IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL CAUSE NO 02 OF 2014

THE REPUBLIC

-VERSUS-

OSWARD LUTEPO

CORAM: HON. JUSTICE R.E. KAPINDU

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

For the Defence: Mr. O. Mtupila

Official Interpreter: Mr. A. Nkhwazi

Court Reporter: Mrs. L. Mboga

ORDER

KAPINDU, J

1. This matter was set down for the 30th of July 2015 for hearing on sentence and also to hear an application by the State to confiscate the property of

the convict herein, Mr. Lutepo, which is tainted with the proceeds of his crime, and/or to impose a pecuniary penalty on him.

2. This Court, on 15 June 2015 which was the day the convict herein pleaded guilty to the charges that he is facing, accepted the application by the State, made under Sections 48(1) as read with 51(2) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (Cap 8:07 of the Laws of Malawi) (hereafter referred to as the MLA), to defer sentence of the accused person in order to give the State room to make applications for confiscation and pecuniary penalty orders under Sections 53 and/or 58, and/or 61 of the MLA. It was then that the matter was adjourned to the 30th of July 2015.

3. As paragraph 1.7 of my decision of 15 June 2015 shows, the state submitted that "it would be reasonable that this Court should have regard to the terms of any financial orders against the convict before deciding on the mode and gravity of any source available to it." The State provided a background to the application for deferment at that time. It stated that from the experiences it had had before some courts in similar cases, it was apprehensive that if the application confiscation order(s) and/or financial penalties was to be made after the sentence in this matter is passed, it might have an undesirable effect on the confiscation order(s) and/or financial penalties that this court may impose. The State reminded the Court that some courts in Malawi have previously rejected confiscation applications by holding that when they passed the sentence, prior to the application for confiscation, they already took into account the possibility that the convict may not pay back (restitute). Such courts have thus refused, argued the State, to impose confiscation orders on the ground that the stiff sentence they imposed was in part in lieu of the confiscation of the property tainted with the proceeds of the money laundering that they would otherwise have made.

4. A few days before the 30th of July 2015 however, the State filed an application with this Court for postponement of the application for confiscation/pecuniary penalty Order, but to proceed with the hearing on sentence. The defence opposes the application arguing that sentencing should only proceed after the application for confiscation/pecuniary penalty Order has been disposed of by this Court, as confiscation and/or pecuniary penalty Order should have implications on the sentence to be imposed on the convict.

5. The learned Director of Public Prosecutions (DPP) began by reminding this Court that when the matter was adjourned last time, there were two issues that were to come for this Court's consideration on 30 July 2015. These were (1) the application for application for a confiscation and/or pecuniary penalty Order, and (2) sentence hearing. She then informed the Court that the State's application (on 15 July 2015) was that the Court should proceed to hear the parties' representations on sentence and then proceed to impose the sentence; but that it should postpone the application for confiscation and/or pecuniary penalty Order.

6. She submitted that the State was of the view that that position was well-founded in law. She reminded the Court that on 15 June 2015, the State had applied to have the matter adjourned to the 21st of August 2015 but that, wisely so, this Court stated that it was mindful of the convict's right to be sentenced within a reasonable time after conviction, and that the interests of justice required that sentencing should not be unduly delayed. She stated that the State agrees with this position and that it is for this reason that it argues that sentencing must proceed.

7. It was the DPP's submission that the issue of a confiscation Order is separate from sentencing proceedings. She argued that the law allows the competent authority, which is her office, to make application for a

confiscation Order and/or a pecuniary penalty Order no later than 12 months after conviction. She cited Section 48 of the MLA in support of the proposition.

8. She argued that in order to appreciate the difference between confiscation and sentencing, the Court should look at the procedure in Section 51(2) of the MLA which provides for a situation where the Court may, if it is satisfied as to the reasonability of doing so, to defer passing sentence pending the hearing of the application for confiscation and/or pecuniary penalty Order. She reminded the Court that it already considered this provision on 15 June 2015 when the State made an application to defer sentence.

