IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Case Number 144 of 2003

THE REPUBLIC

Versus

SHABIR SULEMAN

And

ASLAM OSMAN

CORAM: D F MWAUNGULU (JUDGE)

Kaliwo, Legal Practitioner, for the State

Kanyenda, State Advocate, for the State

Banda, SC, Legal Practitioner, for the first defendant

Dokali, Legal Practitioner, for the second defendant

Kaphale, Legal Practitioner, for the second defendant

Kamanga, the official court interpreter

Katemana, court reporter,

Mwaungulu, J.

JUDGMENT

The offence and the charges

Under section 24 (2) of the Corrupt Practices Act, any person who by himself, or by or in conjunction with any other person, corruptly gives, promises, or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as inducement or reward for doing or forbearing to do anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offence. The prosecution must establish (a) a person by herself or through another (b) corruptly (c) (i) gave, (ii) promised or (iii) offered gratification (d) as an inducement for the public officer to do or forbear to do something. The Corrupt Practices Act defines 'corruptly:' "in relation to the soliciting, accepting or obtaining, or to the giving, promising or offering, of a gratification, means the doing of any of the aforementioned things by way of a bribe or other personal temptation, enticement or inducement." The Corrupt Practices Act defines 'gratification': "means any payment, whether in cash or in kind, and includes any rebate, bonus, deduction or percentage, discount, commission, service, forbearance, assistance, protection or any other material gain, benefit, amenity, facility, concession or favour of any description, and any fee, reward, advantage or gift, other than a casual gift."

The state's case on the first count is that Mr. Suleman committed corrupt practices with a public officer in that between 1st June and 31st December 2002 he corruptly offered Mr. Justice Mkandawire gratification in the form of very low rent as an inducement for the Mr. Justice Mkandawire to rule in Mr. Suleman's favour a case which Justice Mkandawire was presiding. On the second count, concerning the same matter before the Honourable Mr. Justice Mkandawire, the State alleges that Mr. Suleman is guilty of corrupt practices with a public officer in that around November 2002 Mr. Suleman corruptly promised to give Mr. Justice Mkandawire gratification in the form of a poultry division of I Conforzi Limited valued at over US$ 500, 000 (Five thousand United States dollars) as an inducement for Mr. Justice Mkandawire to rule in favour of Mr. Suleman. In the third count, as amended, the State accuses Mr. Suleman and Mr. Osman of corrupt practices with a public officer in that between 1st June and 31st December 2002, again concerning the same case, at Greenland Feed in Limbe, they corruptly offered gratification amounting to K1, 000, 000 for Mr. Justice Mkandawire to rule in Mr. Suleman's favour.

Difficulties

The prosecution and the defense fervently empathized with the court's difficulty. Mr. Kaphale, counsel to the second defendant, referred to the court's predicament in deciding in a matter concerning a fellow judge as a struggle between loyalty and betrayal. He warned against giving undue credit to the principal witness, Mr. Justice Mkandawire, because Mr. Justice Mkandawire is a judge. Mr. Kaphale courted this Court's caution because of the severity and mandatory

nature of the possible sentence should this Court convict. Mr. Kaliwo, counsel for the prosecution, urged the court to consider the message the court would send to few like the judge, according to counsel, who not only resist those who would have those like the judge perform public duties influenced by gratifications but, at the peril of their own reputation, report matters so that culprits can be brought to book. All these are formidable considerations, considerations not by any rate insurmountable, given the duty under the law and the duty of the court in any matter where the court, as it should, has to do justice to the parties and in the particular case.

The difficulties are surmountable

The quest for justice, criminal or civil, comports a high duty and ultimate responsibility on those who mete it. The duty requires obtaining a level of truth on the evidence that the judge, on the applicable law (to the facts), arrives at a just result. The judge should therefore act responsibly on the evidence before him, ensuring that only relevant and admissible evidence influences and informs his decision. The judge is ultimately responsible for the factual findings affecting the outcome. It is these findings of fact that determine justice in the matter. Indeed, on findings of fact, the judge draws from his experiences and knowledge of human existence. Of course a judge's determination depends on his knowledge and experience and inferences he can make from proven and brutal facts. Her experience and knowledge of human experience is not any better or worse than that of a well-versed member of her society. Consequently, on findings of fact, except in areas of special knowledge requiring expert opinion, the judge must rely on his knowledge and human experience.

No doubt, innate opinions or prejudices and understanding (lack or presence of it) will affect her judgment. There are reasons in theory and practice why this should happen. The quest for justice to the parties and on the matter, a judge's training and experience in the school of human experience and profession and demands of the office are reason and power enough to overcome, in most of the cases, the prospect of these derailing justice to the parties and the particular case. Indeed in this particular case, I, and I should think any judge in similar circumstances, would have failed justice, if, in determining what is just in this matter, I was unduly influenced by that the accuser in a case of the seriousness demonstrated was a fellow judge. Equally I will have failed justice and been irresponsible if I resile from doing what is just because of fear that my decision would attract criticism on this pretext.

The only message that all would want to hear at the end of the trial is that justice was done and seen to be done. This is scarcely achieved by eloquence and ingenuity of counsel or by a judge's erudite exposition in a judgment. There is prospect that justice, that which people want to see, can be missed and messed through counsel's brilliance and a judge's illustrious industry. It is important that the court sends a right message to public officials and the public alike of the importance and need to resist and report corruption. It is a wrong message to the public and public officials to use those not guilty of crime for sounding the alarm against a crime that has alarmed all of us and attracted firm measures from the legislature. Whatever utility we achieve

from such an exercise, it is morally wrong for a legal system to use its innocent subjects as scapegoats for purging an abominable evil. The criminal law, however, is publicly enforced with the purpose of preventing crime. There is a public utility and public good in preventing crime in bringing those who offend to book.

