid (see section 5 of the *Constitution*). As Chaskalson P, in *State v Makwanyane and Another* [1995] 3LRC 269 said of a similar provision in the interim *Constitution* of South Africa:

*"At the very least the provision evinces concern that under the guise of limitation, rights should not be taken away altogether."*

The principle in section 44(3) has also been dealt with in Ghanaian, Zambian and Tanzanian Courts. In all the three jurisdictions, the right in issue, was the freedom to assemble freely. These courts have held that although a citizen's rights may be restricted by law, they may not be denied. Any law denying such right would be invalid (*New Patriotic Party v Inspector General of Police* (writ No.4 of 1993 (unreported)); *Mulundika and Others v The People* [1996] 2LRC 175) It seems therefore that when the restriction or limitation effectively takes away the right conferred upon the citizen, it is a denial of that right. Such a restriction or limitation abrogates the right altogether and negates its very essence.

Let us now consider the case under discussion. The *Constitution* clearly recognizes that in a proper case, it may be necessary to limit the rights and freedoms set out in it in circumstances where their exercise would be inimical to the realization of the society's collective goals.

However, before such limitations are accepted, it is necessary that they "pass" the criteria provided for by the *Constitution*. We have already said elsewhere that the standard required is very high. Before any limitation or derogation is held as permissible under the *Constitution*, it must:

- (a) be prescribed by law
- (b) be reasonable
- (c) be recognized by international human rights standard
- (d) necessary in an open and democratic society
- (e) not negate the essential content of the right or freedom in question

The issue for determination in this case, then, is whether sections 30(1), 156, 157(a)(a) of the *Customs and Excise Act* pass this test.

The question whether these limitations are prescribed by law is not contentious since the said provisions are duly enacted legislative provisions. It is also a settled question whether the provisions are of general application since the *Customs and Excise Act* applies to everyone who gets himself in a duty-paying position.

However it is submitted that Sections 30(1), 156, 157(a)(a) of the *Customs and Excise Act* negate the essential content of the rights conferred upon the accused by section 42(2)(f)(iii) and (iv). For their effect is to completely take away the rights conferred by the *Constitution* and thus effectively deny the Plaintiff the enjoyment of those rights (*State v Makwanyane and Another, New Patriotic Party v Inspector General of Police, Mulundika and Others v The People*, supra.) The essential content of the presumption of innocence is that the accused is innocent until he is proved guilty. Any law creating presumption of guilt until an accused proves himself innocent or satisfies the Court or some other officer would be taking away from or denying an accused person of his right to be presumed innocent until proven guilty. Such law ought to be held invalid. (*R v Oakes, Attorney General v Lee Kwong-Kut*, supra.)

It is also submitted that restrictions on the right to be presumed innocent are not permissible by international human rights standards. This is borne out by the *International Covenant on Civil and Political Rights* and the *African Charter on Human and Peoples' Rights* which lays down restrictions wherever they accord with international human rights standards (see, for example, articles 6(2), 8(3)(c), 19(3) of the *International Covenant on Civil and Political Rights* and also articles 9(2), 10, 11, 12(1) and (2), 14 of the *African Charter on Human and Peoples' Rights*).



The absence of restrictions on the right to be presumed innocent in the *Covenant* and the Charter is evidence of the recognition that such restrictions are anathema to the existence of the right.

Further to that, it is submitted that the said limitations are not necessary at all, and even less so in an open and democratic society, for they allow the Controller of Customs to prosecute an accused person without affording the accused the chance to challenge the authenticity of the evidence brought against him or her. This is tantamount to conviction by trick and thus unwelcome in an open and democratic society where full disclosure ought to be the rule.

We must now consider whether the restrictions or limitations imposed by sections 30(1), 156, 157(a)(a) of the *Customs and Excise Act* are reasonable. In determining the reasonableness of these sections the starting point would be the sections themselves. It is submitted that limitations which negate the essential rights in question and limitations which contravene provisions in the *Constitution* are not reasonable. Even if they were reasonable, they would not be necessary in an open and democratic society.