9. The learned DPP proceeded to inform the Court that the reason the State was not ready to proceed with the hearing on its application for confiscation and/or pecuniary penalty Order, was because it had encountered several challenges which made it impossible to have that application heard on 30 July 2015, the date to which such hearing had been set. She stated that firstly, the State had found that several of the convict's properties which were targeted for the application to confiscate were seriously encumbered. She stated that some of the properties that the convict declared in pursuant to this Court's Order of 15 June 2015 were encumbered, some by banks. She stated that in fact, one of the encumbered properties had been advertised by the bank for sale. She pointed out that the issue of encumbrances on these properties predated the Notice to confiscate. The DPP pointed out that this was significant because Section 53 of the MLA provides that the rights and interests of third parties is one of the things that the Court must have due regard to during this process. As such, she submitted, the State did not want to make an application before fully considering the issues that have arisen during the valuation process because the State does not wish to mislead

the Court in any way in terms of the status of the properties. I must immediately state though, that regrettably the State did not proceed to provide specific details of these encumbrances.

10. Secondly, the DPP stated that there were wide discrepancies in the value of the property between the defence valuation of 2013 and the State valuation. To highlight this point, she stated that for Woget Industries for example, the plant and equipment capital was valued by the defence at MK 1,427,000,000.00 whilst the Government valuers put it at MK 292,585,250.00. The land on which Woget Industries is situated was valued by the defence at MK 17,000,000.00 whilst the Government valuers peg the value at MK 17, 560,000.00. She submitted that differences have consequently developed between the defence and the State in respect of these discrepancies which have to be resolved before a confiscation Order thereof may be sought. She pointed out that whilst the defence concedes that due to several factors ensuing since 2013 the property might have depreciated in value, the degree of devaluation as per the Government valuers is contested.

11. Another challenge encountered by the State, the DPP pointed out, was that there has been partial non-compliance by the convict in respect of the Order of this Court of 15 June 2015, though she was quick to say that this was no a disguised way of applying for contempt of Court. She said the aim however was to highlight what had not been done and what the State would like to see done. The learned DPP observed that in terms of Paragraph 2.4(h) of the 15 June 2015 Order, the Court ordered that the convict had to declare "Details of all assets worth over MWK 500,000 transferred to others by the convict or by anyone on his behalf, since 1 April 2013." She stated that the convict had failed to comply with this order. The DPP pointed out that the State wrote to the defence and copied the correspondence to the Court, in respect of this lack of compliance. She

stated that defence Counsel had an explanation for the non-compliance which she had been informed that Counsel would raise the explanation himself as he took his turn to address the Court. She however argued that it was the State's interest, and she believed in the interests of justice, that the convict be given more time to comply for purposes of the confiscation process.

12. The learned DPP went further to state that in the event that the convict continued not to comply, the State had an alternative. She said that the State has financial investigators who have already embarked on tracing tainted property. She pointed out that the tracing exercise by the financial investigators is important because it will help the State to assess the actual benefit that the convict got, and that this is very important for purposes of the application for a confiscation and/or pecuniary penalty Order.

13. The DPP also alluded to the Forensic Audit Report that was produced by the British Auditing Firm Baker Tilly. She stated that that Audit Report was not sufficiently comprehensive for purposes of tracing the tainted property herein. She stated that firstly, that Report did not trace or track cash transactions. Secondly she stated that whilst the Report indicated to whom payment was made, it did not show the reasons why such payment was made. She stated that the State's financial investigators herein have to find out why payments were made in order to distinguish innocent third parties from culpable third parties. She stated that the State does not wish to bring innocent third parties into disrepute by mentioning their names in the application.

14. She stated that the State requires a period of two months in order to thoroughly conclude the arrangements and processes necessary before

presenting to the Court the application for a confiscation Order in particular.

15. The learned DPP proceeded to state that under the circumstances, it was necessary that the application for a confiscation and/or pecuniary penalty Order be postponed, but that the hearing on sentence had to proceed.