The difficulties and the considerations, therefore, that Mr. Kaphale and Mr. Kaliwo raised, important as they are, are but an aid in determining the ultimate justice in this matter and between the State, whose pursuit in the matter is the public interest, and the two defendants, Mr. Suleman and Mr. Osman. This public interest is the one that holds the two defendants ransom. They stand accused until this court finds them guilty or innocent. The State's interest has conveniently been stated as public interest. The public interest here should not be understood narrowly to mean the State's interest to have the defendant convicted. The State's public interest should be understood to extend to the defendants who are part of that public and not extracted or extricated from it by commission or allegation of committing a crime. At one level, it is the duty of the State emanating from the public interest to ensure that the innocent are acquitted of crime alleged against them. At the other level, the state owes a duty in prosecution of crime to the defendant. The defendant remains, despite the crime and accusation of it, part of the public in whose interest the State is pursuing the prosecution in the first place.

The burden of proof

Consequently, the duty of this Court in these criminal proceedings is to serve the public interest so defined. The quest for criminal justice is to punish the guilty and absolve the innocent. This the law achieves by allocating the burden and demarcating a threshold of proof. In criminal proceedings, on the general premise that he who alleges must prove, since the House of Lords decision in Woolmington v Director of Public Prosecutions [1935] A.C. 462, reconsidered by the House in R v Hunt [1987] AC 352, the burden of proof is on the prosecution. Viscount Sankey, L.C., said at 481-482:

"Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt, subject [to the qualification involving the defence of insanity and 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 either by the prosecution or the prisoner, as to whether [the offence was committed by him], 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."

Generally then the state must prove the defendant's guilt.

The standard of proof

Counsel on both sides, referred to Woolmington v Director of Public Prosecutions and decisions of the Supreme Court of Appeal, Chiwaya v Rep (1966-68) 4 ALR (Mal) 64, R v Idana 1964-65) 3 ALR (Mal) 59, and this Court, R v Saidi, (1923-61) 1 ALR (Mal) 560, and Dickson v R (1962-63) 2 ALR (Mal) 252, for that the burden remains the prosecution's throughout to prove the defendant's guilt and the standard for the prosecution to attain before a court convicts is one beyond reasonable doubt. There are many judicial pronouncements, most pertaining to the appropriate direction to the jury and nevertheless helpful to a judge in a non-jury criminal trial, explaining the meaning of the requirement that proof be beyond reasonable doubt. Counsel on both sides referred this Court to Lord Denning's understanding of proof beyond reasonable doubt in Miller v Minister of Pensions [1947] 2 Al ER 372:

"…there is a compelling presumption in the man's favour which must prevail unless the evidence proves beyond reasonable doubt that the disease was not attributable to or aggravated by was service, and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence. "of course it is possible, but not in the least probable, " the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Mr. Banda, SC, understood, correctly in my view, that to mean that the court must be certain that it is sure that the defendant is guilty of the offence charged.

In R v Allan [1969] 1 WLR 33 Lord Justice Fenton Atkinson remarked to the effect that it is not necessarily a matter of precise formulation or choice of words. In R v Kritz [1950] 1 KB 82 at 89 Lord Goddard, CJ, remarked obiter:

"It is not the particular formula that matters: it is the effect of the summing-up. If the jury are made to understand that they have to be satisfied and must not return a verdict against a defendant unless they feel sure, and that the onus is all the time on the prosecution and not on the defence, then whether the judge uses one form of language or another is neither here nor there."

The House of Lords approved this passage in Walters v The Queen [1969] 2 AC 26. This notwithstanding, it is prudent, as Lord Scarman remarked in Ferguson v The Queen [1971] 1 WLR 94, to employ some formula and the one approved by the House of Lords in Woolmington v Director of Public Prosecutions and Mancini v Director of Public Prosecutions [1942] AC 1 is

one requiring proof beyond reasonable doubt. R v Head 1961) 45 Cr. App. R 225, R v Woods (1961) Crim. L.R. 324 and R v Law [1961] Crim. L.R. 52, respectively, disapprove expressions such as 'reasonably sure,' 'pretty sure' and 'pretty certain.' Moreover, it is inadequate to inform the jury to be satisfied without more: R v Hepworth [1955] 2 QB 600; and R v Allan. In R v Hepworth Lord Goddard, CJ, thought at 603 the directions 'You, the jury, must be completely satisfied' or 'You must feel sure of the prisoner's guilt.' The safest, it now seems, is to use the two combinations 'You must be satisfied beyond reasonable doubt so that you feel sure of the defendant's guilt,' per Lord Scarman in Ferguson v The Queen at 99.

This high standard of proof applies generally to all criminal cases. The justification for such a high standard rests, in my judgment on the incidence of criminal justice. In civil proceedings, subjects invoke the courts' coercive power and authority to enforce individual obligations and duties arising from mutual and collateral arrangements or inferred by law from certain relationships or interactions. There proof on the preponderance of probabilities satisfies the necessary proof for liability. In criminal justice the State invokes the courts' coercive power at the peril of punishment. It is this prospect, irrespective of the extent and the nature of the penalty, which, as matters should be, will depend on the nature of the crime, that requires that the court must not invoke the coercive power of the State unless satisfied beyond reasonable doubt so that it is sure that the crime occurred and the defendant is the author of it. It cannot be, as Mr. Kaphale suggested, that there is need for more care here than in any other criminal case because of the mandatory minimum sentence.

