



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

CRIMINAL CASE NUMBER 26 OF 2003

THE REPUBLIC

-VS-

RODRICK IBO CHIZINGA

LIGHTON MAGANIZO PHANGIRE

G.D.C HOLDINGS LIMITED

**CORAM: HONOURABLE JUSTICE F.E KAPANDA**

Nampota of Counsel for the State (ACB)

Msisha SC of Counsel for the 8<sup>th</sup> Accused (GDC)

Nyimba of Counsel for 1<sup>st</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Accused

PJS Chirwa of Counsel for 2<sup>nd</sup> and 9<sup>th</sup> Accused

Chalamanda of Counsel for 1<sup>st</sup> Accused (Rodrick Ibo Chizinga)

Kalaya of Counsel for 7<sup>th</sup> Accused ( Lighton Maganizo  
Phangire)

**Place and Dates of hearing:** Blantyre, 2<sup>nd</sup> October 1998, 3<sup>rd</sup> October  
1998, 19<sup>th</sup> October 1998, 12<sup>th</sup> October 1998, 12<sup>th</sup> November 1998, 9<sup>th</sup>

December 1998, 10<sup>th</sup> December 1998, 18<sup>th</sup> January 1999, 3<sup>rd</sup> February 1999, 29<sup>th</sup> March 1999, 12<sup>th</sup> April 1999, 26<sup>th</sup> May 1999, 27<sup>th</sup> July 1999, 16<sup>th</sup> August 1999, 17<sup>th</sup> August 1999, 14<sup>th</sup> September 1999, 15<sup>th</sup> September 1999, 16<sup>th</sup> September 1999, 21<sup>st</sup> October 1999, 28<sup>th</sup> October 1999, 14<sup>th</sup> December 1999, 6<sup>th</sup> March 2000, 8<sup>th</sup> March 2000, 17<sup>th</sup> May 2000, 19<sup>th</sup> May 2000, 24<sup>th</sup> June 2000, 25<sup>th</sup> June 2000, 4<sup>th</sup> July 2000, 16<sup>th</sup> October 2000, 17<sup>th</sup> October 2000, 30<sup>th</sup> October 2000, 31<sup>st</sup> October 2000, 31<sup>st</sup> October 2000, 1<sup>st</sup> August 2001, 12<sup>th</sup> September 2001, 26<sup>th</sup> May 2003, 28<sup>th</sup> May 2003, 29<sup>th</sup> May 2003, 30<sup>th</sup> May 2003, 12<sup>th</sup> November 2003, 14<sup>th</sup> November 2003, 15<sup>th</sup> December 2003, 7<sup>th</sup> January 2004, 13<sup>th</sup> February 2004, 19<sup>th</sup> March 2004, 25<sup>th</sup> November 2004, 25<sup>th</sup> February 2005, 28<sup>th</sup> March 2005, 18<sup>th</sup> April 2005, 19<sup>th</sup> April 2005, 22<sup>nd</sup> April 2005 and 16<sup>th</sup> May 2005.

**Date of Judgement:**

May 2006

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## **JUDGEMENT**

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**Kapanda, J:**

**INTRODUCTION:**

The Anti-Corruption Bureau (the ACB) instituted these criminal proceedings against a number of Defendants. Indeed, at the commencement of these criminal proceedings in 1998 there were nine Defendants. At the time the prosecution's case was closing there remained seven (7) accused persons. There are now three (3) criminal Defendants who are still answering charges preferred by the State. The said three accused persons are; Rodrick Ibo Chizinga, Lighton Enos Maganizo Phangire and GDC Holdings Limited (Hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Accused respectively).

## **THE INDICTMENT:**

There are varying counts preferred against the Accused persons herein. The said counts in respect of each of the Defendants are as follows:

### **1<sup>st</sup> Accused (Rodrick Ibo Chizinga)**

The State has charged Rodrick Ibo Chizinga with three offences under the Corrupt Practices Act. It is the State's allegation that all the three offences were committed at Mwanza. In the first count, he was charged with the offence Corrupt Practices with Public Officer as provided for in Section 24 (2) of the said Corrupt Practices Act. The second count relates to the offence of attempting to give gratification to public officer as is stipulated in Section 35 of the Corrupt Practices Act. Lastly, the first Accused is indicated with the offence of misleading Officers of the Anti-Corruption Bureau which is an offence created in Section 14 (b) of the Corruption Practices Act. The State alleges that the first two offences were committed on or about the first day of September 1997, whilst the last offence is said to have been committed on 1<sup>st</sup> April 1998. As regards the first count of Corrupt Practices with Public Officer, the State alleges that the first Accused corruptly gave gratification in the form of cash to Christopher Msinja, a Police Officer, for the said Msinja to forbear from conducting a detailed check of foreign currency and unknown suspected individuals on GDC Holdings Limited's foreign registered trucks.

In the second count, the state alleges that the first Defendant attempted to give gratification, in the form of cash to Christopher Alex Msinja, Lekani, Sergeant Kulumbadzi, Constable Mwakikunga and Detective Nkuka, all Police Officers, for the said Police Officers to forbear from conducting a detailed check of the foreign currency and unknown suspected individuals on GDC Holding Limited's foreign registered trucks.

Lastly in the third count, the first Defendant is accused of misleading the Officers of the Anti-Corruption Bureau. The State is alleging that the first Defendant misled officers of the ACB by making fake statements namely; that GDC Holdings Limited was paying toll fees for all its foreign registered trucks and that the contents of the memoranda the first Defendant was

writing to his superiors were false in material particular when in fact GDC Holdings Limited was not paying toll fee for all its foreign registered trucks and that the contents of the memoranda the first Defendant was writing were in fact true.

2<sup>nd</sup> Accused (Lighton Enos Maganizo Phangire).

Lighton Enos Maganizo Phangire, herein after referred as the 2<sup>nd</sup> Defendant, stands charged with two offences under Section 24 (1) of the Corrupt Practices Act. The offences are alleged to have been committed between the period of 1<sup>st</sup> April 1996 and 31<sup>st</sup> July 1998. Further, the particulars of offence indicate that the offences were allegedly committed at diverse places, to wit, Mwanza, Blantyre and Balaka. Indeed, the 2<sup>nd</sup> Defendant is charged with two counts of Corrupt Practices by Public Officer. In the first count the state charges that the 2<sup>nd</sup> Defendant, at Mwanza Boarder and at Balaka, corruptly accepted from GDC Holdings Limited gratification in the form of cash amounting to K234, 160.00 and entertainment in the form of parties. It is alleged that the said cash and entertainment were allegedly accepted by the 2<sup>nd</sup> Defendant as an inducement for forbearing to carry out detailed weighing of GDC Holding Limited trucks and checking of payment of toll fees in excess of U\$220,000.00 by the said GDC Holding Limited. The State further alleges that the said weighing of trucks and checking of payment of toll fees is a concern of the Road Traffic Commission.

Lastly, the second Defendant is alleged to have corruptly solicited from DGC Holdings Limited, at the premises, gratification in the form of cash amounting to K234,160.00 as an inducement for him to forbear to carry out detailed weighing of GDC Holdings Limited and checking of payment of toll fees in excess of U\$220,000.00 by the said GDC Holdings Limited. Again the prosecution alleges that the said weighing and checking of payment of toll fees is a concern of the Road Traffic Commission.

3<sup>rd</sup> Accused (GDC Holdings Limited)

GDC Holdings Limited is the 3<sup>rd</sup> Defendant in this Criminal matter. The State preferred four counts against the 3<sup>rd</sup> Defendant. The main counts are three and the fourth count is an alternative. In point of fact, in the first three counts in the charge sheet, the 3<sup>rd</sup> Defendant is charged with the offences of Corrupt Practices with Public Officer's provided under Section 24 (2) of the Corrupt Practices Act and in the alternative count the offence preferred against the 3<sup>rd</sup> Defendant is the one of Official Corruption obtaining in Section 90 (b) of the Penal Code. The offences are said to have been committed between 1<sup>st</sup> April 1996 and 31<sup>st</sup> July 1998 at Balaka and Mwanza.

In the first three counts the 3<sup>rd</sup> Defendant is alleged to have corruptly given gratification to Phangire in the form of cash amounting to K234,160.00 and entertainment in the form of parties, to a number of officers, viz. Raison Enos Mwenitete, Lighton Enos Maganizo Phangire and Selwin Petros Simfukwe and some unknown public officers, so that there could forbear from carrying out their respective official duties<sup>1</sup>.

<sup>1</sup> The counts preferred against the 3<sup>rd</sup> accused and the particulars of the offences are as follows;

**Offence (Section and Law)**

Corrupt Practices with public officer, contrary to Section 24 (2) of the Corrupt Practices Act.

**Particulars of Offence**

1. **GDC HOLDINGS LIMITED** between the period 1<sup>st</sup> April, 1996 and 31<sup>st</sup> July 1998 at Mwanza Boarder in the District of Mwanza corruptly gave gratification in the form of cash amounting to Two hundred and thirty four thousand one hundred and sixty Kwacha (234,160) and entertainment in the form of parties to Raibon Enos Mwenitete and some other unknown public officers as an inducement for the said Raibon Enos Mwenitete and such other unknown public officers to forbear from collecting toll fees in excess of two hundred and twenty thousand United States Dollars (US\$220,000), an equivalent to eight million six hundred Malawi kwacha (8.6 Million) from GDC Holdings Limited a concern of the Department of Customs and Excise and the Ministry of Transport.

**Offence (Section and Law)**

Corrupt Practices with public officer, contrary to Section 24 (2) of the Corrupt Practices Act.

**Particulars of Offence**

2. **GDC HOLDINGS LIMITED** between the period 1<sup>st</sup> April, 1996 and 31<sup>st</sup> July 1998 at mwanza Boarder in the District of Mwanza and at Balaka in the District of Balaka corruptly gave gratification in the form of cash amounting to Two hundred and thirty four thousand one hundred and sixty Kwacha (234,160) and entertainment in the form of parties to Lighton Enos Maganizo Phangire, and some other unknown public officers as an inducement for the said officers to forbear from carrying out a detailed weighing of GDC Holdings Limited and from checking payment of toll fees in excess of two hundred and twenty thousand United States Dollars (US\$220,000), an equivalent to eight million six hundred Malawi kwacha (8.6 Million) by the said GDC Holdings Limited a concern of the Road Traffic Commission.