16. The DPP stated that it had to be recalled that confiscation orders are different from restitution. It was her argument that it is restitution that affects sentence but not confiscation. She submitted that where a convict restitutes voluntarily, that is a factor that does towards reduction of sentence. She stated that this was not so with confiscation orders. According to the DPP, a confiscation order is not made in relation to the sentence which would be or has been imposed. She cited the case of the **Republic v Dzinyemba Soko** in which a Magistrate refused to make a confiscation order on the basis that he had already imposed a stiff prison sentence. She pointed out that this decision was wrong, and is the decision that prompted the State in the first place to seek to proceed by making an application for confiscation of property first before proceeding to sentence, so that when the Court is imposing the sentence, the sentence should not affect the confiscation order because the whole purpose of anti-money laundering legislation is to ensure that launderers should not in any way derive financial or other benefit from the proceeds of crime.

17. The learned DPP stressed that even a look at the general scheme of the MLA would show that the processes of sentence and confiscation are separate. She invited the Court to notice that under the MLA an application for a confiscation or pecuniary penalty Order could be brought to Court at any time within 12 months after conviction. She contended that it would be absurd to construe this to mean that the framers of the

legislation intended that the Court could wait for up to 12 months before sentencing a convicted money launderer.

18. The DPP submitted that after exploring Malawian authorities, no case on the point was found. As a result, she had to look elsewhere and she found a relevant South African case, **NDPP v Gardener** (582/2009) [2011] ZASCA 25 (18 March 2011) where Cachalia JA stated, at paragraph 23 of the Judgment, that:

> It is plain that confiscation and sentence are to be treated separately – for good reason. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant's culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect but this is not its rationale. The severity of a sentence, therefore, generally ought not to have a bearing on the exercise of a court's discretion whether to make a confiscation order; especially so in this case because, in the sentencing proceedings, the high court had taken into account the repayments as an indication of remorse on the respondents' part, ie a mitigating factor. In my view the high court should therefore not have had regard to the prison sentences it imposed on the respondents in deciding on the appropriateness of a confiscation order.

19. It was the DPP's submission that the import of this decision is that it indeed comes out as punitive to impose a severe sentence and to also impose a confiscation Order, but that the two are different.

20. The DPP proceeded to mention though that with reference to a fine, a Court cannot impose a fine before making a confiscation Order, but that there is no restriction on sentence that goes to a prison term.

21. Counsel Oswald Mtupila representing the convict presented forceful arguments in rebuttal. He started by making it plainly clear that the defence objected to the State's application for postponement of the hearing on confiscation and/or pecuniary penalty Order whilst at the same time proceeding with the sentence hearing.

22. Counsel referred the Court to the provisions of Section 48 of the MLA which had also been cited in aid of the DPP's submissions. Counsel Mtupila stated that the Court has to look with emphasis on the words "after conviction" as used in that Section. He stated that the import of the provision is that an application for a confiscation order or pecuniary penalty Order may be brought within twelve months "after conviction." He stressed that the Court should notice that it says "after conviction" and not "after sentence." He submitted that when one examines the full context of the MLA, what emerges clearly is that the framers of the Act had in mind that an application for confiscation of property had to be brought before sentence. He contended that the indication of the twelve months period was not for purposes of separating the process of sentence from that of confiscation. Rather, it was to make sure that the convict should not be made to wait indefinitely for his or her sentence after conviction whilst waiting for an application for confiscation to be made.

23. Counsel submitted that this position was indeed further supported by the provisions of Section 51(2) of the MLA. Counsel stated that it is observable that that Section provides that the Court may defer sentence pending an application for confiscation of property or imposition of a pecuniary penalty. According to Counsel Mtupila, the intention of this provision is simply to ensure that if the application for confiscation of property or imposition of a pecuniary penalty cannot be brought soon after sentence, then the Court should be empowered to defer sentence until such application is brought.

24. It was Counsel's submission that the rationale behind ensuring that these processes go together is to ensure that a convict should not be punished twice for the same offence. Counsel submitted that proceeding otherwise would entail double punishment because if sentence is passed before the application for a confiscation Order is considered, the Court will proceed to impose a sentence that would be oblivious of the loss that the convict will suffer upon having his property confiscated, or being ordered to pay a pecuniary penalty. He submitted that the taking away of property by way of confiscation presents a punitive detriment on the part of the convict.