Further to that, it must be remembered that the *Customs and Excise Act* was enacted in 1969 for (according to the preamble to the Act) for the administration management and control of customs and excise, the imposition and collection of customs, excise and other duties and for matters connected therewith. Collection of revenue is therefore one of the most important overall objectives for the enactment of that statute. One however should not stop at looking at the overall objective. It is necessary to consider the objective or purpose for the inclusion in that statute of Sections 30(1), 156 and 157(a)(iv). The language in which the sections are couched clearly indicates that the purpose or objective of these sections was to make it easier for the department to secure convictions and to collect revenue even where there may be doubt as to whether revenue is due. If indeed one of the purposes was to secure easy convictions then the purpose itself is unconstitutional. In the recent case of *Abuki & Another v. Attorney General*, the Constitutional Court of Uganda adopted the "purpose and effect" principle. Under this principle the Court considers:

*"... both the purpose and effect of an impugned statute to determine its constitutionality. If the purpose of the statute infringes a right guaranteed by the constitution, that statute is declared unconstitutional. Where the purpose of the statute is purportedly within the constitution, the court would go further to examine its effects. If the effects violate a right guaranteed by the constitution, that statute is also declared unconstitutional."*



The purpose in this case would be unconstitutional because it infringes the rights guaranteed by the *Constitution* including the rights to be presumed innocent until proved guilty. And if the purpose was to collect revenue in doubtful circumstances then the sections impinge not only on the rights referred to above but also on the right to engage in economic activity.

It should be mentioned that the department can collect revenue without the three sections and can ensure that revenue is collected and not evaded by improving the administration and management of the department. Further it cannot be said that the object is sufficiently important to warrant the overriding of a constitutionally guaranteed right. There are other ways of enforcing or ensuring that revenue is collected. Even if the alternative measures may result in loss of some revenue such loss would not warrant the limitations imposed. In other words the restrictions in the three sections are not proportionate to the objects set out in the preamble to the *Customs and Excise Act (R v Oakes)*.

The limitations are arbitrary and unfair as they are more likely than not to result in the conviction of innocent persons and they have the effect of taking away the rights completely. They do not impair the rights in issue as little as possible. It would require the stretching of principles to hold that such provisions were reasonable.

Lastly, the restrictions under discussion are not saved by section 45(1) which operates only when a state of emergency has been declared. No such state of emergency has been declared ever since the *Constitution* came into effect.

It is, thus, the Plaintiff's contention that the said provisions fail the test prescribed by section 44(2) and (3) of the *Constitution*, and further, that they are not saved by section 45(1) of the *Constitution*.

### **3.2 Issue Number Three**

***Whether the principles of interpretation involved in construing the Constitution would allow the limitations and restrictions imposed by sections 30(1), 156 and 157(a)(iv) of the Customs & Excise Act on the rights guaranteed by section 42(2)(f)(iii) and (iv) of the Constitution***

Among other things, Chapter II of the *Constitution* deals with its interpretation. More particularly, section 11(1) provides that:

*"Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution."*

Further to that, section 11(2)(c) empowers the court to have regard to comparable foreign case law when interpreting the provisions of the *Constitution*. And indeed foreign courts have evolved principles of Constitutional interpretation. For example in *Minister of Home Affairs and Another v Fisher & another* [1980] AC 319 at 328 it was stated that when interpreting the provisions of the constitution, especially human rights provisions, courts are called upon to adopt a generous and purposive interpretation in order to give the individual full measure of the protection accorded by the constitution. And in *Attorney General v Jobe* [1984] AC 689; [1985] LRC(Const) 556 Lord Diplock, concurring with the generous and purposive approach said:

*"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction"*

The Court of Appeal of Botswana attempted to define generous construction when it said in *Dow v Attorney General* [1992] LRC(Const) 623 at 668

*"Generous construction means...that you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous language such interpretation is compelling..."*

Furthermore it must always be borne in mindb that the *Constitution* is a living document and that its provisions are intended to authorize and limit governmental power. On this important principle, one can do no better than quote from *Trop v Dulles* (1958) 356 US 86 cited with approval in *A Juvenile v the State* [1989] LRC (Const)774 at787.

*" The provisions of the Constitution are not time – worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of our Government. When the constitutionality of an Act of*



*Congress is challenged in the Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice."*

The Malawi Supreme Court of Appeal in the case of *Blantyre Netting Limited v C. V. Chidzulo and others*, MSCA Civil Appeal No 17 of 1995 (unreported) embraced the generous and purposive approach and applied the principle in interpreting the *Constitution*. Their Lordships at page 8 of the Judgement said;

*"In short, the principle laid down by the above cases is that a generous approach should be taken to the interpretation of fundamental human rights provisions in a Constitution. We think that this approach accords with the tenor and spirit of the Malawi Constitution and we propose to adopt it."*

It is thus of vital importance to generously and purposely construe constitutional provisions dealing with human rights.

Coming to the case under consideration it ought to be noted that whilst Section 42(2) of the *Constitution* entrenches the right to be presumed innocent, the right to remain silent, the right to challenge evidence and the right not to be compelled to give evidence. If the provisions of that section are given a generous and purposive interpretation and they are not treated as an old adage, then it falls to reason that Section 42(2) ought to be given as wide an interpretation as is possible so that the rights for the accused do not become a little more than "hollow shibboleths" that may be ignored.