## **FACTUAL BACKGROUND**

### Institution of investigations

On the 17<sup>th</sup> of March, 1998 the Anti-Corruption Bureau received a complaint of alleged corrupt practices by GDC Holdings Limited (hereinafter called "GDC"). The allegation was that GDC was bribing officers from, among others, Customs and Excise, Department of Road Traffic Commission and Immigration at Mwanza border. It was further alleged that GDC was bribing the said officers so that its foreign registered trucks enter Malawi without paying the necessary duties (hereinafter called "toll fees").

### *Procedure at Mwanza Border*

The following appears to have been established by the investigations that were conducted by the ACB.

#### Customs

The Ministry of Transport and Communications was under authority

#### **Offence (Section and Law)**

Corrupt Practices with public officer, contrary to Section 24 (2) of the Corrupt Practices Act.

#### **Particulars of Offence**

3. **GDC HOLDINGS LIMITED** between the period 1<sup>st</sup> April, 1996 and 31<sup>st</sup> July 1998 at Mwanza Boarder in the District of Mwanza, corruptly gave gratification in the form of cash amounting to Two hundred and thirty four thousand one hundred and sixty Kwacha (234,160) and entertainment in the form of parties to Salwin Petros Simfukwe and some other unknown public officers as an inducement for the said Selwin Petros Simfukwe and such other unknown public officer to expedite the checking of travel documents for GDC Holdings Limited drivers and unknown suspected passengers on GDC Holdings Limited trucks a concern of the Immigration Department

#### **Offence (Section and Law)**

Official Corruption, contrary to Section 90 (b) of the Penal Code as read with Section 24 of the Penal Code.

#### **Particulars of Offence**

4. **GDC HOLDINGS LIMITED** between the period 1<sup>st</sup> April, 1996 and 31<sup>st</sup> July 1998 at Mwanza Boarder in the District of Mwanza, corruptly gave Raibon Enos Mwenitete, a person employed in the Public Service, cash amounting to Two hundred and thirty four thousand one hundred and sixty Kwacha (234,160) and entertainment in the form of parties on account of the said Raibon Enos Mwenitete having forborne to collect toll fees in excess of two hundred and twenty thousand United States Dollars (U\$220,000), an equivalent to eight million six hundred Malawi kwacha (8.6 Million) from GDC Holdings Limited.

to collect toll fees in respect of all foreign registered truck entering the Malawi border. In this regard the Ministry of Transport and Communications engaged the Department of Customs and Excise to undertake the collection exercise. It would appear that there were other players in the exercise. These were the Road Traffic Commission, the Malawi Police and the Department of Immigration. As it were, the Police function was to check for foreign currency and unknown suspected foreign individuals crossing the border including those on GDC foreign registered trucks and other trucks at Mwanza border. The Immigration department was charged with the responsibility of checking for passports and other travel documents of those travelling on these trucks. The Road Traffic Commission was checking for the weights of those vehicles and whether the trucks carried the necessary MOTC's

#### Issuance of MOTCs

It is in evidence that when a foreign registered truck arrived at the border, personnel manning the truck were required to complete Ministry of Transport Certificates (hereinafter called "MOTCs"). The certificates, among other things, provided for a date of entry of the truck, the destination of the truck, the amount payable in toll fees and the registration number of the truck. A copy of each completed certificate would then be given to the truck personnel and another copy would remain at the border.

#### Arrangement of Payment of toll Fees by GDC

Payments were made by GDC in Dollars at the Customs Head Office in Blantyre. The payment was recorded in a registrar that was maintained at the border by the Officer-in-Charge of Customs. Each time a GDC truck crossed the border, the GDC personnel were preparing Toll Fees Control Sheets (hereinafter called the "TFCs") enumerating the list of trucks that cross the border. On the basis of the TFCs the Officer-in-Charge would then deduct from the register the equivalent of the toll fees in the toll fee register. It was an outstanding instruction that as soon as the Toll Fees are depleted, Customs officers should not allow GDC trucks.

Further, the state offered testimony to the effect that when the TFCs were presented by GDC, the Officer-in-Charge of Customs at Mwanza was required to do a verification exercise and thereafter stamp and sign the TFCs. Apparently, all TFCs were signed by the Officer-in-Charge for Customs who at the material time was Mr. Mwenitete.

#### The North Bound Sheets

Once trucks entered the border an officer from GDC, Mr. Rodrick Chizinga, one of the Defendants herein, was preparing a list of all trucks that had entered the border at the material time. The list was called North Bound Sheets (hereinafter called NBSs). These NBSs were being sent to his Head Office. Further, GDC was also preparing the TFCs for presentation to Customs at the Border. Investigations disclosed that the TFCs contained frequently fewer foreign registered trucks, which had entered the border than those appearing on the NBS. The NBS were for internal use. In other words, there were discrepancies between the TFCs and the NBSs. The result was that it appeared that lesser Toll Fees shown as having been paid for the said foreign registered trucks. Indeed, in the eyes of ACB lesser Toll Fee was discovered as having being collected by the Department of Customs and Excise.

#### “The Make Plan documents”

There is evidence that suggests that after the TFCs were prepared, Mr. Rodrick Chizinga was preparing a hand written memorandum to the management of GDC, which was called “Make Plan”. The so called “The Make Plan documents” indicated the number of trucks in respect of which Toll Fees had not been paid; the amount actually due for payment; amount recommended for payment to public officers at the border and savings that would be realized thereby. In turn monthly goodwill requisitions would be prepared for payment to officers of various departments at the border. The officers shown on the document were those whose functions had to do with the crossing of GDC trucks at the border. Among them were Customs, Road Traffic, Immigration and Police.

It is said that as a result of the above practices, sums in excess of K8.6 million in Toll Fees were lost by Malawi Government between the period 1<sup>st</sup> April, 1996 and 31<sup>st</sup> July 1997 (see exhibit 51A and 51B). Moreover, it was put by the state that within the same period a so called goodwill in excess of K234, 160.00 was allegedly paid to public officials at the said Mwanza border.

The ACB further told this court that in the course of the investigations, Rodrick Chizinga told the Anti-Corruption Bureau officers that all Toll Fees due to be paid by GDC were paid and that information contained in the “Make Plan documents” was false. It is moreover the testimony of the prosecution that Rodrick Chizinga maintained that he made the payments because Chinthowa, who at that time was the operations manager but had died at the time when this matter was coming to court, promised him money.

The Defendants

The state, through the Anti-Corruption Bureau ((the ACB), preferred



a number of counts against the Defendant's herein<sup>2</sup>. At the commencement of these proceedings the ACB had wanted to prosecute some of the Defendants under some provisions of the Penal Code of the laws of Malawi. The Court adjudged that the ACB had no mandate to prosecute for offences under the Penal Code. The Defendants are now standing charged with offences provided for under the Corrupt Practices Act<sup>3</sup>.

The state closed its case. It then remained for this Court to determine if there were corrupt cases for each of the Defendants to answer. Of the nine Defendants there are now remaining seven (7) Defendants. The other two Defendants are no longer standing charged with any offence. Mr. Harvey Kapoya Munthali is discharged on account of his illness while Mr. Syprian Zulu is no longer a defendant due to death. Accordingly the State withdrew the cases against Harvey Kapoya Munthali and Syprian Zulu.

The Court had entered pleas of not guilty in respect of each of the remaining Defendants. For this reason, it then became necessary for the State to offer evidence in support of the charges preferred against the said remaining Criminal Defendants. The State called thirteen witnesses.

### **Acquittal of some Defendants**

The Court has had the occasion to review the evidence adduced through these said thirteen (13) witnesses. From the testimony of these witnesses, the following are the trite facts that the State based its case against the Defendants:

The State avers that GDC Holdings Limited corruptly gave gratification to public officers. Further, the ACB asserts that Rodrick Ibo Chizinga attempted to corrupt Police Officer at Mwanza Boarder. Moreover, the State says that Rodrick Ibo Chizinga misled officers of the ACB and thereby committed an offence under the said Corrupt Practices Act.

As regards, the other Defendants, who were Public Officers, the record will show that the State attempted to demonstrate that these other Defendants received gratification from DGC Holdings Limited. The said gratification, so the evidence went, was said to have been in the sum of K234,160.00 cash and entertainment in the form of parties. The testimony did not show how much each one of them received as gratification. Suffice to say that the State put up a global figure of the said sum of K234,160.00 as the total sum that GDC Holdings Limited is said to have given the said Public Officers at Mwanza Boarder.

The State further purported to show that Steve Marko Tsoka Banda, Harvey Kapoya Munthali and Syprian Zulu received gratification from Mwitha. I must say that there was no scintilla of evidence to prove that the above mentioned Defendants received any money from the said Mwitha. The witness the State called to prove this case retracted a statement he made to the ACB implicating the three Accused persons

<sup>2</sup> At the commencement of trial the Defendants were as follows; (a) Rodrick Ibo Chizinga (b) Steve marko Tsoka Band (c) Harvey kapoya Munthali (d) Syprian Zulu (e) Rainbon Enos Mwenitete (f) Lighton Maganizo Phangire (g) Selwin Petros Simfukwe (h) GDC Holding Ltd (i) Tonnex Duncan Mphepo. There are now in effect seven (7) Dendants.

<sup>3</sup> Act No. 18 of 1995

named above. The State then applied that he be treated as a hostile witness pursuant to the Criminal Procedure Evidence Code<sup>4</sup>. Since the witness was treated as a hostile, unless the law informs this Court to disregard his evidence. Indeed, as I understand it, whatever he said in his testimony was not evidence at all in this Court<sup>5</sup>. The above were the salient facts of the case by the State as obtained from the evidence on record. I was required to determine whether or not there was a prima facie case for the Defendants to answer. Indeed, at that stage of the proceedings the principle and only issue that was to be decided was *viz* whether there were charges for each, or any, of the Defendants to answer.