This matter rests on the burden and incidence of that burden

The Court in this matter is called upon, subject to credibility, to decide whether, on the material and information before it, the State has established the defendants' guilt beyond reasonable doubt. It was, however, necessary to lay the principles on the burden and standard of proof because this case turns on them. The matter raises no questions of interpretation or application of legal principles. Much, as the witness examination and submissions show, turns on credibility of witnesses. The credibility of witnesses is, as it should be, a matter for the tribunal of fact, the jury, where the judge sits with one, or the judge, where the judge sits without one. The finding of the tribunal of fact on credibility and indeed on any fact binds the appellate court precisely for the reason that the appellate court does not have the vantage and advantage, which only the trial court has, of seeing and observing the witnesses and assessing demeanour. Credibility, however, is evaluated from more things than demeanour.

In assessing credibility, the court will no doubt observe the witness' conduct in the course of trial for behaviour confirming or undermining truth and accuracy. There is no doubt that such conduct is critical to veracity and accuracy. First, a tribunal of fact examining credibility from such conduct must be cautious that such conduct may relate to a specific or whole aspect of the testimony. Consequently, behaviour relating to a specific aspect may not affect the overall assessment of veracity or accuracy. Secondly, the credibility of a witness may only be known

from consideration of the whole testimony in relation to how all said it is consistent with itself or the whole testimony. It is not surprising, therefore, that counsel on both sides urged me to approach this matter from the totality of the evidence before me. Indeed it is the duty of this Court to consider the matter from all the evidence before it. This Court must treat and scrutinize the evidence of the prosecution and the defence equally. Just as this Court must consider any defence or defendants' explanation emanating from the evidence even if not raised by defence counsel or the defendant. In considering the defendant's explanation and answers to the allegations a trial court must, as defence counsel have reminded me, regard what Weston, J., said in Gondwe v Rep (1971-72) 6 ALR (Mal) 33 at 36-37:

"Nevertheless, it is trite learning that it is for the prosecution to establish its case beyond reasonable doubt and not for an accused person to prove his innocence. This has been said so often as to be in danger of losing its urgency. As in every case where an accused person gives an explanation, in this case its application required that the court's approach to the appellant's story should not have been what it evidently was: "Is the accused's story true or false?", resulting, if the answer were "False," in a finding that the appellant must necessarily have had a fraudulent intent. The proper question for the court to have asked itself was----"Is the accused's story true or might it reasonably be true?" ----with the result that if the answer were that the appellant might reasonably have been telling the truth, the prosecution would not in that case have discharged the burden of proof beyond reasonable doubt imposed upon it by law.

The first count

After these general observations it is now opportune to consider the allegations against the defendants. Conveniently, I should proceed with each of the counts, starting of, course, with the first count. In that count, only Mr. Suleman stands charged of the offence. It is very easy to dispose of this count because, in my judgment, the only question for determination is whether the offers of the shopping premises at the former British African Tobacco Ltd at Ginnery Corner were intended to influence the judge in the action he was presiding. The much detail about who first called, who was there when they met, how they met, how much rent was agreed, etc., are important only to answer the primary question just raised. For there is no doubt that Mr. Suleman met Mr. Justice Mkandawire at his farm in Chileka. Just as there is no doubt that some rent lower than whatever was discussed between them. It is clear from the judge's own evidence that on this occasion Mr. Suleman never said or even suggested the offer of the premises or the lower rentals were for the judge deciding in Mr. Suleman's favour in the action pending before him. As a matter of fact the judge informed the court that he only associated the overtures concerning the premises many days after and precisely when Mr. Suleman, while passing by, pointed Gurmair Garments Ltd to the judge.

The State's theory is that the offer of the lower rentals could not have been for any reason other than influencing the judge to decide for the first defendant in the matter before him. The State premises the inference, absent express words from Mr. Suleman, on many pretexts. First,

that the first defendant, according to the Judge's evidence, sought the judge. This in itself far from establishes that the overtures were for the judge to decide in the first defendant's favour in the matter involving the first defendant that was pending before the judge. This is because it depends on the second premise on which the State bases the inference, namely, that the first defendant knew at the time of the overtures that the judge was presiding over the matter. Despite rigorous cross-examination, Mr. Kaliwo and Mr. Kanyenda, a legal practitioner from the Anti Corruption Bureau assisting Mr. Kaliwo, never put the critical questions to Mr. Suleman. In my most considered opinion, given that Mr. Suleman admitted the conversation, though not its contents, and Justice Mkandawire stated that Mr. Suleman never said the overtures were to influence the judge in the case before the judge and that it is only later that the judge associated the overtures with the case, it was important to put to Mr. Suleman the fact as to whether when he went to see the judge he knew the judge was presiding in the matter. Just as it was important to put to Mr. Suleman the fact whether, if he knew the judge was presiding on the matter, the offer was to influence the judge.

The inference, therefore, that he knew the judge was presiding on the matter can only be on circumstantial evidence. In this particular case, it could be inferred from that in the subsequent overture he mentions the case and, as we saw earlier, on the judge's evidence, Mr. Suleman pointed Gurmair Garments Ltd to the judge. These facts are as consistent with that as at a subsequent time the first defendant knew as they are with that he never knew at the time he discussed with the judge. On inferences on circumstantial evidence, the common law of England, see R v Hodge (1838) 2 Lew CC 227 and McGreevy v Director of Public Prosecutions [1973] 1WLR 276, is the same as the common law of Malawi, see Banda v Republic (1971-72) 6 ALR (Mal) 383 and Nyamizinga v Republic (1971-72) 6 ALR (Mal) 258, that if the case against the defendant depends wholly or substantially on circumstantial evidence, the court must be satisfied that the circumstances are consistent with that the defendant committed the offence and that the circumstances are inconsistent with any rational conclusion that the defendant is the guilty person. The proven facts must be such that they are capable of only one inference. Moreover, even taking that the defendant knew the judge was presiding in the matter, it does not necessarily follow that the transaction was to influence the judge.