25. Further, Counsel Mtupila submitted that it should be considered as a general principle that where there has been recovery of what was lost, such recovery should be taken into account when sentencing.

26. Counsel Mtupila further argued that confiscation of property was akin to restitution. He argued that the purpose of confiscation is to make good of the loss that has been occasioned by reason of the criminal enterprise, and that confiscation of property seeks to achieve the same goal.

27. Counsel Mtupila challenged the State for failure to cite a binding authority for the proposition that the processes of sentence and confiscation are separate and can proceed separately. He argued that the decision of the Supreme Court of South Africa cited by Counsel was only persuasive and not binding. Counsel submitted that such a distinction as the State sought to make drew no support whatsoever from the MLA.

28. Counsel observed that the State had submitted that a confiscation order is meant to remove the benefit that a convict derived from the offence. In this regard, Counsel submitted that in the instant case, the State had not yet established what benefit the convict had derived.

29. He further contended that sight should also not be lost of the fact that in the present case, the convict had actually pleaded guilty, and has been cooperative, and that he is ready to restitute. He argued that in light of these circumstances, it would be unjust to have him sentenced before determination of the application for confiscation of his property or imposition of a pecuniary penalty.

30. Counsel then changed tack and move on to provide explanation as to the failure by the convict herein to comply with some aspects of this Court's Order of 15 June 2015, as pointed out by the DPP.

31. Counsel stated that in advance it had to be mentioned that the convict had been cooperating with the State and had largely complied, and that a picture should not be painted to the Court that he is a defiant citizen. He stated that the convict declared his assets as required by the Court order. He stated however that there had been some difficulty complying with Paragraph 2.4(h) of the Order of 15 June because of two factors. First, he stated that the convict is now incarcerated in prison and that as such, it is difficult for him to have access to some documents. Secondly that the information contained in Bank statements furnished to

the defence by the State on 8 June 2015 did not have, accompanying it, all cheque images which would assist the convict to recall who was paid what amount. Counsel informed the Court that in many cases, the cheques that were cashed were Cash cheques and that the bank Statements in such cases would not indicate the name of the payee. Such details could only be accessed if the corresponding cheque images were provided. In this regard, Counsel stated that now that this matter is before this Court, the convict prays that this Court should order that Standard Bank Malawi Ltd should retrieve and produce all cheque images for the two companies in issue herein, namely O & G Construction Ltd and International Procurement Services for the period 1st April 2013 to 30 November 2013. Counsel undertook that should that information be provided, the convict will be able to fully comply with Paragraph 2.4(h) of this Court's Order of 15 June 2015 within seven days from the date of receipt of the cheque images.

32. Counsel concluded his submission by stating that it is the prayer of the defence that, as this Court participates in the development of jurisprudence under the MLA in this country, the Court should consider and hold that confiscation and/or pecuniary penalty orders should be made before a convict is sentenced so that the convict, such as Mr. Lutepo in the instant case, should be favourably considered on sentence in the light of the confiscation or pecuniary penalty Order.

33. The DPP replied. She started by acknowledging that the defence had advanced very compelling arguments. She proceeded to emphasise that a confiscation Order, internationally, is meant to take away the benefit derived from crime. She submitted that a reading of Sections 48 and 53 of the MLA would show that they refer to tainted property as being the realizable property. She stated that by contrast, under restitution, the

convict decides what to give. He can give property that is legitimately acquired. She contended that the convict must give "clean property."

34. On this point, Counsel Matemba, who also appeared on behalf of the State, pointed out that to illustrate the point, in the case of Republic v Senzani, Mrs. Senzani restituted not the MK63million that she had laundered, but the house that she had acquired in 2003. She did that voluntarily. He argued that the State accepted this restitution because the property was not tainted. If the property had been tainted, he submitted, the State could not have accepted it as restitution because then it could have been property which the State had to confiscate.

35. Finally, the learned DPP submitted that confiscation does not necessarily entail recovery of the full amount laundered. She stated that it may possibly happen if it can be shown that the benefit of the convict from the proceeds was the full amount laundered. However, she observed, in many cases of money laundering, there are various other people who share in benefitting from the laundered money. So confiscation targets the benefit that a particular convict is shown to have derived from the proceeds of the crime.