### **Consideration of the Issue**

The State contended that there was a prima facie cases for each of the nine Defendants to answer. The Defendants, through their Counsel, were of the view that the State had failed to establish a prima facie against each one of them. In point of fact they submitted that they had no case to answer.

As I understand it, the position at law is that a prima facie case is one which a reasonable Court properly directing its mind to the law and evidence could convict if no explanation is offered by a Defendant<sup>6</sup>. Further, this Court has authoritatively put it that a submission that there is no case to answer could properly be made and upheld where there has been no evidence to prove an essential element in an alleged offence or when the evidence offered by the State has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it<sup>7</sup>.

Turning to the instant case, my finding was that the State had failed to establish a prima facie case against the following Defendants *viz* Steve marko Tsoka Banda, Raibon Enos Mwenitete, Selwin Petros Simfukwe and Tonnex Duncan Mphepo. In my Judgement the State had failed to prove an essential element of the corruption in respect of these four Defendants i.e receipt of gratification in the alleged sum of K234,160.00 by any of these Defendants. Indeed, there was no evidence to suggest that they got part of this money. For all there was to it the said good will money was not made to a particular Defendant or Public Officer in these proceedings. Indeed, the witness conceded that they did not find any evidence that any of the above mentioned defendants received the alleged sum of K234, 160.00 or nay sums of money at all. Actually, the testimony of the state witness to the effect that good will payments were made to these officers had been discredited in cross examination. In fact this Court held the view that the fact that payment vouchers said goodwill was going to Mwanza Customs or Immigration or to Mwanza Weighbridge did not mean that it must have been the Officers-in-Charge of the Departments concerned or a named public officer in the mentioned Departments received the money. The State should have offered more that tendering the payments vouchers or the paid cheques. No single

<sup>4</sup> Section 230 of the Criminal Procedure and Evidence Code Cap 8:01 of the Laws of Malawi.

<sup>5</sup> Magombo and Phiri *V* Republic [1981 – 83] 10 MLR 1

<sup>6</sup> Chidzelo *V* Director of Public Prosecution 8 MLR 229

<sup>7</sup> Republic *V* Dzaipa 8 MLR 307

witness testified to the fact that the aforementioned defendants received any or part of the alleged goodwill money. Moreover, there was no proof offered to the effect that as a result of the said goodwill payment and parties the Defendants failed to collect toll fees or weighbridge fees or that passengers on GDC vehicles had their passports processed quickly on account of the alleged bribes.

As regards the evidence of invitation to parties, this Court held the view that the same could not be characterised as a bribe. In saying so I was alive to the strong submission by Mr. Msisha SC, that there was no evidence as regards how much was spent on each invitee so as to be caught by the provision of the said Corrupt Practices Act. Further, the Court agreed with the submission that since the value of the parties is not known it would not be possible to determine if the Christmas parties in relation to every invitee went over the threshold necessary to qualify them as gratification and remove them from the definition of casual gifts<sup>8</sup>.

By reason of the foregoing, it could not be said that the State had established a prima facie case against Steve Marko Banda, Rainbon Enos Mwenitete, Selwin Simfukwe and Tonnex Duncan Mphepo. Consequently, this Court acquitted Steve Marko Banda, Rainbon Enos Mwenitete, Selwin Simfukwe and Tonnex Duncan Mphepo of the offences of corruption they were charged with.

### **Facts of the case in respect of the remaining Defendants.**

As mentioned in the introductory remarks, there are now three Defendants remaining who are answering various charges of offences preferred by the State. The remaining Defendants elected to testify in their respective defences. It is now necessary that the Court should enumerate the facts of the case arising from both the testimony of State witness and the Defendants. I propose to set out the facts in respect of each Defendant separately. The said facts in respect of each Defendant as follows:

#### **Rodrick Ibo Chizinga (1<sup>st</sup> Defendant)**

The 1<sup>st</sup> Defendant is and was at all material times an employee of GDC Holdings Limited (the 3<sup>rd</sup> Defendant). The duty station of the 1<sup>st</sup> Defendant was Mwanza Border post. Further, it is not in dispute that the 1<sup>st</sup> Defendant was working as a Depot Supervisor for the said 3<sup>rd</sup> Defendant at the said Mwanza Boarder. He was the overall in-charge of operations at Mwanza Boarder but in particular his work involved seeing to

<sup>8</sup> See Section 3 of the said Corrupt Practices Act before amendment.

it that all the customs formalities in respect of GDC Holdings Limited registered trucks has been complied with at the said boarder.

#### Purported corruption of Police Officers

As already seen, the State alleges that Mr. Chizinga gave gratification to a Police Officer and that he attempted to give gratification to some named Police Officers based at Mwanza police Station. The said Officers, Mr. Msinja, was paraded before this Court to testify on this count.

It was his evidence that sometime in September 1997, the 1<sup>st</sup> Defendant brought an envelope to him. The envelope, he further said, contained the sum of K1050.00 in amounts already apportioned to individual officers at Mwanza Police Station. Purported to testify, the Defendant denies giving an envelope to Mr. Msanja. However, he admitted giving an envelope to a certain Constable Tepeka, who was then based at Mwanza Police Station for on ward mission to the Officer in-charge (Mr. Msinja). Further, it is in evidence that the Defendant neither knew the contents of the said envelop nor made any enquiries as to what was in the envelope. Moreover, it is on record that the said envelop had been give to him by the late Mr. B. Chinthowa and it was sealed. He continued to say that he handed over the said envelop to a certain Woman Constable Tepeka and not PW5 one Mwakikunga that was referred to in his testimony.

Payment of toll fees: On misleading ACB Officers on payment of toll fees.

As will have already been observed, the ACB purported to show that the 1<sup>st</sup> Defendant herein (Mr. Chizinga) misled its Officers. The State's case is that Mr. Chizinga told ACB officials that all toll fees, in respect of all vehicles belonging to his employees, had been paid when in point of fact some trucks were not in fact paid for.

The Defendant does not deny that he was responsible for the payment of toll fees. He further informed the Court that he would write reports on the said payment of toll fees and submit same to his bosses in Blantyre. However, the 1<sup>st</sup> Defendant denied that he lied to ACB Officers on the payment of the toll fees. Actually, on being show the northbound sheets, he admitted that although the vehicles appearing on such sheets did not appear on the toll fee control sheets that in itself did not mean that toll fees had not been paid in respect of the said vehicles. It was further put in evidence by him that the non-appearance was only in furtherance of a scheme devised by his immediate boss to defraud the employees, GDC. Indeed, it was offered in evidence by the 1<sup>st</sup> Defendant that some brands appearing on the North Bound Sheet do not appear on the toll fees control Sheet on orders from Mr. Benson Chinthowa, but that the non-appearance is no proof that the too fees had not been paid.

Finally, the 1<sup>st</sup> Defendant testified that although some trucks were not indicated on the control sheet as having paid toll fees, the truth of the matter is that such fees were paid. In this regard, the 1<sup>st</sup> Defendant said that the reliable documents to prove or disapprove this would be T10 TC3 forms and not toll fees control sheets. Moreover, it was his testimony that actually if the general receipts had been (or were) produced, they would have clearly shown that all the toll fees payments in respect of the trucks had been make in connection with the said trucks.

## **Lighton Enos Maganizo Phangire (2<sup>nd</sup>) Defendant**

As was State evidence, the State has preferred two counts against the 2<sup>nd</sup> Defendant. It is well to point out that the State alleged that the 2<sup>nd</sup> Defendant corruptly accepted cash from GDC Holdings Limited amounting to K234,160.00 and that he got gratification from the said GDC in the form of parties. The second count says that the 2<sup>nd</sup> Defendant solicited from GDC Holdings Limited the sum of K234,160.00.

The sum of K234,160

The records were that this very sum of K234,160 was the subject of charge against the other Defendants in this matter. Indeed, it is the same amount that the State alleged was given to other Defendants in the very same matter. These other Defendants were acquitted by this Court and the Court will later comment on the said acquittal. Further, it is well to point that if it were to be said the prosecution never attempted to prove receipt of the said sum of K234,160 by the second Defendant. If anything the Court purported to show that the Defendant must have been given K1,600 that had been drawn from the petty cash by a certain Mr. Hendrey Mbendera, a former employee of GDC Holdings Limited. There was no direct proof of giving since Mr. Mbendera told the Court that a certain Mr. Benson Chinthowa asked for this money when the 2<sup>nd</sup> Defendant come to the office of the said Mr. Mbendera. As it were the said Mbendera suspected that the said sum of K1,600 was meant to be given to 2<sup>nd</sup> Defendant.

Further, it is in evidence that the said Mr. Mbendera did not see money being given to the 2<sup>nd</sup> Defendant. Furthermore, the Court has ascertained that the testimony of the State was to the effect that some alleged goodwill payment was being made to Balaka weighbridge where the 2<sup>nd</sup> Defendant was working together with other Officers. However, the payment vouchers which purportedly showed payment of goodwill to Balaka weighbridge does not show names of recipients. It is well to point that there is evidence on record to the effect that between 1996-1997 the 2<sup>nd</sup> Defendant had visited the offices of GDC Blantyre. However, the 2<sup>nd</sup> Defendant said that he was visiting a certain Mr. Sito tembo who was a mechanic at GDC and later brought a vehicle from him. The said Mr. Sito Tembo confirmed that he once worked for GDC and during that time the 2<sup>nd</sup> Defendant visited him to have a motorcycle repaired.

### **Christmas Parties**

As stated earlier, it is the State's case is that the 2<sup>nd</sup> Defendant, and others, was treated to Christmas parties. This, in the eyes of the State, was gratification. However, it must be pointed out that there was no direct evidence of the 2<sup>nd</sup> Defendant having attended the said Christmas parties that were allegedly organised by GDC. Actually, the 2<sup>nd</sup> Defendant

vehemently denied having attended the party that was held at Mwanza. He however admitted attending a Road Traffic Department party held in Blantyre in 1992.

