IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL CAUSE NO 02 OF 2014

THE REPUBLIC

-VERSUS-

OSWALD FLYWELL GIDEON LUTEPO

DR. JOYCE BANDA (INTERESTED PARTY)

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

: Mrs. Kachale, Director of Public Prosecutions, for the State

: Mr. Oliver Gondwe, Senior State Advocate, for the State

: Mr. Mtupila, Counsel for the accused person

: Mr. Nkhwazi, Official Interpreter

: Mrs. Mboga, Court Reporter.

RULING

KAPINDU, J

1. Mr. Oswald Flywell Lutepo is the accused person in this case. He is facing charges of theft and money laundering. Since the end of last year, Mr. Lutepo has been reported to be ill. On 5 March 2015, Counsel for the accused person, Mr. Oswald Mtupila, made an application on behalf of

the accused person, for an order that an assessment of the accused person's mental health be done, for purposes of determining his fitness to stand trial. The picture that was painted of the accused person at the time was that of someone who was having serious psychological challenges or psychiatric disorders, and that his condition was deteriorating by the day.

2. Counsel Mtupila made the application under the Court's inherent jurisdiction, but invited the Court to be guided by the provisions of Section 133 of the Criminal Procedure and Evidence Code (Cap 8:01 of the Laws of Malawi) (CP & EC) in coming to its decision.

3. The Director of Public Prosecutions, Mrs. Kachale, had no objection to the application.

4. After giving the matter my most careful consideration, in a very detailed Ruling, I granted the application made on behalf of the accused person.

5. I granted that order, mindful that this was necessary to ensure that the accused person is accorded a fair trial. I mentioned in my decision of 5 March 2015, and I say so again today, that decisions on orders as to mental assessments in circumstances as the one presented before this Court in this matter, have been hard to come by. This ought not to be an indictment on our legal system. It appears that the experience is shared even among some of the bigger and older jurisdictions in the commonwealth common law legal tradition.[1] It is therefore necessary to seek guidance from decisions in other jurisdictions that cultivate case

[1] See Astrid Birgden and Don Thomson, The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers, 6 *Psychiatry Psychol. & L.* 207 1999

law comparable to ours; and to draw inspiration from available scholarly and other juristic literature.

6. John D. Buretta, in his work *Competency to Stand Trial,* has stated that:

> The conviction of a legally incompetent defendant, or the failure of a trial court to provide an adequate competency determination, violates due process by depriving the defendant of [his or] her constitutional right to a fair trial.[2]

7. It was indeed held in the American Federal Supreme Court decision in ***Drope v. Missouri***,[3]that:

> Due process is violated if a competency hearing is not held when sufficient doubt arises regarding a defendant's competency.

8. Astrid Birgden and Don Thomson, in their work *The Assessment of Fitness to Stand Trial for Defendants with an Intellectual Disability: A Proposed Assessment Procedure Involving Mental Health Professionals and Lawyers,* have astutely stated that:

> In the criminal justice process, a defendant must be fit to stand trial so that the criminal procedure is dignified, the results are reliable and the punishment

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[2] John D. Buretta, "Competency to Stand Trial", 24 *Ann. Rev. Crim. Proc.* 1027 1995

[3] 420 U.S. 162, 181-82 (1975)

> is morally justified (i.e. a fair trial) (Grisso, 1988; Melton, Petrila, Poythress, & Slobogin, 1987).[4]

9. Marc E. Schiffer, in his work *Fitness to Stand Trial*, wrote in 1977, that:

> The idea that persons of unsound mind should not be made to stand trial is one rooted in age-old concepts of fair play and fundamental justice. Originally, jurists may have viewed a defendant's affliction with mental illness as a sign of demoniacal possession or as evidence of direct intervention by the Almighty; in either case, it was thought unwise to proceed. Besides being a measure to appease the supernatural forces, the fitness requirement is both the product of the traditional right of an accused to make full answer and defence...and a logical extension of the rule which evolved at common law prohibiting trials in absentia.[5]

10. I was therefore persuaded, in view of this fair trial position as articulated by the law publicists, more so considering that the right to a fair trial is expressly guaranteed and entrenched under Section 42(2)(f) of the Constitution of the Republic of Malawi (the Constitution); and indeed given the factual circumstances that had been presented before me, which I outlined in detail in my decision of 5 March 2015, that it was necessary to make the order that I made.

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4 Astrid Birgden and Don Thomson (note 1 above).