Of course if the defendant knew the judge was dealing with the matter, one can infer that the first defendant's actions were so as to influence the judge. It does not follow, however, that because of it or despite of it the judge and Mr. Suleman could not genuinely transact. It could very well be that if the transaction went through, more especially if in the negotiations the judge accepted lower than the market rent, the judge would have recused himself. It is quite another to say that in all such circumstances a citizen wants to influence the judge. It is not that in these circumstances the court will not always say that it is not the case that the citizen wants to influence the judge. It is that in those circumstances human experience would require a little more. That more will, of course, depend on the evidence and the circumstances of the case. In this particular case that more is, on the evidence and circumstances, wanting. The matter is compounded by that it is unclear from the evidence that when the judge discussed with the first defendant the judge knew that he was presiding on the first defendant's matter.

The suggestion seems to be that the judge should have known that he was dealing with the defendant in the matter because, as the first defendant contends, and the judge refuses, the judge and the defendant associated before and because the fist defendant appeared with counsel before the judge many times. On the first question, it is the word of the judge against that of the first defendant. On that I prefer the word of the judge, not because he is a judge. I do that as an overall impression on the evidence and the conduct of the proceedings. On the latter, all three counsels, Mr. Banda, SC, Mr. Dokali and Mr. Kaphale, at least in relation to this transaction, never asked Justice Mkandawire whether at the time of the transaction he knew that he was presiding in the matter where the first defendant was a party. It also seems to me that the interactions between the judge and the first defendant, if they occurred at all, were seldom and businesslike and with the first defendant's father at times and others at the shop. There seems to be some credence in the judge's insistence he probably came to know about the first defendant as result of this case.

Neither can we safely determine the judge knew he was presiding on the first defendant's case on the several encounters in chambers. The judge's evidence on the matter is that he probably saw the first defendant. The upshot of the evidence from the defence and the prosecution on this matter is that there was premise for that the judge knew the first defendant from this intercourse. Indeed there was premise for that knowledge. The question is whether that is enough for the inference that the judge knew the defendant and that the judge was deciding in a matter involving the defendant. In my, judgment, it is only just enough and, therefore, insufficient. It cannot be, in my judgment, that a judge, who attends to many chamber applications, just as others who have to deal with many people on a daily basis, would register all who appear before him. The suggestion that this was something so serious that the judge should have remembered details of it, which we consider generally later, does not arise at this stage.

On the first count, therefore, while there was some discussion, on the evidence, it has not been established beyond reasonable doubt that the offer for lower rent was for the judge to decide in the first defendant's favour in the matter in which the first defendant was a party. The prosecution has to prove beyond reasonable doubt that the offers for rent were for the judge to decide in the first defendant's favour in the matter involving the first defendant. On the overall evidence, the state has failed to discharge that burden. The most that the prosecution has done is establish a premise for it. The first defendant's explanation, which, in my judgment, on the authority of Gondwe v Rep, is reasonably true, is that there was a bargain. This undermines the prosecution's case. On the evidence before both sides, there was a genuine bargain on the rentals. The first defendant on balance of probabilities establishes that the discussions could have been conducted in that spirit.

The second count

On the second count, it may be useful again to narrow the issues for determination. On this count the prosecutions theory is that the first defendant offered Justice Mkandawire at Mwaiwathu

Private Hospital a poultry division of I Conforzi for the judge to decide in the first defendant's favour in a matter concerning the first defendant. The judge and Mr. Suleman agree on the encounter and the subject matter of the conversation: the poultry division of I Conforzi. They, naturally, disagree on the contents of the conversation, the first defendant denying that he, as the judge alleges, offered the judge a poultry division of the I Conforzi for the judge to decide in favour of the first defendant in a case before the judge. The first defendant's opens up a defence that the judge is the one who solicited K3, 000, 000 from the first defendant for the judge to rule in the first defendant's favour.

The judge's testimony on this is that, on a brief encounter at Mwaiwathu Private Hospital, the first defendant offered him a poultry division of I Conforzi Ltd. When this happened, in the earlier encounter, the first defendant, pointing to the Gurmair Garments Ltd Building, had specifically said to the judge, "You remember that case, the Gurmair Garments case? That is the building. You see the thing is locked up, it has been locked up for some time." This is the time when it dawned to the judge that the first defendant was up to something because the judge was seized of the Gurmair Garments case. So when the first defendant offered the building to him at Mwaiwathu Private Hospital, although the first defendant, much like, in the first case, did not say that it was so that the judge would decide in his favour, it was in the context of both the judge and the defendant knowing that the judge and probably the first defendant were involved in the matter. It is also useful to notice that the offer here was significantly different. In the judge's words, the first defendant said: "Do you know the Conforzi Poultry unit? . . . I am making arrangements to buy that. If I buy it I will give it to you?" The judge's testimony on this is that the offer of a gift of this magnitude was in the context of the case that to both of them was now known to involve them.

The cross-examination centred on that the first defendant could not have made such an offer at Mwaiwathu Private Hospital. First, that the first defendant could not make such an offer with all the people around at the particular place at the hospital. In ordinary human intercourse, I find no reason why in those circumstances and place the first defendant could not make such an offer. The reverse could only be based on a generalization that people could not make such an offer in a place where there are people who generally mind their own business. Such a generalization cannot be supported by human experience and knowledge. One must remember that since the meeting at the farm, a meeting of considerable duration, the defendant met the judge again and had a whole tour at the British African Tobacco Ltd, at the first defendant's workplace and at butchery. There was a relationship developing. To my mind, on the basis of the relationship developing, it is very probable that the first defendant could make such an offer. The defendant, knowing the gravity of the matter, could not have been shouting for all and sundry to hear. Almost, the same reasoning applies to the second aspect of cross-examination to undermine the judge's testimony.