Further to that, when Section 44(3) is interpreted generously and purposely and is given full effect, the irresistible conclusion is that it serves to cement the rights accorded by section 42(2)(f)(iii) and (iv). The effect of section 44(3) is to ensure that rights are not denied on the pretext that they are being limited.

It is the plaintiff's submission that Sections 30(1), 156 and 157(a)(iv) of the *Customs and Excise Act* not only whittle down an accused's person's rights to be presumed innocent until proven guilty, the right to remain silent and to challenge evidence *etc*, but also deny those rights. The sections attack the very foundation of those right and strip them of their essential content.

### **3.3 Issue Number Four**



***Whether sections 30(1), 156 and 157(a)(iv) of the Customs & Excise Act are invalidated by section 5 of the Constitution by reason of their incompatibility with sections 42(2)(f)(iii) and (iv), 44(2) and (3); and section 45(1).***

In order to maintain the status of the *Constitution* as the supreme law of the land section 5 of the *Constitution* provides that "any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid".

The effect of a provision similar to section 5 was considered in *Attorney General v Lee Kwong Kut* (1992) LRC (Criminal Law Reports) In that case the *Hong Kong Bill of Rights Ordinance* section 3(2) stated that "all pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency repealed." It was held in that case that the effect of the provision was to repeal section 30 of the *Summary Offences Ordinance* because the section violated the presumption of innocence embodied in section 8, article 11 of the *Hong Kong Bill of Rights Ordinance*. section 30 of the *Summary Offences Ordinance* of Rights Ordinance required a person brought before a Magistrate charged with having in his possession anything which may be reasonably suspected of having been stolen, to give an account to the satisfaction of the Magistrate failing which he would be liable to imprisonment or a fine.

It is thus clear that any statute that deviates from the provisions of the *Constitution* will be struck down.

In the case under consideration, it has been demonstrated that sections 30(1), 156, 157(a)(iv) of the *Customs and Excise Act* are inconsistent with section 42(2)(f)(iii) and (iv) of the *Constitution*; and further, that they are not justified by section 44(2),(3) and section 45(1) of the *Constitution*. Thus applying section 5 of the *Constitution*, the provisions of sections 30(1), 156 and 157(a)(iv) of the *Customs and Excise Act* are invalid to the extent that they conflict with the *Constitution*.

Since section 46 of the *Constitution* provides that "where a court...finds that rights or freedoms conferred by this Constitution have been unlawfully denied or violated, it shall have the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms...";and since section 200 of the *Constitution* empowers a competent court to declare any laws currently in force *unconstitutional*, the plaintiff submits that the Court ought to make an order holding that sections 30(1), 156, 157(a)(iv) of the *Customs and Excise Act* are invalid and of no effect by reason of their conflict with the *Constitution*.

#### 4.0 CONCLUSION

What is in question here is the validity of sections 30(1), 156, 157(a)(iv) of the *Customs and Excise Act*. It is not in doubt that these are in conflict with section 42(2)(f)(iii) and (iv) of the *Constitution* because they reverse the onus of proof to an accused, they compel him or her to testify, they deny him or her the right to challenge evidence brought against him or her; and, ultimately, compel the accused to be a witness against himself or herself. The story does not end there, the said sections are also not justified by the provisions of section 44(2) and section 45(1) in that they are not permissible limitations, restrictions or derogations from the rights guaranteed by section 42(2)(f)(iii) and (iv) of the *Constitution*. Further to that, the said restrictions negate the essential content of the right to be presumed innocent and thus contravening section 44(3) (For how can the onus of proof be reversed and yet the right to be presumed innocent still remain? How can the right to remain silent continue to exist when the accused is bidden to explain his innocence? How can the accused challenge evidence when the person adducing it is given immunity from cross-examination?)

Further, the interpretation principles applying to the *Constitution* do not permit the restriction of the rights guaranteed by section 42(2)(f)(iii) and (iv) of the *Constitution* in a manner as unreasonable and democratic as is done by sections 30(1), 156, 157(a)(iv) of the *Customs and Excise Act*.

Consequently it is the Plaintiff's humble submission that the Court does find that the said provisions of the *Customs and Excise Act* are invalid by reason of their inconsistency with the *Constitution*, and further, that the Court does make an order that the said provisions are invalid and that they be struck down as being of no legal force whatsoever.

Dated this 29<sup>th</sup> day of March 2000

Nyirenda and Msisha