It is not in dispute that between 1996 and 1997, the dates in question in the two counts, the 2<sup>nd</sup> Defendant was working at Balaka weighbridge. He was a weighbridge attendant under the Road Traffic Department. Further, there is uncontroverted evidence that the 2<sup>nd</sup> Defendant was working at the said weighbridge under the supervision of a certain Mr. Majawa. Accordingly, he was not the overall in-charge at the said Balaka weighbridge.

### **GDC Holding Limited (3<sup>rd</sup> Defendant)**

As will be observed from the evidence on the record the following facts emerge:

There is undisputed evidence that the 3<sup>rd</sup> Defendant is a limited liability company registered in Malawi. It is the State's insinuation that GDC Limited devised a plan to evade payment of toll fees by corruptly paying public officers. Further, the prosecution's witnesses attempted to show that the 3<sup>rd</sup> Defendant was in the habit of paying public officers in the departments of Customs and Excise, Immigration and Road Traffic to achieve the alleged evasion of payment of toll fees. Moreover, there was testimony to the effect that GDC organised parties for the said public officers as one way of corrupting them so that they do not collect toll fees or carry the detailed weighing of GDC's vehicles. As regards payment of money to the said public officers, it is important to observe that the total sum of K234, 160 that was given as a global sum in respect of each of the said officers and no attempt was made to indicate as to how much each of the said officers allegedly received from GDC Limited. Furthermore, it is clear from the evidence preferred by the prosecution that the State is trying to show that toll fees, payable on foreign registered vehicles, in the sum of U\$220,000 would have been lost due to the scheme that was allegedly devised by GDC Holdings Limited. However, there was no evidence that GDC Holdings Limited owned any foreign registered vehicles but there is some testimony to show that GDC Holdings Limited used to pay toll fees in respect of some vehicles.

I must point out that the 3<sup>rd</sup> Defendant offered evidence whose purpose and effect was to show that the so called good will payments were not sanctioned by it. Indeed, the testimony by the 3<sup>rd</sup> Defendant was that there was no policy to evade payment of toll fees and that it suspects that the so called "good will transactions" was a scheme that was created by GDC Finance Manager, Operations manager and General Manager, who colluded and stole money from it for their personal use. A certain Mr. Holmes appeared before this Court and said that he actually caused an investigation to be instituted which showed that the scheme was a creation of the 3<sup>rd</sup> Defendant's Operations Manager. It was his further evidence that the investigation were never completed because ACB came and demanded to see the documents that have been tendered in evidence in this matter. He further stated that he suspected that the Finance manager, the Operations Manager and General Manager of GDC

at that time had all colluded to steal money from GDC Holdings Limited.

## **Analysis**

The first accused was charged with three counts of corrupt practices by public officers contrary to Section 24 (2) of the Corrupt Practices Act; attempting to commit an offence of corrupt practices with public officers contrary to Section 35 of the Corrupt Practices Act and misleading officers of the Anti-Corruption Bureau contrary to section 14 (b) of the Corruption Practices Act.

On the first count, the first accused was alleged to have corruptly given gratification in the form of cash to Christopher Alex Msinja a Police Officer-in-Charge at Mwanza border for the said Msinja to forbear from conducting a detailed check of foreign currency and unknown suspected foreign individuals on GDC foreign registered trucks at Mwanza border.

In the second count, the first accused was alleged to have attempted to give gratification in the form of cash to Christopher Alex Msinja; one Lekani, Sergeant Kulumbazi, Constable Mwakikunga and Detective Constable Nkuka, all Police Officers at Mwanza border as an inducement or reward for the said Police Officers to forbear from conducting a detailed check of the foreign currency and unknown suspected foreign individuals on GDC foreign registered trucks at Mwanza border.

The above two activities were allegedly committed on or about the 1<sup>st</sup> day of September 1997 at the said Mwanza border.

The first accused was further alleged to have mislead officers of the Anti-Corruption Bureau by making false statements namely that GDC was paying Toll Fees for all its foreign registered trucks and that the contents of the memoranda (Make Plan documents) were false in material particular when in fact GDC was not paying the Toll Fees of all its foreign registered trucks and that the contents of the memoranda above referred were in fact true.

Section 24 (2) pursuant to which the first accused has been charged provides as follows:-

**“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 an inducement to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall guilty of an offence”.**

Under the said section 24 (2), the prosecution is expected to prove the following elements for an offence of corrupt practices with a public officer to be established.

- (a) Did the accused person give gratification to a public officer?
- (b) Was such gratification given corruptly?
- (c) Was the gratification for the benefit of such public officer or any other person?
- (d) Was the gratification given as an inducement for the public officer to do or forbear to do something?
- (e) Was the thing forborne to be done in relation to a transaction a concern of a public body?

The first accused is also charged with attempting to give the above named Police officers gratification as an inducement for the said Police Officers to forbear from carrying out their duty of checking foreign currency and suspected foreign individuals on GDC trucks.

Under Section 14 (b) of the Corrupt Practices Act, an offence of misleading officers of the Anti Corruption Bureau will be committed when the accused person has given any false information to the said officers of the Anti Corruption Bureau. The giving of such false information must be done knowingly. Section 14(b) provides as follows-

“Any person who knowingly -

- (a) makes or causes to be made to the Bureau a false report of the commission of an offence under this Act; or
- b) misleads the Director, the Deputy, Director or other officer of the Bureau by giving any false information, or by making any false statements or accusations.

Shall be guilty of an offensive and liable to a fine of K100,000 and to imprisonment for ten years.”

For an offence under the above section to be proved it must be established by the prosecution that the accused gave false information or made a false statement to the Anti- Corruption Bureau. It must also be demonstrated that the false information or the false statement were made by the accused knowingly. Further, it must be established that the false information or the false statement misled the Director, the Deputy Director or other officer of the Bureau.

As noted earlier, the second accused was charged with two counts of corrupt practices by public officers. In the first count he is alleged to have accepted the sum of K234, 160 between the period 1<sup>st</sup> April 1996



and 31<sup>st</sup> July, 1998 from GDC. He is also alleged to have accepted entertainment. It is alleged that the above was accepted as an inducement for forbearing to carry out detailed weighing of GDC foreign registered trucks.

In the second count, he is alleged to have accepted and to have solicited similar amounts from GDC Holdings Limited at Blantyre as an inducement for him to forbear the above weighing and checking of GDC trucks.

The evidence that has come in Court is that among the monthly payments by GDC to public officers, some payment was going to Balaka Weighbridge where Mr. Phangire was stationed.

For an offence of corrupt practices by public officers to be established against the second accused, the prosecution should prove that the second accused corruptly accepted gratification to forbear from carrying out the detailed weighing and the checking of Toll Fees on GDC trucks. It must also be shown that such weighing and checking was a concern of the Road Traffic Commission. It cannot be disputed that the weighing and checking are a concern of the Road Traffic Commission. The issues are whether the second accused accepted gratification and whether he forbore to do so weigh the trucks and check toll fees. Nevertheless, In terms of Section 33 (1) and 47 of the Corrupt Practices Act it would not be a defence on the part of the second accused to say that he did not forbear to check toll fees and weigh the said trucks as long as it is proved that he accepted or solicited gratification from GDC. Sections 33(1) and 47 provide as follows-

“Section 33 (1) If, in any proceedings for an offence under any section of this Part, it is proved that the accused accepted any gratification, believing or suspecting or having reasonable grounds to believe or suspect that the gratification was given as an inducement or reward for or otherwise on account of his doing or forbearing to do, or having forborne to do, any act referred to in that section, it shall be on defence that:-

- (a) he did not actually have the power, right or opportunity so to do or forbear;
- (b) he accepted the gratification without intending so to do or forbear; or
- (c) he did not in fact so do or forbear

Section 47 “Where any public officer has corruptly solicited, accepted, obtained, or agreed to accept or attempted to receive or obtain any gratification, it shall not be a defence in any trial in respect of an offence under Part IV:-

- (a) that the appointment, nomination or election of such person or any other person as a public officer was invalid or void; or
- (b) that such public officer or any other public servant did not have the power, authority or opportunity of doing or of forbearing from doing the act, favour or disfavour to which the gratification related; or
- (c) that the public officer did not actually do any act, favour or disfavour to induce the gratification, or never had the intention of doing so”.

As it were, this section suggests that the absence of actual forbearance therefore would not be fatal to the prosecution case.

The third accused, GCD Holdings Limited, is charged with three counts of the offence of corrupt practices with public officers contrary to Section 24 (2) of the Corrupt Practices Act and in the alternative an offence of official corruption contrary to Section 90 (b) of the Penal Code.

It is alleged that the third accused corruptly gave gratification amounting to K234, 160.00 to Raibon Enos Mwenitete, the second accused, Tonnex Mphepo and Selwin Simfukwe all officials of the Department of Customs and Excise, The Road Traffic Commission and the Immigration department respectively and other unknown public officers. The third accused is also alleged to have invited the above persons and other unknown public officers to parties. The said sums of money and the parties, it is suspected, were given as an inducement for the above persons and other unknown public officers to forbear from collecting Toll Fees in excess of K8.6 million in the case of Raibon Enos Mwenitete and the second accused and to expedite the checking of travel documents for GDC drivers and unknown suspected passengers on GDC Holdings trucks in the case of Selwin Simfukwe.

For an offence of corrupt practices with public officers to be proved, the prosecution must show that the third accused gave gratification to public officers. Further, for an offence of official corruption under Section 90 (b) to be established the prosecution must prove that the said third accused person gave property or benefit to persons employed in the public service. The prosecution must also prove that such giving was on account of an act or omission by the said persons employed in the public service.