Mr. Banda, SC, suggests that the first defendant could not have made such an offer at that place because there were other places and situations more condign where the first defendant could make such an offer. In my judgment, I do not think how this aspect could undermine the judge's testimony. The calculation was not in the judge's mind. The judge, on his testimony, had only a

faint suspicion based on the first defendant's reference to Gurmair Garments Ltd when passing by the company. The prosecution and indeed the judge could not answer why the first defendant decided to strike when he struck. I have a bit of difficulties thinking that the first defendant could not make the offer at such a place. Human experience shows that crime and proof of crime are about opportunity. Certain opportunities are more condign for crime. Human experience shows that crimes may not be committed even in the best of opportunities. Yet crimes may be committed in the worst of opportunities. A tribunal of fact has, based on general considerations and credibility, to determine what happened in a particular case. Yes the first defendant did not make such an offer in the circumstances described earlier. When an opportunity arose, albeit not as good an opportunity, according to the judge, the first defendant made the offer to the judge.

There is more in the particular case why the offer could be made at the Mwaiwathu Private Hospital. The conversation was made in the context of known facts that even a bystander would not know. Only the defendant and the judge would know. It is not, from the judge's evidence, that the first defendant blurted the whole story with the offer of the bribe. I quoted the exact words the first defendant used. They show that only those who appreciated the context could understand them. Consequently, they could be said in the presence of bystanders without the bystanders having a clue of what was being intended. The judge must be telling the truth because if he were fabricating, he would have mentioned a proper and condign place consistent with the fabrication. He could not mention an obscure place.

The argument that the first defendant could not have made the offer on the second count because the first defendant had not yet bought I Conforzi and was just at the time a hopeful bidder is equally easy to dispose on the evidence. I have looked closely at the judge's testimony on this point. It is very obvious from the judge's testimony that the first defendant's offer referred to a future event. It is not that at the time of the conversation the sale of I Conforzi already occurred. Moreover, the first defendant's evidence on this point clearly points to that the offer could not have been based on the actual purchase occurring.

The first defendant's evidence on this point is denial that there was the offer the judge suggests. He contends the judge mentioned a rumour that the first defendant's concern was buying I Conforzi. The judge, according to the first defendant, worried that that would affect the judge's poultry business. The first defendant assured the judge that if he bought, confirming the futurity of the purchase, the market was big enough. The first defendant, therefore, according to his version of events, never offered the judge a poultry division of I Conforzi Ltd. Up to this point, the defendant's testimony confirms a few things. First that there was a discussion concerning a poultry division of I Conforzi Ltd. Secondly, at that point there is but a rumour about the sale of I Conforzi Ltd. Thirdly, there is confirmation that a sale is pending rather than that it has occurred because of the reassurances to the judge.

The question is, up to this point who is telling the truth? I can say with certainty that the truth is with the judge judging from demeanour and the coherency and consistence in the judge's version of events as opposed to the first defendant's version. Of course, there are lapses in the judge's

memory of the dates of the occurrence of events. This particular event occurred. There is no dispute about the subject matter of the discussion. The date is peripheral to the matter. The judge is telling the truth on the occurrence of the events and the subject matter of the discussions. If we end at this point of the discussions at Mwaiwathu, the judge, on his version of events, left the place a sad man at the suggestion of the corruption. On the first defendant's version of the event, the judge was assured there would be no threat to the poultry farm. Observably, this version of the events up to this point, namely that the judge mentioned the rumour and the defendant's assurances, was never put to Justice Mkandawire. The judge was cross-examined at length on this event. The first defendant's version of events and conversations were never put to the judge.

It is when one considers the first defendant's version of events after the Mwaiwathu Private Hospital from the perspective of the matters put to Justice Mkandawire in cross-examination when problems multiply. One purpose of cross-examination is to put the case of the cross-examining party to the other side. The first defendant told the court that later that evening the judge called him suggesting that the judge could help the first defendant in the case if he gave him K3, 000, 000. It is said the judge had said that the first defendant had just been awarded K15, 000, 000 and there was no harm in sharing the money. The matter of K3, 000, 000 was put to Justice Mkandawire but in a very interesting context, I must say. The suggestion from the first defendant's evidence is that this offer was made in the evening after Mwaiwathu or at any rate not at the farm.

The case put to the judge was that he was the one who first discussed the case with the first defendant. The case put to the judge was that from the beginning the judge asked for money, K3, 000, 000, from the first defendant to finish his farm. The case put to the judge was that because of this offer the judge invited the first defendant to the farm to inspect the produce. The case put to the judge was that the matter was adjourned from time to time because the judge was waiting for the first defendant to make the payments. Of course, the judge denied all this. What is important, however, is that the telephone conversation and the contents of the conversation of the evening after the Mwaiwathu Private Hospital were not put to the judge. There is grave inconsistence in when the K3, 000, 000 offer was made to the judge between what was put to the judge and what came in the testimony. There is some levity in certain aspects of the first defendant's suggestions on what actually happened. The suggestion that the judge said that he wanted to share the proceeds of a distress of K15, 000, 000 the first defendant obtained from Gurmair Garments Ltd is baffling. Moreover, the first defendant only realized K5, 000, 000. It is curious that the judge would request K3, 000, 000.

On the whole, I found the judge more credible by his demeanour, the coherence and consistency in his testimony and the evaluation of the whole case. If there is any truth on what happened on the second count, it is that the first defendant offered the judge the poultry division of I Conforzi Ltd. I think the judge is more truthful because, as we have seen, in relation to this offer, the judge is adamant that this time round the first defendant spoke of the offer in the context of both the judge and the first defendant knowing the judge was presiding in the Gurmair Garments matter.