5 Marc E. Schiffer, Fitness to Stand Trial, 35 *U. Toronto Fac. L. Rev*. 1 1977

11. Crucially, I ordered that the accused person had to be kept in custody at the Queen Elizabeth Central Hospital (QECH) in the City of Blantyre for the purposes of psychiatric assessment and observation as to his fitness for trial, and/or treatment. I directed two psychiatric specialists, these being Dr. Jennifer Ahrens who was mentioned in Shunem Nkosi's affidavit in support of the application to order mental health assessment, and another who was to be appointed by the Hospital Director of QECH, to conduct an independent assessment of the mental health condition of the accused person, and in particular, his capacity to stand trial in the instant criminal proceedings. The Hospital Director, Dr. Andrew Gonani, appointed Dr. Felix Kauye as the second psychiatric specialist to conduct the assessment.

12. The decision on fitness to stand trial is a decision to be made by the Court and not by medical people. As Attorney H. H. Bull, QC, correctly stated, addressing a gathering of expert forensic psychiatrists, which speech was peer-reviewed, edited and subsequently published in the esteemed *Criminal Law Quarterly* journal:

> These issues [of fitness to stand trial] will not be determined by you as medical men: you stand in no higher position than witnesses, albeit expert witnesses entitled to express an opinion. The issue is determined by the triers of fact, i.e., if it is a jury trial, by the jury, if a non-jury trial, by the judge or magistrate. The triers of fact are entitled to reject the medical testimony no matter how cogent it may seem to you. They try the issue and decide it on all the evidence before them. Despite what medical witnesses may say

> as to the mental condition they may, rejecting that evidence, still find the accused fit to stand trial.[6]

13. Similarly, John D. Buretta states that:

> Fitness to stand trial is a legal, not a clinical decision; the mental health professional offers an opinion and the court decides. Determining fitness is a moral, social and legal matter determined by legislation and the courts using the common-sense viewpoint of laypersons (Morse, 1978). The courts should not shift responsibility to mental health professionals to define what fitness is when such practitioners do not have the specific ability to decide the legal issue (Bonnie, 1993). Research and descriptive literature indicate that mental health professionals tend to assess mental status or intellectual capacity alone. However, there is no empirical evidence of a relationship between these clinical assessments and fitness to stand trial (Grisso, 1988; Szasz, 1988).[7]

14. In view of this, it was essential that the Court also had to give guidance to the psychiatric specialists on what to look for when deciding on issues of fitness to stand trial. I have already pointed out that in many jurisdictions, decisions on the issue of fitness to stand trial are rather rare, giving rise to some definitional problems. As an illustration, in their scholarly article referred to earlier in this ruling, Astrid Birgden and Don Thomson have stated that:

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6 H. H. Bull, Fitness to Stand Trial, 8 *Crim. L.Q.* 290 1965-1966, at 295.

7 Astrid Birgden and Don Thomson (note 1 above), Pages 208-209.

> The rarity of fitness being raised in Australia and New Zealand (as in Canada and the United Kingdom) in comparison to the United States of America has implications for any research into its definition and assessment. In Australia and New Zealand it is unknown what percentage of defendants have the issue of fitness to stand trial raised but it is considered extremely small. Studies reflecting data collected in three states in Australia and one study in New Zealand indicate that a finding of unfitness as the result of mental impairment rarely occurs (Brookbanks, 1996; Hayes, Langley, & Greer, 1993; Hayes, Sterry, Ovadia, Boerma, & Greer, 1991; Law Reform Commission of WA, 1991; New South Wales Law Reform Commission, 1994; Van Groningen, 1989).[8]

15. This speaks to the problem that I have had to grapple with in dealing with this issue in the Malawian context where such seems to equally be the position. Astrid Birgden and Don Thomson go further to say:

> In Australia the most influential case has been that of ***R v Presser*** 1958. The ***Presser*** criteria outlined by Justice Smith are similar to those delineated by (page 208) ***R v Pritchard*** 1836 in the UK and ***R v Dusky*** 1960 [must be ***Dusky v. US***] in the USA. The criteria reflect a common notion of the ability to understand, comprehend and assist in order to participate meaningfully in the criminal trial process.