Moreover, my understanding is that in terms of section 24 of the Penal Code once a corporation is found to have committed a criminal

offence every person charged with or concerned with the control or management of the affairs of the company shall be guilty of such offence. Section 24 of the Penal Code provides as follows:

“Where an offence is committed by any company or other body corporate or by any society, association or body of persons, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and shall be liable to be punished accordingly, unless it is proven by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”

The above section further means that the person charged with the responsibility of running the company will be exculpated from liability if they show that they were not aware that the offence was being committed and that they took all reasonable steps to prevent its omission.

## **Law and Discussion**

### *Burden of Proof*

Section 187 of the Criminal Procedure and Evidence Code is instructive on the burden of proof in criminal trials in Malawi. The said provision is to the effect that the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution. Further, in **R vs. Sinambale 4**<sup>9</sup>, cited with approval the case of **Miller vs. Minister of Pensions**<sup>10</sup>, is for proposition that the degree of proof required in a criminal case is a proof beyond reasonable doubt but that this does not mean proof beyond a shadow of doubt. Thus, if the evidence leaves only a remote and improbable possibility in the accused’s favour the conviction will still be justified as to do otherwise would mean that the criminal law will not adequately protect society.

The burden of proof on all the charges the defendants are answering is on the State. The State must therefore prove all the elements of the offences charged based on the particulars asserted by the State in the Charge Sheet.

### *Preliminary remarks*

#### *The prosecution’s hypothesis*

The court has observed that the prosecution’s case rests on the theory that GDC Holdings Limited was giving gratification to public officers. Further, it is well to observe that the state is of the view that Rodrick Ibo Chizinga was acting on behalf of GDC Limited (3<sup>rd</sup> Defendant) when he allegedly gave gratification to Police Officers at Mwanza Police.

<sup>9</sup> ALR (Mal) 191

<sup>10</sup> [1947] 2 ALLER 373

Accordingly, in the event that this court finds that GDC Holdings Limited is not in any way liable I see no reason why there ought to be a case against any of the Defendants.

### *Status of the 3<sup>rd</sup> Defendant*

State Exhibit P1 shows that the 3<sup>rd</sup> Defendant is a Malawi registered company. It is not a foreign company and does not own any foreign registered vehicles.

### *Vicarious and Corporate Liability*

There is no doubt that the 3<sup>rd</sup> defendant as a corporate entity did not itself engage in the commission of an offence. It is its servants and agents who may have acted or omitted to act in circumstances giving rise to the suspicion that offences had been committed. It is therefore a legitimate exercise to determine if the 3<sup>rd</sup> defendant will be criminally liable for the actions of its servants. Generally at law there is no vicarious criminal liability for the acts of another. The only exception relates to aiding abetting counselling and procuring the commission of an offence<sup>11</sup>. Moreover, being a corporate entity, a company has no mens rea of its own. For certain purposes however the mental state of key personnel of a company will be treated as the mental state of the company. Generally it is the mens rea of very senior or personnel at the Board level of a company which will be held to be the means rea of a company<sup>12</sup>. Further, it was stated by Arlidge and Parry on Fraud 2<sup>nd</sup> edition as follows-

“ Where an offence is committed by a person whose position within a Company is such as to justify regarding his actions and intentions as those of the company itself, the Company will also be guilty of the offence”<sup>13</sup>

Arlidge proceeds further on page 199 to say that:

“ An officer who positively encourages or assists in the commission of the offence will in any event be guilty as an accessory. It is arguable that the same would apply to a director, at least who simply acquiesces in the fraud, on the ground that a person who has authority to prevent an offence being committed may be implicated by the mere failure to exercise that authority.”<sup>14</sup>

In the instant case the 3<sup>rd</sup> Defendant engaged a General Manager and an Accountant as its employees. The General Manager testified that he was not aware of any toll fees being evaded. The Accountant testified that funds were withdrawn from the company to pay public officers so that

<sup>11</sup> Blackstone's Criminal Practice 1995 para A5.10.

<sup>12</sup> Director of Public Prosecutions v Kent & Sussex Contractors Ltd [1944] KB 46.

<sup>13</sup> see also the case of Tesco Supermarkets Limited vs. Natrass\_(1972) AC 153

<sup>14</sup> see also the case of Tuck vs. Robson (1970)1 W.L.R 741

toll fees were not paid. He conceded in cross examination that he had never seen evidence of payment to any public officer. If it had been established by the State that these two officers were in fact carrying out orders of the Board or were doing something for the Company even if the Board was not aware of what they were doing, there would have been a possibility of the mens rea of these officers being attributed to the 3<sup>rd</sup> Defendant (GDC). From the mere delegation by the board of the functions of general manager and accountant to these officers it cannot be concluded that acts or omissions of these persons were in the realm of criminal justice the acts and omission of the 3<sup>rd</sup> defendant<sup>15</sup>. In any event they did not admit to participating in the commission of any offence.

#### *Obligation to pay toll fees*

It is commonplace that toll fees were payable only by foreign registered trucks. The legal obligation to pay toll fees, therefore, rested on the owners of the foreign registered vehicles which entered Malawi. These were GDC Limitada, a Mozambican company and GDC Hauliers Limited, a Zimbabwean company.

The offence in Count 9, against 3<sup>rd</sup> Defendant, cannot be sustained on the evidence because all the vehicles in respect of which it is alleged that toll fees were not paid belonged to foreign companies from Mozambique and Zimbabwe. Though the State offered no explanation for the involvement of the 3<sup>rd</sup> Defendant it is clear that the 3<sup>rd</sup> Defendant as a local company merely acted as an agent for the foreign companies in arranging and paying toll fees for their vehicles. The State had no legal or any right to collect toll fees from the 3<sup>rd</sup> Defendant just like the 3<sup>rd</sup> Defendant had no obligation to pay such fees.

In a letter from the Controller of Customs to the Anti Corruption Bureau, dated 6<sup>th</sup> May 1998 the State explains how the toll fee collection system was managed. Several points appear from this letter which ought to have been answered or explained by the State but which were ignored. These are:

- 1) The Department of Customs & Excise maintained the records regarding the payment of toll fees;
- 2) Receipts for all payments were in existence but could not be produced by Customs because they were surrendered to the Treasury Cashier;
- 3) Only foreign registered vehicles pay toll fees.
- 4) The 3<sup>rd</sup> Defendant made payments in cash over the counter when prepaid funds run out.

<sup>15</sup> Blackstone's op cit para A5.11

- 5) The official details of GDC Mozambique and Zimbabwe trucks crossing the border were contained in the MOTC 3 forms.

The said letter and its contents were introduced by the State and at the same time not disputed by the State. The contents were put in so that the court could believe them and place some reliance on them. Unfortunately, this court could not find anything in the letter to prove commission of an offence on the part of the 3<sup>rd</sup> Defendant. It is so found.

It is well to point that in his Caution Statement, Harvey Kapyola Munthali denies receipt of any money from any transporters. Further, in the Caution Statement of Steven Marko Tsoka Banda there is an admission of receipt of some casual gifts but none from the 3<sup>rd</sup> Defendant. Again, in his statement Tonnex Duncan Mphepo (weighbridge operator at Mwanza) admits attending a Christmas party in 1997 but denies receiving any money from the 3<sup>rd</sup> Defendant or anyone else.

There is a document, exhibit P18A, stating that toll fees have not been paid in respect of certain vehicles. It apparently originated from Rhodrick Chizinga and was directed to Benson Chintowa. Chizinga says he copied the wording from what Benson wrote for him. There is no suggestion that prepaid toll fees had been exhausted at this point. Therefore, there is no basis for concluding that the contents of the document are in fact true. Certainly, in order to actually avoid paying toll fees, the incoming drivers would have had to be involved in driving through without paying toll fees. Yet the evidence is that all drivers always received a copy of an MOTC to evidence the fact of payment of toll fees.

It will be noted that the State did not call any driver to testify to the fact of crossing the border without paying toll fees and without receiving a copy of the MOTC3 form which every foreign vehicle entering the country had to have for use at entry and within the country to show that it had paid toll fees. As if the above anomalies are not enough, the State did not call a single Customs or Road Traffic or Police Officer to testify that they found even one foreign registered vehicle connected with the 3<sup>rd</sup> Defendant within the country having crossed the border but carrying no MOTC3 form to indicate that it had not paid toll fees. It is ludicrous that even if corrupt practices occurred all Police Officers, Road Traffic Officers and Customs Officers throughout the country where these vehicles went would have been corrupted by small payments at Mwanza so as to induce them not to act against such vehicles. The only logical explanation, in my judgment, as to why no apprehensions of vehicles within the country for not having paid toll fees at the border is that all foreign registered vehicles connected in any way with the 3<sup>rd</sup> Defendant carried MOTC3 forms. On a minimum the State should have found a few vehicles which were apprehended within the country because they did not have the MOTC3 form indicating that though the vehicles were in the country, they had not paid toll fees on entry. In the absence of such proof, this court will be slow to accept the theory being advanced by the State that foreign registered trucks connected with the 3<sup>rd</sup> Defendant crossed the border without paying toll fees on account of corruption.

### *The “make plan documents”*

Rhodrick Chizinga clearly testified to being asked to carry out certain tasks by his supervisor, Benson Chintowa. His testimony was not shown to be false. It could be argued that he is taking advantage of the death of Benson Chintowa but against that must be considered the fact that he could not have designed and implemented any system of fraud on his own when it was clear that he was acting as a go between. On his own he could not have drawn any funds from the 3<sup>rd</sup> Defendant. The balance of probabilities would support the conclusion that Chizinga merely carried out the instructions of others and according to him those instructions were from Chintowa. There is no reason why he should not be believed. Additionally, exhibit P22 (and similar documents) does not prove non payment of toll fees. If anything it records the reimbursement of toll fees paid. In my opinion, this exhibit confirms that cash was used to pay toll fees and reimbursements were collected and presumably taken to Mwanza. Alternatively, cash was requisitioned and taken to Mwanza to pay up if a vehicle had been allowed to go through when the pre-payment had been exhausted.