In examination-in-chief the judge said, much like in the first case, that the first defendant never said that the offer was made so that the judge should decide in the first defendant's favour in the matter the judge was presiding. Having found that the first defendant offered to give the poultry unit of IC Conforzi, much like in the first count, the court has to determine whether the offer was such that the judge was to decide in the first defendant's favour in the case the judge was presiding. What was said in the first count applies mutatis mutandis. In the absence of express words, that intention bases on circumstantial evidence. Only that in this count, on the facts and the evidence, there is more for the inference that the offer was intended to influence the judge in the Gurmair Garments case.

In relation to the first count, it was unclear whether the judge and the first defendant knew each other or knew that anyone of them was involved in the Gurmair Garments case. Moreover, the offer there was for lower rent, a tenancy was in the offing for which the judge was to pay. Both these aspects and others cast some reasonable doubt in my mind whether the offer was with the case in mind. I thought that on the facts, while the first defendant could have wanted to influence the judge, the facts were also consistent with a genuine tenancy. In dealing with the first count, I explained the difficulties of inferring to the contrary and suggested that all depends on the facts and that there should be more in every way for the inference that from an offer of the like here the defendant intends to influence the judge. I also suggested that that inference might be more readily made where the defendant making the offer knows that the judge is presiding in a case. Here by the time of the offer the first defendant and the judge knew that the judge was presiding in the matter. Moreover, there is more in the second case. The offer made was for a complete gift with nothing passing from the judge to the first defendant. Surely given that the first defendant knew that the judge was presiding over the Gurmair Garments case and that the first defendant was involved, such a huge gift can only have been to influence the judge to decide in the first defendant's favour in the case the judge was presiding. I find no reason for such a huge and consequential offer to the judge other than that the judge decide in a particular manner in a matter where, by the time, both the judge and the first defendant knew they were involved.

The third count

For the third count, the issues may also have to be narrowed. The judge referred to a specific event. The second defendant, who answers this count with the first defendant, concedes the occurrence. The dispute, again, relates to the content of the conversation, not the conversation itself. This of course eases the problem to deciding whether the truth lies in what the judge or the second defendant says. Again whether the judge was called to the office or went on his own, whether he went alone or in the company of the driver, who he met are only important to determine where the truth lies. On the third count, therefore, the questions are whether the second defendant said the words at all, said them in the presence of the second defendant's employees. The related question is, if the second defendant said the words on what basis would such words form a basis for convicting the first defendant on the third count.

Concerning whether the second defendant offered the judge as alleged, it is the testimony of the judge as against that of the second defendant. The judge's testimony on this is that the second defendant had been calling him for some time before the conversation the gravemen of the third count. The judge went for some other business to the second defendant's offices. The second defendant, who wanted them to speak a little further from those around, said, at the judge's insistence that they talk in that place in the office, that he, the second defendant, had been looking for the judge for some time. The second defendant introduced the Gurmair Garments case. The second defendant asked the judge if he knew the case. On the judge agreeing, the second defendant said to the judge that Shabir Suleman was offering K1, 000, 000 if only the judge would decide in favour of Shabir Suleman. The second defendant informed the judge that if the offer were agreeable, K500, 000 would be immediately available. Of course, the judge's immediate reaction was disgust. The second defendant, referring to the long business association with the judge, tried to persuade the judge. The judge refused and left the place.

The second defendant's evidence on the point is that indeed he met the judge at the office around the time under discussion. On the particular occasion, however, the second defendant ran into the judge when the judge was talking to the second defendant's employee. The second defendant talked to the judge briefly and innocuously and left the judge to converse with the employee. The employee gave evidence to the same effect. There was some discussion about whether the judge came alone or with a driver. Of course, whether the judge came with the driver or not is not a fact in issue for the offence for which the second defendant and the first defendant stand charged. The issue made out of it, however, is that if the judge is lying on this aspect and whether it is the judge who first called Mr. Osman, very little credence should be given to what he says overall. Given the nature of the second defendant's defence, I find no reason why the judge should lie on this point. Unlike the first defendant who suggested that the judge was soliciting the bribe or at least some money from him, there is no such suggestion from second defendant. In all fairness the judge was going to meet somebody to who the judge, by dishonoured cheques, owed money and had not returned a book to for a long time. The judge could not therefore ordinarily invite himself to the second defendant. The judge's suggestion that he went to the first defendant's premises for different reasons and only met the second defendant, who, according to the judge, was looking for him, makes more and better sense.

If, as is the case, the question is between the judge and the second defendant who is telling the truth, the answer, in my best judgment, is that the judge is telling the truth. I do so not only because of demeanour, where the judge was excellent, and that the judge was unscathed in cross-examination on the point. I also do so because the judge's version of the events looks more probable and credible. This credibility and probability does not only apply in relation to the judge's and the first defendant's evidence on this point. It arises from consideration of the whole case. The only relationship, as far as we know, between the first and the second defendant is landlord and tenant. Indeed the judge would know from what we now understand to be where the two offices are, namely, the first defendant's and Gurmair Garments Ltd's, that the second defendant was connected by a tenancy to the first defendant. One, however, would have extreme difficulty thinking why the judge would want to smear the second defendant, a mere tenant, with a bribery affecting the first defendant. The only reason, on the facts and the evidence, why the judge would want to smear the second defendant with a bribery concerning the first defendant is

that the judge owed the second defendant a book and money. That sounds implausible. In my judgment that the tenancy between the first and second defendant was sour adds more credence to the judge's story. The judge would not know that as to take advantage against the second defendant. I think there is truth in saying that the second defendant approached, as the judge suggests, and made the offer that he made.

It is necessary to examine the purport of the words the second defendant use. This is important for two reasons: first, to establish the second defendant's criminality; and secondly, to establish the first defendant's. What the second defendant said to the judge was that the first defendant would give K1, 000,000 to the judge if the judge decided in the first defendant's favour. There is a suggestion of a down payment. Under our criminal law, the person who actually commits the act or omission with the requisite state of mind is guilty of the offence whether such act or omission was counseled or procured at the aegis of another. It would matter less therefore in this case, in so far as it is the second defendant who made the offer to the judge, that, according to the statement made to the judge, the first defendant requested the second defendant to make the offer. The second defendant is the principal offender. The question, which arises then, is whether the first defendant can be guilty of this offence .