[8] Ibid, Page 208

16. In my decision of 5 March 2015, I was acutely aware of this position. I carefully went through scholarly and other literature on the point as well as some judicial decisions, including ***R v M (John)***[9] and ***Dusky v. US***,[10] and came up with a set of criteria that I opine properly encapsulates the factors to be taken into account by the Court in making a decision on fitness for trial, and provided these as the primary criteria based on which the psychiatric experts were to conduct their assessment and report to this Court. Without restricting the generality of the assessment that the psychiatric specialists had to make in their Report, the Court specifically invited the specialists to consider the following factors that the Court will now consider in making its determination on the accused person's fitness to stand trial.

i. His ability and/or capacity to comprehend the charges framed against him;
ii. His ability and/or capacity to realise the seriousness of the penalties if proven guilty;
iii. His ability and/or capacity to follow the proceedings of the court;
iv. His ability and/or capacity to help his lawyer to defend his case;
v. His ability and/or capacity to maintain appropriate behaviour in the court; and
vi. His ability and/or capacity to competently give his own evidence should the need arise and should he elect to do so.

17. I directed that the Reports herein had to be furnished to this Court no later than 30 calendar days from the 5th of March 2015. The Court

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9 [2003] EWCA Crim 3452.
10 362 U.S. 402 (1960)

required two Reports, one each from the two psychiatric specialists, which were to be compiled and issued independently of each other.

18. The matter was, at that point, adjourned to today, the 16th of April 2015 to consider the Reports of the psychiatric specialists on the accused person's mental health and capacity to stand trial, and to make further directions and any other necessary orders as may be appropriate.

19. I must also mention that Marc E. Schiffer, in his article referenced earlier in this ruling,[11]discusses the case of ***Regina v. Boylen***,[12] stating that:

> In coming to its conclusion on the second issue that amnesia, though it might be a disadvantage to the accused, would not render his trial unfair, the court said: The fact that he is not able to instruct counsel as to the events is part of his defence to the charge ... that fact, of itself, cannot excuse an accused from trial and does not render him unfit to stand trial. The point is made by Edmond Davies, J. in Podola at p.424: "Such a plea is easy to advance, and it may be extremely difficult to refute. It affords an obvious and convenient refuge to a person finding himself or herself in a position of grave difficulty and danger - and, the graver the danger the greater the motive for making an assertion of this kind." The inability of an accused, who is otherwise normal, to recall events and not to be

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11 (note 5 above)

12 (1972), 18 C.R.N.S. 273, at 278

able to instruct counsel as is normally done, in my opinion, does not deny him the right to a fair hearing.

20. All these are therefore considerations that I have borne in mind in arriving at my decision on this matter.

21. Pursuant to my Order on mental health assessment of 5 March 2015, the Psychiatric experts have both duly complied. The two independently compiled psychiatric assessment reports on the accused person's mental health as it relates to his fitness to stand trial, were personally delivered to me under strict confidential seal by the Hospital Director of QECH, Dr. Andrew Gonani. This Court is most grateful for the dutiful cooperation of the two expert psychiatrists and their supporting psychiatric teams, and the Hospital Director of QECH, Dr. Gonani.

22. Section 133(1)(a) &(b) of the Criminal Procedure and Evidence Code provides that:

> (1) When in the course of a trial or preliminary inquiry the court has reason to believe that the accused may be of unsound mind so as to be incapable of making his defence, the court shall adjourn the trial or inquiry for such period, not exceeding one month, as the court may deem fit, and shall thereafter—
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> (a) order that during such adjournment the accused shall be kept in custody or at such other appropriate place as the court may direct, for observation and treatment;
>
> (b) direct that a medical practitioner examine the accused and inquire into his mental condition,

with particular reference to his capability of making his defence, and report to the court thereon, and the medical practitioner shall comply with such direction and his report **shall on its mere production be admissible in evidence as proof of its contents.**

23. Thus having received the reports from the psychiatric specialists herein, this Court admits the same in evidence as proof of their contents.

24. Before proceeding to make my ruling, I invited both learned Counsel for the accused person and the learned Director of Public Prosecutions to make representations to the Court, if any, based on the psychiatric reports made and produced by the psychiatric experts herein. Both indicated that they had taken note of the contents of the reports, and that they did not have anything else to say save to invite the Court to make its decision as to fitness of the accused person to stand trial, and/or provide any necessary directions.

25. Both reports are very extensive and comprehensive. I have read every sentence and every line in each of the reports. I have considered the reports with great care and utmost circumspection. The details in the reports have been particularly useful in shaping the Court's decision. I quickly remind myself in this regard, that the reports and the details, some of them very sensitive doctor-patient details, were meant to assist this Court to arrive at an informed decision, but not necessarily to be divulged to the public. I will therefore steer clear of divulging any such sensitive details or such details as must remain strictly confidential. It suffices for me to highlight only those details that I consider to be essential for a reasoned ruling of this nature to be coherent and

sensible, and in particular, I highlight the major overall assessment findings.