### *The Toll Fee Control Sheet*

The prosecution introduced into evidence an exhibit which has been marked as P45. It is called a Toll Fee Control Sheet. This document was prepared by Customs and used to draw down the prepaid toll fees. Any inaccuracies in the documents could have been caused by error or omission on the part of Customs. If any instances of Customs actually failing to draw down are shown, it should not be forgotten that some trucks were paid for through cash as demonstrated by Exhibit P22. There is a suggestion that the entries relating to toll fee control sheets were made by Chizinga or someone else at the 3<sup>rd</sup> Defendant. However, it is important to observe that irrespective of the author of the control sheets, on a daily basis, the documents were verified by Customs and stamped accordingly.

It is not farfetched to opine that the existence of discrepancy between the entries recorded on the toll fee control sheets and the northbound sheets, could have been the result of mistakes. What is definite is that the control sheets were recording the vehicles in respect of which debits would be made against the prepaid toll fees. The control sheets were not recording situations involving the payment of toll fees by cash such as were referred to by Chizinga and the Controller of Customs and Excise, Mr. Mtingwi and evidenced by receipts sent to Treasury Cashier. Actually, the maintenance of North bound sheets by the 3<sup>rd</sup>

Defendant tends to negative the assertion that toll fees were being evaded. In my view a person intending to evade toll fees would not have meticulously recorded all incoming vehicles on the northbound sheets and then have different records on the toll fee control sheets. The 1<sup>st</sup> Defendant [Chizinga] or anyone else with a scheme for evading toll fees would have ensured that the northbound sheets had the same information as the toll fee control sheets. Indeed, a simple evaluation between the Northbound Sheets against the Toll Fee Control Sheets overlooks the payments which were made in cash and which are referred to by a number of people viz. the Controller of Customs and Excise in Exhibit P43; by Chizinga in his Caution Statement and in the reimbursement claims such as State Exhibit P 22. The Anti Corruption Bureau should have secured the Receipts which Customs had sent to Treasury cashier to include those in their reconciliation before concluding that any vehicle on a Northbound sheet, but which did not show on a Toll Fee Control sheet, represented an evasion of toll fees.

**XXXXXX***The core of the state's case*

The evidence of the Anti Corruption Bureau is largely that of Mr. Victor Banda an Anti Corruption Bureau investigator. He testified that he received information that the 3<sup>rd</sup> Defendant was evading toll fees and carried out an investigation. I am alive to the fact that there is testimony from the 3<sup>rd</sup> Defendant that it cooperated fully and in fact carried out its own investigation and gave the Anti Corruption Bureau information showing that funds were drawn from the company by a few individuals allegedly to pay "goodwill or toll fees etc" at Mwanza. Further, it is in evidence that the 3<sup>rd</sup> Defendant gave Mr Banda all the documents in its possession relating to claims for goodwill etc.

It is said by the ACB that on the basis of the Northbound Sheets and the toll fee register it concluded that toll fees amounting to K8, 600,000 had not been paid from April 1996 to 31 July 1998. Mr Banda further put it that he prepared an analysis, marked as State Exhibit P51A, which shows the toll fees due on the basis of the northbound sheets and the toll fees register. Based on these he took the view that the Northbound Sheets correctly recorded the foreign trucks coming into Malawi and their destinations within Malawi. Mr Banda did not however establish that the information in the Northbound Sheets in fact represented the truth in terms of foreign GDC vehicles which actually came into the country.



Instead of investigating this aspect and eliminating the possibility, which was put to him, that the Northbound Sheets may have been deliberately falsified as part of the scheme for defrauding the 3<sup>rd</sup> Defendant, Mr. Banda concluded that the Northbound Sheets were in fact a correct record of incoming GDC foreign registered vehicles.

However, it will be observed that in cross examination Mr Banda made the following acknowledgment or admissions<sup>16</sup>:

- a) that the Northbound Sheets and the Toll Fee Control Sheets were not accounting documents for purposes of toll fees or foreign trucks entering the country and that these were the documents of the 3<sup>rd</sup> Defendant;
- b) that he was given copies of all these documents by the 3<sup>rd</sup> Defendant voluntarily when he asked for documents.
- c) that the government accounting documents, for toll fee purposes, were the PTA MOTC 3 forms;
- d) that he relied on the North-bound sheets which are internal documents of the 3<sup>rd</sup> Defendant to determine the numbers of foreign registered GDC vehicles which came into Malawi;
- e) that it was possible that in fact no toll fees were evaded;
- f) that the northbound sheets could be wrong;
- g) that he did not investigate any issue relating to passengers in GDC vehicles;
- h) that he concluded bribes were paid because he saw the payment vouchers and cheques even though cheques were always in name of

<sup>16</sup> PW12 also made similar concessions

cashiers Mbendera and Maliro;

- i) that none of the GDC personnel who were involved in the drawing of money for goodwill from the company identified any public officer as payee of the money they drew;
- j) that he established nothing but merely made inferences;
- k) that he did not allow Customs to investigate;
- l) that collection of toll fees was sometimes done in arrears;

Additionally, none of the official accounting documents for toll fees was produced by Mr Banda. The originals of the memoranda were never found. Mr. Banda contented that the vehicles recorded on the memorandum in fact crossed the border and some did not pay toll fees.

Nonetheless, Mr. Banda did not establish that the 3<sup>rd</sup> Defendant in fact paid bribes to public officers at Mwanza and elsewhere. In my judgment what he established was that funds were drawn out of the 3<sup>rd</sup> Defendant as a ploy that goodwill was to be paid to some unidentified people. He conceded that when Mr Holmes joined the 3<sup>rd</sup> Defendant Company as Financial Director he was concerned with the goodwill withdrawals from the said company and put a stop to the practice. He conceded that he had no evidence that public officers received the goodwill money from the 3<sup>rd</sup> Defendant. Nevertheless, Mr. Banda took the view that the circumstances showed that they must have received the money.

Mr. Banda noted that the system of prepayment of toll fees was introduced by Customs and that sometimes vehicles went through when the prepaid funds had been exhausted. He took the view that no vehicle should have passed without first paying. Yet, as seen earlier, no one from Customs verified the conclusion reached by Mr. Banda.

In respect of entertainment Mr. Banda was not able to say how many parties the 3<sup>rd</sup> Defendant organised and how many times each of the public officers charged the offences herein attended such parties. Neither did he give the value of the food or drink consumed.

*Analysis of Toll Fee Control Sheets (3/98)*

State Exhibit P20 consists of Toll Fee Control Sheets. An examination of these sheets and other documents will show that reliance should and could not have been placed on these sheets to prove that toll fees were not paid. For example:

| Date   | Toll Fee Control Sheet No | Date   | Northbound Sheet No. | Exhibit No. | Observation   |
|--------|---------------------------|--------|----------------------|-------------|---|
| 3/1/97 | 3/98                      | 2/1/98 |                      | P46B        | The Toll Fee Control Sheet is for 1997 while the Northbound Sheet is for 1998 |

The Toll Fee Control Sheets are all duly stamped by Customs and Excise. This can only signify that they correctly record the vehicles which had paid their toll fee from the prepaid amount. The document says nothing about payments made in cash.

Further, the Toll Fee Register shows that some vehicles recorded on the Northbound Sheets were not recorded in the Toll Fee Register. This may tend to suggest that some vehicles did not pay toll fees. Equally this could suggest that fees were paid for in cash. The trucks may have paid toll fees in cash or may have paid through the same prepayment system later. The documents which would have conclusively shown that a vehicle on the North Bound Sheets did not pay toll fee would be the MOTC3 forms and the Receipts issued for vehicles crossing and paying in cash. The Receipts were available at the Treasury Cashier and Mr. Mtingwi, the Controller of Customs and Excise, pointed this out but apparently the Anti Corruption Bureau chose to ignore that avenue.

There is considerable doubt as to whether indeed toll fees were evaded and that doubt was created by the failure to check the MOTC3 books comprehensively and also to get the General Receipt Books from the Treasury Cashier to see what cash payments were made for toll fees.

Furthermore, it will be seen that the Toll Fee Control Sheet was

completed by the 3<sup>rd</sup> Defendant on one day and stamped by Customs generally on another day. In this regard, the entire evidence of Mr Victor Banda, as summarised in State Exhibit P51B, deals only with payments made through the prepayment system. It does not cover payments made in cash which the Controller of Customs acknowledged. Mr Banda did not even try to check for the receipts sent to Treasury cashier to confirm or disprove the contents of Mr Mtingwi's statement.

Additionally, the documents used to claim funds from the 3<sup>rd</sup> Defendant do not always illustrate that the vehicles on those documents matched those recorded on the Northbound Sheets. For example:-

| Date    | Exhibit No. | Particulars  | Comments  |
|---------|-------------|--|---|
| 10/6/96 | P17         | Make Plan payment for H528, H501, H530   | The Northbound sheets do not show these trucks crossing |
| 4/11/96 | P25A        | H807, H748, H504, H678, H749, H633, H627, H824, H823, H825, H661, H534, H508, H531, H605, H504 | Northbound sheets do not show these vehicles crossing   |

The documents used to collect funds out of the 3<sup>rd</sup> Defendant also show some funds being collected to pay toll fees. As I see it, the investigators did not bother to verify with the Receipts at Treasury Cashier if in fact toll fees in those amounts were paid over.

| Date     | Exhibit No. | Particulars          |
|----------|-------------|----------------------|
| 24/12/97 | P21A        | PV for Toll Fees     |
|          | P21B        | Cheque for Toll fees |
| 25/7/97  |             | PV for Toll fees     |