36. Restitution, by contrast, she argued, aims at getting back the full amount.

37. All in all the DPP submitted that the law is clear and the Court can proceed to sentence the convict whilst postponing the hearing of the application for the imposition of a confiscation order and/or a pecuniary penalty Order.

38. Such were the arguments before me. The question that I now have to decide is whether I should order that hearing of the convict's sentence herein should proceed whilst postponing the hearing of the application for

the imposition of a confiscation order and/or a pecuniary penalty Order; or whether both can only proceed, one after the other, starting with hearing of the application for the imposition of a confiscation order and/or a pecuniary penalty Order; in which case under the circumstances, I have to adjourn the hearing of both applications as the State is not yet ready with the application for the imposition of a confiscation order and/or a pecuniary penalty Order.

39. At the centre of this dispute is the issue as to whether meting out sentence without consideration of the question of confiscation of property or a pecuniary penalty; and then proceeding to make an Order of confiscation of tainted property or pecuniary penalty at a later date – after sentence has already been imposed; is the right thing to do in legal principle, or it is legally impermissible and archetypical of judicial overkill.

40. I must begin by acknowledging with great appreciation, the arguments that were advanced by both the State and the defence. The arguments were no doubt very cogent. I have thought long and hard through these arguments. As is evident from these arguments, and will become further evident from the analysis that follows, there are no easy answers to the questions and issues raised. After a careful reflection though, it seems to me that in the main, the answers are nearer to us than I initially thought: they derive from right within the MLA itself. We need not import, for this purpose, some esoteric principles bred in foreign jurisdictions in contexts unrelated or completely unfamiliar to ours. Neither are the answers to be primarily derived from some sophisticated exploration and analysis of trans-boundary or trans-continental comparative jurisprudence. At the same time though, an analysis and domestic injection of some comparative jurisprudence into our own has some logical and epistemic value. It enriches our own thinking and

knowledge through a necessary cross-pollination of jurisprudential ideas and the general concept of justice.

41. It is interesting that both parties started their analysis by reference to Section 48(1) of the MLA, and both ran with their arguments, derived from this Section, into diametrically opposite directions and leading them to different conceptual destinations.

42. According to the DPP, what we should note from Section 48(1) is that it provides that the competent authority (which is her office) may bring an application to Court for the confiscation of tainted property or for the imposition of a pecuniary Order within 12 months from the date of conviction. She ties this with Section 42(2)(f)(x) of the Constitution which requires that a person convicted of a crime should be sentenced within a reasonable time. Her contention is that it would be unreasonable for a Court to wait for up to 12 months after conviction before the Court sentences the convict. Yet, she argues, Section 48(1) is plain that she can wait for that long before bringing the application for confiscation of property or imposition of a pecuniary penalty. The legislature, according to her submission, could not have intended that the process of confiscating tainted property or imposing a pecuniary penalty should lead to a breach of the right of the convict to be sentenced within a reasonable time after conviction. The only construction of Section 48(1) that makes sense is therefore, according to the DPP, that the sentence hearing is a separate process from the process of confiscating tainted property and/or imposing a pecuniary penalty. As such, she argues, one can proceed independent of the other.

43. Counsel Mtupila argues, essentially, that in fact, Section 48(1) of the Constitution supports the right of the convict to be sentenced within a reasonable time. He starts by saying that this Court should notice that

Section 48(1) says that the application for confiscation of property or imposition of a pecuniary property can be brought by the DPP "after conviction" and not "after sentence." He argues that there is a material difference between these two. Secondly he proceeds to argue that by stating that the DPP can bring the application under Section 48(1) within 12 months from the date of conviction, all that the 12 months' time limit seeks to achieve is to ensure that under no circumstances should the sentencing of the convict be delayed by more than 12 months because to do so would be to violate the right of the convict to be sentenced within a reasonable time under Section 42(2)(f)(x) of the Constitution. That time limit, he argues should not be construed to mean that the sentencing process is separate from the process of confiscation of property or imposition of a pecuniary penalty.