26. I start with the findings of the learned Dr. Jenifer Ahrens. Dr. Ahrens has an MBChB, is a Fellow of the Royal College of Psychiatrists in London, and is the Head of the Department of Mental Health at the College of Medicine, University of Malawi. Her expertise as a psychiatric specialist is profound and beyond doubt.

27. Dr. Ahrens and her psychiatric team assessed Mr. Lutepo between 12 March 2015 and 20 March 2015. Dr Ahrens referred to the specific items I invited her to consider in compiling her report. She stated that "In my opinion Mr. Lutepo is fit to plead and stand trial." Specifically she said:

i. Mr. Lutepo has capacity to comprehend the charges framed against him;
ii. Mr. Lutepo has capacity to realise the seriousness of the penalties if proven guilty;
iii. Mr. Lutepo has capacity to follow the proceedings of the court;
iv. Mr. Lutepo has capacity to help his lawyer to defend his case;
v. Whilst it is not possible to predict the future behaviour of Mr. Lutepo, I did not note any behaviour during his admission and assessment that would indicate that he would behave inappropriately in court;
vi. Mr. Lutepo has capacity to competently give his own evidence should the need arise and should he elect to do so.

28. Dr. Ahrens stated that Mr. Lutepo does not have a mental disorder that would make him unfit to stand trial. She states that this is evidenced by the fact that:

i. Mr. Lutepo's behaviour and symptoms varied over time and were not consistent with the presence of a range of symptoms and abnormal behaviour that would be expected with a true presentation of a psychotic illness.

ii. Mr. Lutepo does not fulfil the diagnostic criteria for a major depressive disorder;

iii. Mr. Lutepo does not fulfil the diagnostic criteria for a cognition impairing disorder such as dementia;

iv. Mr. Lutepo may fulfil diagnostic criteria for anxiety disorder and he certainly appeared worried and sad as would be expected of someone in his position facing the charges currently brought against him. However, Mr. Lutepo's lack of co-operation with the examination process did not allow me to be able to elicit the range of symptoms that would need to be present to make such a diagnosis.

v. Even were he to fulfil this criteria, this would not impact on his fitness to stand trial or capacity to participate in the proceedings.

vi. Mr. Lutepo was uncooperative with the assessment process, varying which language he would communicate in and refusing to communicate in English when it was evident that he was able to understand English given his responding to questions prior to their translation in Chichewa. He also denied understanding basic concepts…while at other times being able to answer quite complex questions. These are not the symptoms that would be consistent with any psychiatric disorder.

vii. In my clinical experience, Mr. Lutepo's presentation during the period of assessment at QECH did not fulfil the diagnostic criteria of any mental illness or disorder that would affect his insight or understanding of proceedings at the Court that would impact on his fitness to stand trial.

29. Thus Dr. Ahrens Assessment is abundantly clear: the accused person, Mr. Lutepo, has no mental illness or psychiatric disorder and he is fit to stand trial.

30. The Second Opinion is that of the learned Dr. Felix Kauye. Dr. Kauye holds a PhD in clinical mental health. He also holds an MBBS, a B.Med.Sc and is a fellow of the South African College of Psychiatrists. He is a former director of Mental Health Services in the Ministry of Health in Malawi, and is currently a Consultant Psychiatrist in Manchester, United Kingdom. Thus again, Dr. Kauye's credentials as a specialist psychiatrist are outstanding. His expertise in these matters is beyond question.

31. Dr. Kauye, together with his psychiatric team, assessed Mr. Lutepo between 20 March 2015 and 25 March 2015.

32. Dr. Kauye's overall diagnosis, which appears in Section 6.0 of his Report titled "Diagnosis", states that:

> It is my opinion after examination of all reports as mentioned above, and also after assessing Mr. Oswald Lutepo on two separate occasions, that Mr. Lutepo's diagnosis is Malingering. Malingering is a psychiatric

diagnosis whereby one consciously feigns mental symptoms for secondary gain.