It is also well to observe that the documents which refer to “goodwill and Make Plan” prove only the collection of funds from the 3<sup>rd</sup> Defendant and no more. They do not prove payment to any public officer and indeed no public officer has been identified as receiving any funds out of this money. If a table were to be drawn the following picture emerges:

|          |       |   |        |  |
|----------|-------|---|--------|--|
| 11/9/96  | P4    | Goodwill Req. for Sept 96 (K9,150)                    | K9,150 | No evidence of payment to any public officer |
| 6/11/96  | P25B  | PV for Goodwill Mwanza (K5,500)                       | K5,500 | ^  |
| 10/10/96 | P 31A | PV goodwill Balaka (K1,600)                           | K1,600 | ^  |
| 10/10/96 | P31B  | Goodwill Req. for Balaka weighbridge (K1,600)         | K1,600 | ^  |
| 10/10/96 | P31C  | PV goodwill Balaka (K1,600)                           | K1,600 | ^  |
| 22/10/96 | P42   | PV Goodwill K5,000                                    | K5,000 | ^  |
| 6/11/96  | P32A  | PV goodwill Bt & Balaka (K3,600)                      | K3,600 | ^  |
| 6/11/96  | P32B  | Goodwill Req. ROAD TRAFFIC DEPARTMENT (K2,000)        |        | ^  |
|          | P33A  | Goodwill Req. ROAD TRAFFIC DEPARTMENT Bt & allowances |        | ^  |
|          | P37A  | Goodwill Req.   |        | ^  |
| 8/8/97   | P37B  | Goodwill for Aug 98                                   |        |  |
| 10/6/97  |       | Goodwill for June 97                                  |        | ^  |

In respect of allegations in the documents used to draw funds out of

the 3<sup>rd</sup> Defendant the Court has noted that some vehicles referred to in those documents do not appear on the Northbound Sheets for the same days. This is again clearly illustrated in the diagram below:

| Date     | Exhibit No. | Particulars   | Amount                            | Comments  |
|----------|-------------|---|-----------------------------------|---|
| 10/6/96  | P17         | Make Plan payment for H528, H501, H530  |                                   | The Northbound sheets do not show these trucks crossing |
| 2/7/96   | P123        | H513, H323, H   | K11,016 - 3,000<br>(K8,016)       |   |
| 26/6/96  | P23         | H739, H602, H534, H510, H517  | K9363.60 - K1800<br>(K7,563.60)   |   |
| 28/7/96  | P18A        |   | (K6,000)                          |   |
| 6/8/96   | P11A        | H510, H509, H532, H517, H641, H508, H638, H503, H614, H515                                | K16,640- K5080<br>(K11,640)       |   |
| 8/8/96   | P11B        | Cheque for K5,000   |                                   |   |
| 25/8/96  |             | H510, H509, H532, H517, H641, H508, H638, H503, H874, H515                                | K16,620 - 5000<br>(K11,600)       |   |
| 10/10/96 | P24A        | H531, H516, H812, H7777, H800, H507, H510, H532, H751, H768, H634, H512, H525, H693, H506 |                                   |   |
| 20/10/96 | P24A        | H531, H516, H812, H777, H800, H507, H510, H   | \$1,612<br>K24,180 bal<br>\$5,040 | P42 account goodwill PV                                 |
| 4/11/96  | P25A        | H807, H748, H504, H678, H749, H633, H627, H824, H823,                                     |                                   | Northbound sheets do not show these                     |

|  |  |  |  |                      |
|--|--|--|--|----------------------|
|  |  | H825, H661, H534,<br>H508, H531, H605,<br>H504 |  | vehicles<br>crossing |
|--|--|--|--|----------------------|

This, in this court's mind, again shows that either the Northbound Sheets were falsified in some respects or that the creator of these documents knew that no one was going to compare the truck numbers on these papers and on the Northbound Sheets. This could only be because the creator was the same person that received the money drawn and was also responsible for completing the Northbound Sheets.

*Origins of the so called "goodwill payment"*

The evidence of Mr. Rob Holmes established that when he was appointed to be responsible for the Malawi operations he found Mr. Kangulu as the General Manager. He also said that he found no evidence of the practice of drawing funds for goodwill having existed before the stewardship of Mr Kangulu. It was further put in evidence by him that he was asked on a number of occasions to sign cheques which were payable to cash. He was told that these payments were for tolls at Mwanza. There was no reason, so he says, to doubt the management and signed. After a while as he was getting more acquainted with the operations in Malawi, and had the opportunity to check on various transactions he realised that he had not seen receipts from anyone to acknowledge receipt of the funds drawn from the few cheques he had been asked to sign. When he asked for receipts and non were forthcoming it occurred to him that the Company was being defrauded of funds by its own officers. He refused to sign any more cheques for payments to Mwanza. He also gave instructions terminating the practice of drawing funds under the description of goodwill payments.

He categorically put it before this court that his instructions were given well before the Anti Corruption Bureau launched an investigation into the alleged corruption of boarder officials at customs, and police and it occurred to him that the Company management was defrauding the Company

The position of the 3<sup>rd</sup> Defendant which appears not to have been manufactured during the proceedings, but was presented to the Anti Corruption Bureau for investigation, is that there was serious fraud during the time when Mr Kangulu was General Manager under the pretext of drawing funds for the payment of goodwill. The practice was stopped well before the Anti Corruption Bureau came to make inquiries about the matter as soon as Robert Holmes ascertained that there was no valid basis for the funds which were being claimed and that there were no receipts for the funds drawn.

The master-mind behind the withdrawal of funds from the 3<sup>rd</sup> Defendant on the pretext that the funds were to be used to pay goodwill appears to have been Benson Chintowa. Unfortunately he died before the case was filed. It is also clear that all the withdrawals for goodwill brought before the Court in respect of "goodwill" requisitions of cash from the 3<sup>rd</sup> Defendant were made when Mr. Kangulu was the General Manager. No evidence was uncovered to show such a practice prior to Mr. Kangulu becoming the General Manager of the 3<sup>rd</sup> Defendant. This does not necessarily mean that Mr Kangulu was part of the fraud. He may have been taken advantage of by his subordinates because they figured out that he was susceptible to such trickery. The evidence of Mr Lindeire was to the effect that this was the practice even before Kangulu became General Manager but this assertion was unsupported by the evidence. The evidence of Mr. Lindeire is at its best suspect because he was the Accountant for the 3<sup>rd</sup> Defendant but comprehensively failed to question the practice of requisitioning funds for so called good will payments as any qualified accountant would have done.

This court finds and concludes that the defence of the 3<sup>rd</sup> Defendant is plausible. If the 3<sup>rd</sup> Defendant had adopted their position only after the commencement of investigations, there could have been a basis for disbelieving this position.



### *The statutory framework*

It is common cause that the procedure for dealing with offences under the Corrupt Practices Act is governed by the Criminal Procedure and Evidence Code<sup>17</sup>. The standard of Proof remains that beyond reasonable doubt. The burden of proof remains on the Anti Corruption Bureau. Indeed, where the burden is sought to be shifted to the accused that would violate the constitutional right to be presumed innocent<sup>18</sup>.

### *Section 24 offences*

Section 24 of the Corrupt Practices Act creates offences relating to public officers. The term public officer is defined widely and includes Ministers<sup>19</sup>. There is no dispute that all the alleged recipients herein were public officers. It is imperative to note that the section does not criminalize the soliciting accepting or obtaining of some gratification. The section makes criminal, the act of corruptly receiving, soliciting, giving etc. The term corrupt is not defined in the Corrupt Practices Act. "Corruptly" is defined in Black's Law Dictionary as follows<sup>20</sup>:

"When used in a statute, this term, generally imports a wrongful design to acquire some pecuniary or other advantage"

For an offence to be established under section 24 of the Corrupt Practices Act, the Anti Corruption Bureau must lead evidence to show the following:

that there was a public officer involved;

that the accused gave or agreed to give or attempted to give a public officer some gratification;

that the gratification was as an inducement or reward for doing or forbearing to do some act with which the public officer was concerned;

precise nature of the gratification alleged to have been given;

<sup>17</sup> Section 2 of the Corrupt Practices Act

<sup>18</sup> *Jumbe and Another vs. Attorney General* Constitutional Case No. 1 and 2 of 2005 High Court decision of 21<sup>st</sup> October 2005 [unreported]

<sup>19</sup> Section 3 of the Corrupt Practices Act.

<sup>20</sup> See section 2 (2) Corrupt Practices Act (Corrupt Practices Act) 2 See section 3 of the Corrupt Practices Act

35<sup>th</sup> edition page 311.

that the giving etc was done corruptly, i.e. with a wrongful design to acquire a pecuniary or other advantage for corruptor;

that a dinner constitutes a gratification;

that the Christmas parties in issue were not conventional hospitality on a modest scale;

that the particular parties in issue were not a conventional hospitality on a modest scale;

that the parties were an inducement for public officers not to collect toll and other fees.

### *Gratification*

In dealing with offences under the Corrupt Practices Act it is also important to understand that the giving, receipt or acceptance of a gratification is not an offence. The gratification which can form the basis of an offence must be as defined in the Act.

Gratification is defined as "any payment in cash or in kind . . . other than a casual gift"<sup>21</sup>. And a casual gift is defined as any conventional hospitality on a modest scale or an unsolicited gift not exceeding K500 . . ."

As I understand it, the definition of gratification and the exclusion of certain benefits from the term gratification require that the nature of the gratification which is the subject matter of a charge must be specified together with its value. Evidence for the State must be called to prove the value of the gratification. This is a necessary conclusion when it is considered that the term gratification is defined in section 3 of the Corrupt Practices Act as excluding "casual gifts".

Thus, not all gratifications can form the basis of an indictment. It is only those that go beyond casual gift which can be the subject of an offence. From the definition of casual gift it becomes patent that for any offence charged in which it is alleged that a gratification was involved, the Anti Corruption Bureau must establish that the alleged gratification was

<sup>21</sup> Section 3 Corrupt Practices Act

not (1) conventional hospitality on a modest scale or (2) an unsolicited gift not exceeding K500.00 in value<sup>22</sup>.

Accordingly, it is found and concluded that the Charges against 3<sup>rd</sup> Defendant cannot be sustained when it is considered that not all giving or acceptances of a gratification that constitute offences. It is only those acceptances which can be described as "corrupt" which can support a charge of corruption.