It is very easy to see that if the first defendant is convicted on the third count it would be because of the statement by the second defendant implicating the first defendant. That is why it is important to understand the nature of the statement that the second defendant made to the judge. If the statement is understood as a confession of the crime, unless the first defendant adopts it, it is inadmissible against the first defendant if its purport, which certainly it is, is to show that the first defendant is guilty of the offence in the third count. The statement however should not be so understood. This statement is not a confession. A confession by definition is an admission by the person accused of the crime that he or another, who adopts the statement, committed a crime. A confession, therefore, presupposes that the offence has been committed. There cannot be a confession of a crime not committed. The words that the second defendant used are the commission of the crime. The suggestion about the first defendant's involvement is part of the crime. They, as statements, are admissible against the first defendant on two principles of law excepting them from the rule against hearsay evidence.

The statements are admissible first as part of the res gestae. The statement was so interwoven and proximate to the commission of the offence as to comport the necessary contemporaniety necessary for admission as an exception to the rule against hearsay. The second rule against the rule against hearsay on which these statements are admissible against the first defendant concern statements in the course of a conspiracy. The statements of one conspirator in the course of a crime are admissible under an exception to the rule against hearsay against other conspirators. Consequently, although there is no evidence, as is contended by both the first and second defendant, directly of the first and second defendant agreeing to the second defendant making the offer to the judge, on the two rules of evidence just considered, there is the second defendant's statement implicating the first defendant. There is a limit, however, to the extent to which statements of a conspirator can found a conviction against another conspirator. This must be apparent from this court's decision in Palitu and others v the Republic, Cr. App. No. 30 of 2001,

unreported, where this principle was considered. The court said:

"At common law therefore confession evidence is relevant and admissible unless excluded by another rule. One such rule excludes confessions obtained by duress. Even if not obtained by duress, as the trial court found, a confession under section 176, a codifying provision, is only evidence against the maker. The law is not any different for a conspiracy. Of course statements in the course or in furtherance of a common purpose are admissible as an exception to the hearsay rule under the res gestae rule. The statement must however be made in the course or in furtherance of the conspiracy and there must be independent evidence of the conspiracy. A confession at the police is clearly not made in the course or in furtherance of a crime R v Walters (1979) 69 Cr. App. R 115, 1200) and the judge must direct himself, if sitting alone, and the jury that the statements cannot provide a link between the defendant and the conspiracy (R v Blake (1993) Cr. App. R. 169)."

There is no independent evidence of a conspiracy or actual agreement save for the second defendant's statement. The statement therefore cannot be heard against the first defendant. It is only evidence against the second defendant.

Of course, the statement refers to the first defendant as the instigator of the crime. Shorn of this instigating aspect the statement stands alone and indicates a promise to the judge of money, however, acquired, to induce the judge to decide in the first defendant's favour. In law, that aspect of the statement attaching blame to the first defendant should be treated as a self-servicing statement and inadmissible in favour of the second defendant. Consequently, there was an offer and promise of gratification, as that term is understood in the Corrupt Practices Act, by the second defendant.

Conclusion

In my judgment it is not difficult to affirm the theory, which all this time has been the prosecution's, that the two defendants, to influence judge Mkandawire to decide in a matter involving the first defendant, offered the judge gratification. All, of course, begins with the matter before the judge concerning Gurmair Garments Ltd. For quite sometime Gurmair Garments Ltd, a tenant to Ishmael Properties, a concern in which the first defendant is a Manager, was in huge financial difficulties. The first defendant's property company is concerned about arrears of rent. Of course, there are assurances from Malawi Development corporation to which Gurmair Garments Ltd is a subsidiary guaranteeing the rentals. Somehow, when the matters came to the crunch, the first defendants property company decided to distress and actually distressed against Gurmair Garments Ltd. Gurmair Garments Ltd's property including heavy machinery is sold at K15, 000,000. The first defendant's property company recovers the arrears of rent and pays the legal practitioners legal costs. The liquidator of Gurmair Garments Ltd challenges the distress for reasons to which it is unnecessary to consider, the matter still

pending in the action that triggered the events that followed. The stakes are high for the property company. If Gurmair Garments Ltd were to succeed in the action before Justice Mkandawire, the property company would have to repay the arrears of rent of up to K5,000,000 and legal costs amounting to slightly above K2,000,000. This would exclude legal costs for defending the action and any damages recoverable as a result of the action. The matter is compounded by several adjournments. Both counsel for the liquidator and the first defendant are agreed that there were several adjournments most at the behest of the legal practitioners and some at the judges. It is important to state this because one aspect of the case put to the judge in cross-examination was that the judge adjourned the matter from time to time because he was waiting for payment, apparently delayed on the K3,000,000 that the judge solicited from the first defendant. On this concession by the legal practitioners it cannot be. The motivation, though generally irrelevant for proof of the crime, is easy to see.

One point Banda, SC, urged fervently for the first defendant is that the first defendant need not have wanted to influence the judge. Senior counsel raised two premises: that the arrears of rent were already guaranteed and that the first defendant's legal practitioners assured the first defendant he had a pretty good case. The Malawi Development Corporation's assurance had on the facts been made much earlier and, as Mr. Kaliwo points out, probably lapsed. It is curious that when matters came to where they were, namely, that Gurmair Garments Ltd was not paying the rent, recourse was not had to the guarantee but distress under the lease. It could very well be that the guarantee was not a viable option. It certainly was not as viable now that the first defendant distrained for rent with all prospect of paying huge sums for legal costs and damages and restoring what had already been collected. On the latter, the adage is a bird in the hand is worth more than two in the bush. These grim prospects may not easily be assuaged by assurances of a good case.