33. Just like Dr. Ahrens, Dr. Kauye referred to the specific items I invited him to consider in compiling his report. In concluding his report, he responded to these in the following terms:

> The Court's questions relate to Mr. Lutepo having capacity or competence to attend trial. Capacity assessments have two parts which must both be addressed. The first part is to confirm that the person has a brain disorder causing him to lack capacity.
> Having a brain disorder does not mean that one does not have capacity. The principles of capacity assessments are that everyone should be presumed to have capacity unless proven otherwise. Once the condition of having a brain disorder has been satisfied, then the second part of the assessment is to find if that person has capacity in that specific area under contention and in the case of Mr. Lutepo, it was to deal with competence to stand trial.
> As discussed under the section of diagnosis, Mr. Lutepo's diagnosis is that of Malingering. Malingering does not result from a brain disorder and the person consciously feigns the symptoms. In view of the fact that Mr. Lutepo does not have a brain disorder, then it follows that he has capacity otherwise it will be difficult to explain the cause of his lack of capacity.
> I hope this answers all the court's questions as all questions are related to Mr. Lutepo having capacity.

34. Dr. Kauye finds in his report that whilst subjectively Mr. Lutepo sought to present symptoms suggesting that he was unfamiliar with his environment and that he could not recall or identify basic things, psychiatric objective assessment showed that he was well oriented as to time and place, and he knew what those basic things were. He also observed that his memory function was fairly good.

35. Dr. Kauye mentions that Mr. Lutepo would generally act normal and be calm when he was alone, or when the psychiatrist was not around, and he would suddenly change and seem to exhibit strange psychotic behaviour when the psychiatrist was present. This, strikingly, is a point similarly made by Dr. Ahrens in her report. Both specialists also indicate that the accused person was generally uncooperative during the assessment period when objective psychiatric assessment showed that he could have cooperated.

36. Both psychiatrists also make the point that Mr. Lutepo's overall inconsistent bahavior and inconsistent symptoms provided clear indication that he had neither any form of mental illness nor any form of mental disorder.

37. I am mindful of what I have stated earlier, that despite what medical witnesses may say as to the mental condition of an accused person, the Court may, rejecting that evidence, still find the accused fit to stand trial.[13] This position must be properly explained and understood. I stated in my decision of 5 March 2015, that even if a person is found to be suffering from a mental disorder, it should be assumed that he or she has the mental capacity to decide on various matters unless the

[13] See note 6 (above).

contrary can be shown. I went further to state that "This position mirrors the provision in Section 11 of the Penal Code (Cap 7:01 of the Laws of Malawi) that "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.""[14]The point therefore is that every person is presumed to have capacity and to be fit and competent to be tried unless proven otherwise. It is on the basis of this presumption of mental capacity and competence that Bull states that despite what medical witnesses may say as to the mental condition the Court may, rejecting that evidence, still find the accused fit to stand trial. Obviously the Court must have good reason to conclude that a person, whom medical experts opine to be unfit for trial, should in fact be found to be fit for trial. Where a Court makes such a finding, the finding would be consistent with the presumption of mental competence and fitness to stand trial. The corollary position carries no such presumption and therefore, the specialist medical or clinical findings on mental state and capacity should be more difficult to displace. Where medical experts find that the accused person is fit to stand trial, the finding is, by that very fact, consistent with the presumption of competence and fitness to stand trial. There is no correlative presumption that the accused is unfit to stand trial. In the premises, it should be in very rare and particularly compelling circumstances that a court should displace a finding that the accused person is fit to stand trial, and to replace it with a finding of unfitness to stand trial, without further expert evidence.

38. Reading both reports, which were compiled independently of each other by two highly qualified and experienced mental health specialists, probably the best this country could have locally identified, working with completely separate teams, in two separate hospitals and locations, with

[14] Para. 22 of the Ruling.

each team giving a very detailed account of the daily routine assessment tools, and tasks and the respective general assessment methodologies, the inescapable conclusion that one draws is that the accused person does not have any form of mental disorder and that he is indeed malingering. The accused person is feigning mental illness. He is consciously feigning psychotic and other symptoms of mental disorder for secondary gain. In other words, to put it more plainly, Mr. Lutepo, according to the psychiatric experts, is pretending to be mentally ill, and I so find. The expert evidence provided is in my view irrefragable. I have no reason to disagree with the psychiatric experts. I therefore find that Mr. Lutepo, the accused person herein, is mentally fit to stand trial, and I so determine.

39. This matter must therefore quickly proceed to trial.

Made in Open Court at Zomba this 16th Day of April 2015

RE Kapindu

JUDGE