#### *Proof of Alleged Offences*

It was incumbent upon the Anti Corruption Bureau to place before this Court testimony to prove the following:

that the public officers, named in the counts in the charge sheet, were paid a bribe or given some form of gratification in order not to collect toll fees or weighbridge fees.

that as a result of the bribe or gratification the concerned officers did not collect toll fees or do the other things that are specified in the Counts;

#### *The obligation to collect Toll fees*

The figure of \$220,000 cited in all the counts affecting the accused persons herein relates to what are alleged to be unpaid toll fees. Toll fees were collectable by Customs for the Ministry of Transport. Now, the one and only Customs Officer who was charged and acquitted by this court was Mr. Raibos Mwenitete. He is mentioned in Counts 9 and 12 in relation to the 3<sup>rd</sup> Defendant. All the other public officers named in the other counts were not concerned with the collection of toll fees. Thus, Count 10 is quite misconceived in alleging that Lighton Phangire forbore to check the payment of toll fees. Phangire was a weighbridge officer at Balaka and

<sup>22</sup> See section 3 of Corrupt Practices Act - A Casual gift is defined as any conventional hospitality on a modest scale OR any unsolicited gift of modest value not exceeding K500.00 . . . which is not in any way concerned with the performance of a person's official duty. . .

unconcerned with the collection of toll fees at Mwanza. Furthermore, Count 11 is also misconceived in alleging that Tonnex Mphepo who was a weighbridge officer at Mwanza forbore to check the collection of toll fees as he was not responsible for or concerned with the collection of toll fees.

Actually, there is no evidence that the 3<sup>rd</sup> Defendant gave money to any public officer. In point of fact, there is no evidence that the 3<sup>rd</sup> Defendant paid K234,168 to Raibos Mwenitete to induce him not to collect toll fees. Indeed, Mr Banda concedes that from drawings made from the 3<sup>rd</sup> Defendant for alleged goodwill payments he inferred that funds so drawn from the 8<sup>th</sup> Defendant went to public officers. He felt fortified in his inference by the fact that he found discrepancies between foreign trucks shown on Northbound Sheets and the trucks recorded on Toll Fee Control Sheets. However, he conceded not investigating if the Northbound sheets were accurately compiled. He appreciated that the Northbound Sheets were prepared by the same personnel of the 3<sup>rd</sup> Defendant who prepared the "goodwill documents" yet he did not check to determine that those who created the goodwill system were not deliberately putting misleading figures in the Northbound Sheets.

Furthermore, the evidence on record shows that Mr Banda did not establish what happened to the money drawn for so called goodwill payments. He also accepted that he did not and could not rule out that this was a scheme to defraud the 3<sup>rd</sup> Defendant by Messrs Chinthowa, Kangulu, Chizinga, Mbendera etc. In spite of these possibilities, he nevertheless decided to act only on one possibility and that was the conclusion that public officers were bribed and failed to collect toll fees because of such bribes. As it were, Mr Victor Banda, the key witness herein, ignored clear evidence that based on the documents which were used for accounting for toll fees, Mr Mtingwi, the head of Customs was satisfied that all toll fees were paid. The accounting documents were not examined by Mr. Victor Banda or other investigators or brought to Court. The said Mr. Victor Banda showed a preference for conclusions adverse to the 3<sup>rd</sup> Defendant and therefore which tended to support the conclusion he had reached that all requisitions of funds were for purposes of paying bribes to public officers in order to induce them to forgo the collection of fees payable by foreign registered trucks. He chose to ignore the complaints of the 3<sup>rd</sup> Defendant that it was a victim of fraud at the hands

of some of its employees.

#### *The question of Passengers and Travel Documents*

In this court's judgment, there was totally no attempt to prove the charges against the 3<sup>rd</sup> Defendant as contained in Count 11. Actually, there is no evidence that Selwyn Simfukwe or any other immigration official receive K234,168 from the 3<sup>rd</sup> Defendant to expedite the processing of passengers in the vehicles of the 3<sup>rd</sup> Defendant at the Mwanza Border Post. If it be put here, the fact is that it was not shown that any vehicles of the 3<sup>rd</sup> Defendant carried passengers across the border. It was not shown that passengers in the vehicles of the 3<sup>rd</sup> Defendant had travel documents processed by Simfukwe or any other immigration officer at all, let alone quickly on account of the payment of goodwill. What the court had was mere speculation.

#### *Christmas Parties*

There was no serious attempt to deal with the allegation that the 3<sup>rd</sup> Defendant organised parties for public officers with a view to corrupting the said public officers.

As rightly submitted by Mr. Msisha SC, there was no evidence of value per head of the parties. For that reason, there is no evidence of the total value of the parties to enable this court to work backward and figure out the cost of the parties per head. It is actually in evidence that other persons, who were not public officers charged herein, were also invited to at least one Christmas party organised by the 3<sup>rd</sup> Defendant. Furthermore, there is no evidence that any of the public officers mentioned in the charges actually attended the alleged parties.

#### *Detailed Weighing Of GDC Trucks at Weighbridges*

There is no scintilla of evidence that any weighbridge employee received a payment from the 3<sup>rd</sup> Defendant. Furthermore, there was no attempt to prove that any public officer failed to do his work in terms of weighing vehicles as a result of such suspected payment. It is not clear

what is meant by “detailed weighing”. Additionally, I have read the court record and I do not see any cogent evidence of the 3<sup>rd</sup> Defendant evading weighbridge fees or Road Traffic levies. To the contrary, the evidence of Mr. Lindeire shows that fines were paid each time they were levied when a vehicle was found over laden.

*The global figure of K234, 160.00*

As observed earlier on, the State attempted to demonstrate that the other Defendants received gratification from DGC Holdings Limited. The said gratification, so the evidence went, was said to have been in the sum of K234, 160.00 cash and entertainment in the form of parties. The testimony did not show how much each one of them received as gratification. Suffice to say that the State put up a global figure of the said sum of K234,160.00 as the total sum that GDC holdings Limited is said to have given the said Public Officers at Mwanza Boarder.

There is no evidence that either the global figure of K234,168 or any part of it was paid to any particular public officer. To deal with the failure to establish the fact of any payment to any public officer or the amounts allegedly paid to such officers the charge adopts the approach of referring to unknown persons. Whilst this is a legitimate way to lay charges, it does not substitute for the need to prove the allegations in the charge. Counsel for the state is indeed advised to take note of the wise and illuminating words of Lord Templeman in **Ashmore vs. Corporation of Lloyds** where he said that:

“ It is the duty of Counsel to assist the Judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of 10 bad points the Judge will be capable of fashioning a winner”<sup>23</sup>

In the instant case the state wanted to overwhelm this court with a myriad of the so called “make plan documents” as proof that the Defendants herein received the alleged sum of K234, 160.00 without further and cogent evidence of how much each one of them received. The State would still have to prove that payment was in fact made and that it was made corruptly. The State has only established that funds were withdrawn from the 3<sup>rd</sup> Defendant under the guise of being used for goodwill, reimbursement of toll fees and fines. It has proved nothing else.

Furthermore, the prosecution has failed to deal with the technical

<sup>23</sup> [1992] 1WLR 456

problem created by the fact that casual gifts are permissible. In relation to the said sum of K234, 160.00 allegedly paid to public officers, assuming the alleged payments were in fact made, depending on the number of recipients and the period covered (28 months - 1/4/96 to 31/7/98) by the alleged payments, the payments could have been casual gifts.

Even though it is assumed, which is without proof, that all the funds drawn under the umbrella of goodwill payments, were in fact paid to public officers over a period 2 years 4 months and all the public officers at the named stations received an equal portion of that amount then the State failed to remove the case from the possibility of such payment being non bribes or casual gifts by reason of the amounts allotted to each public officer falling below K500. The burden was on the Anti Corruption Bureau to show that any alleged gifts were not casual gifts. It failed to discharge the said burden.

#### *Whether Toll Fees In fact Payable*

As a parting shot I wish to make an observation which I failed to resist making considering the position of the law. I must say though that the remarks I am making are purely obiter but might be helpful to the executive.

It is doubtful that the Minister had the power to impose toll fees. Section 103 provides for the granting of transit permits. Under that section the Minister is not empowered to impose levies for vehicles which emanate from outside Malawi and terminate their journey in Malawi. He can deal with those that go through Malawi. Under section 170 the Minister is empowered to make regulations for the matters provided for in that section. Those matters do not include the levying of toll fees for non transiting foreign owned vehicles. The Government Notice which provided for the payment of toll fees was therefore ultra vires. Section 170, paragraph 2 refers to fees but these are limited to licence fees<sup>24</sup> and for various appeals.

The other powers under section 170 cover the regulation of loads, speeds, etc but do not extend to the levying of toll fees.

#### **Conclusion**

The long and short of it is that the state has failed to prove the allegations made against all the Defendants. Indeed, on all the crucial issues raised in the charges it cannot be said that the Anti Corruption

<sup>24</sup> para (iii)

Bureau has placed on record evidence to support the allegations.

There is no evidence that the K234, 160 or any part of it was actually paid to any public officer. There is not a single public officer who has been found to have been the recipient of any of that money. As I see it, the Court is being asked to suppose that because the documents prepared by Chinthowa stated that funds were drawn for goodwill payments the funds were in fact used to pay public officers. This is a point which requires proof and cannot be dealt with by assumptions and suppositions. It is irrelevant how attractive it may be to assume that funds collected from the 3<sup>rd</sup> Defendant were passed on to public officers when there is no evidence to establish that fact. Whereas one may hypothesize that the goodwill was intended for, and was paid to, some public officers, one can speculate with equal force that the payments were taken and shared amongst some officers of the 3<sup>rd</sup> Defendant. The State has failed to clear the air as to which speculative venture represents the truth, but not only the truth but something beyond reasonable doubt. Consequently, this court acquits the Defendants of the respective counts they were charged with.

**Pronounced** in open Court this ...<sup>th</sup> day of July 200 at the Principal Registry, Blantyre.

F.E. Kapanda  
**JUDGE**

**QQQQQQQQQQ**