In coming to this conclusion, I have considered fully defense counsel's formidable submissions about the character of the judge. As Mr. Kaphale submitted the second defendant put his character on the line so that he could be allowed to cross examine Justice Mkandawire and introduce evidence affecting the character of the witness. Of course the judge's cheques were dishonoured. Matters of credibility and character are essentially matters of fact for the tribunal of fact. The proper evaluation of character and weight to attach to the evidence of a witness whose character is questioned are matters for the tribunal of fact. Human experience tells us that witnesses of otherwise good character can tell lies. Human experience also tells us that people whose character is questioned can honour truth. Ultimately the tribunal of fact has to make the best judgment on the particular case, facts and witnesses. On the facts as I understand them the judge's presentation of dishonoured cheques had no, if not minimal, effect on the evidence. On the other hand, the dishonoured cheque notwithstanding, the judge was a better witness and his testimony more credible. It may be in future a story of much heroism that a judge whose creditworthiness was at issue blew the whistle, so to speak, against those, who in disregard of honesty, wanted to influence him in a decision involving those bent to undermining the judge's integrity and credibility.

Mr. Kaphale submits concerning many inconsistencies in the judge's testimony. Certainly,

inconsistencies, if not explained, undermine the testimony of a witness or a particular case. Not all inconsistencies should have this result. Certainly, grave inconsistencies, if not explained should have this result. Moreover certain grave inconsistencies could have different results. Proof is about facts in issue and not about everything else. Consequently grave inconsistencies in the facts in issue have, as Mr. Kaphale suggests, to be explained. The facts in issue in this matter are spelled out in the charge. Each of the three counts raises the facts in issue. The prosecution meticulously gave crisp and detailed evidence on the facts in issue of each of the counts. There was much evidence from both sides on the specific issues of fact raised on each of the counts. On the evidence on each count there is no inconsistency or conflict in the judges testimony. On the face of it therefore there are no inconsistencies to undermine the prosecutions case. Mr. Kaphale and Mr. Banda, SC, submit strongly that there is inconsistence on the sequence of events particularly whether it is the Mwaiwathu Private Hospital or the event at Green Feed that occurred first. The sequence of events was not the fact in issue. The inconsistency would therefore only relate to the credibility of the witness and the effect that might have on the overall testimony. On the former, I found the judge a credible witness. However undermining the cross-examination was on this aspect, re-examination re-enforced the sequence of events. Moreover this inconsistence far from undermined the facts in issue. There is no dispute from the defendants that the three episodes the basis of these three proceedings occurred. The only dispute that I know was as to what actually transpired. The sequence of events has no consequences. Consequently, the inconsistencies and conflicts have no bearing overall on the judge's testimony.

Finally there was much ado about the judge forgetting some useful detail on the matter. Poor memory undermines the accuracy of the information. A witness who cannot remember or remembers very little is unlikely to be of any help to a tribunal of fact whose duty to do justice depends on the accuracy and veracity of information necessary for determination. Certainly the judge could not remember a number of things. He came poorly on the dates and minute detail. He was, however, candid about his failure to remember all detail. The judge, however, never deserves the very forgetful witness that the defence caricatured. The judge was fully alert and remembering exciting details about consequential conversations that this court has listened to. At the end of the day its these details that proved important. The dates when the events occurred were, on the nature of the allegations, inconsequential. While in practice the dates when the events occurred are included in the charge, they are not important unless of course they are in issue. On the nature of the allegations, the exact dates when what happened happened proved inconsequential.

Mr. Banda, SC, therefore argued generally that the events could not have occurred in that time because, for example at the time of the alleged conversations the premises at BAT grounds had already been sold and the property company of the first defendant was not at a particular time a serious bidder of I Conforzi Ltd. This argument is unimportant given that on the prosecution and the defence evidence there is no doubt as to the occurrence of the events. In some respects there is evidence from both sides confirming that whatever dates it was that the events occurred, the events occurred sometime before the judge eventually recused himself. Consequently, the question, a puzzling one why the judge continued to preside the case when these offers were made turns out on the chemistry and stamina of the judge. The judge's explanation for why he

took long to report is that he thought the earlier overtures casual and never took them seriously. Mr. Banda, SC, thinks that the crime, on this assessment of the judge of the first defendant's overtures, never occurred. The judge, however, subsequently took the matters, as he should have done, seriously. Of course the judge opined that for an offence as grave as the one under consideration he should have reported the matter within 24 hours. Mr. Kaphale and Mr. Banda, SC, want this court to take the judge on his words concerning the attitude of the judge to the allegation and the time the judge would have reported the matter. However important these statements are to the defence case, they are matters of opinion. Opinions are not facts. Except for expert opinion, the court never takes opinions from witnesses. Opinions are matters for a judge. There would be an affront to justice if in all cases, subject of course to limitation statutes and laches, the court refused to do justice because a witness for some reason never acted in the time he should. There will be cases, and the present one is not one of them, where such tardiness for many reasons undermines justice and, in the interest of justice, the court should deprecate a witness who does not act promptly.

On the whole therefore I find that the state has not established to the requisite standard the guilt of Mr. Suleman on the first count. The state has established the guilt of Mr. Suleman on the second count. The state has not established to the requisite standard Mr. Suleman's guilt on the third count as amended. I therefore acquit Mr. Suleman of the offence of corrupt practices with a public officer on the first and third counts. I convict Mr. Suleman on the offence of corrupt practices with a public officer on the second count. Finally I find Mr. Osman guilty of the offence of corrupt practices with a public officer on the third count. I convict him accordingly.

Made in Open Court this 30th Day of March 2004.

D F Mwaungulu

JUDGE