44. I have already pointed out how cogent and forceful both arguments are. However, I proceed from a different premise, one which, it appears to me, both parties seem not to have addressed their minds to. According to Section 48(1)(a) of the MLA, a confiscation order is made "**against property** that is tainted property in respect of the offence."[1] Similarly, Section 54(1) of the MLA provides that "(1) Subject to subsection(2), where a court makes **a confiscation order against any property** under section 53, the property vests absolutely with the Government by virtue of the order."[2] Of significance under these provisions is the fact that the confiscation Order is made "against the tainted property". It is not made "against the person of the convict." A confiscation order is therefore an order *in rem*, that may, beyond the convict, be enforced against any person to whom the tainted property may be traced (i.e a person having an interest in the tainted property). The procedure under Section 49 of the MLA for

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1 My emphasis
2 My emphasis

instance, lays this bare. The point that the confiscation procedure is a procedure *in rem* rather than *in personam* also comes out clearly under Section 52 of the MLA which is headed "Procedure for *in rem* confiscation order where person dies or absconds."[3]

45. Parallels may perhaps be drawn with principles relating to forfeiture elsewhere. In the Sychelles, the Supreme Court of Appeal, in the case of **Hackl v Financial Intelligence Unit** (2012) SLR 225, considered the constitutionality of confiscation procedure under that country's anti-money laundering legislation. The main is well summarised in the following opening paragraph of the decision:

> This case is without doubt one of the most comprehensive attacks on the constitutionality of laws, specifically the provisions of the Anti-Money Laundering Acts of 2006 and 2008 (hereinafter AMLA) and the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCCCA), as against the right to property guaranteed in the Constitution of Seychelles.

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[3] Section 52 of the MLA provides that: (1) Where—
(a) a person has been charged with a serious crime; and
(b) a warrant for the arrest of the person has been issued in relation to that charge,
the competent authority may apply to the court for a confiscation order in respect of any tainted property if the defendant has died or absconded.
(2) For the purposes of subsection(1), a person is deemed to have absconded if reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued, and the person shall be deemed to have so absconded on the last day of that period of six months.
(3) Where the competent authority applies under this section for a confiscation order against any tainted property the court shall, before hearing the application—
(a) require notice of the application to be given to any person who, in the opinion of the court, appears to have an interest in the property;
(b) direct the notice of the application to be published in the Gazette and in a newspaper published and circulating in Malawi containing such particulars and for so long as the court may require.

46. The Court dismissed the constitutional challenge. The Court held that:

> POCCCA provides for the confiscation of proceeds of crime. These are necessary and proportionate limitations to the right to property as permitted by our Constitution. The appellant has not disputed that the funds and properties forfeited in Seychelles are derived from his criminal conduct in Germany. It is not in the public interest that persons be allowed to transfer money and freely invest in, buy or enjoy property in Seychelles when such money derives from their nefarious activities. It does not serve the good name or reputation of Seychelles… Seychelles has an interest in suppressing the conditions likely to favour the reward of crime committed; removing the instruments and the assets derived from the commission of unlawful activity which might in turn permit the funding of further offences meets this objective. The argument by the appellant that the provisions of AMLA and POCCCA are repugnant to his constitutional right to property is therefore unsustainable.

47. In the South African case of **Simon Prophet v National Director of Public Prosecutions** 2007 (6) SA 169 (CC) Nkabinde J, dismissing a constitutional challenge on the validity of a law requiring the confiscation (or forfeiture) of property used in the commission of drugs offence, stated that forfeiture "rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner."

48. The Court in **Hackl v Financial Intelligence Unit** in turn relied on decisions from elsewhere, including the United States of America (US). The Court said:

> In **United States v Ursery** (95-345) 518 US 267 (1996) the Supreme Court of the United States of America after reviewing a long list of similar precedents found that in contrast to the *in personam* nature of criminal actions, *in rem* forfeitures are neither "punishment" nor criminal for purposes of the double jeopardy clause of the American Constitution. In the case of **Bennis v Michigan** (94-8729) 517 U.S. 1163 (1996) the forfeiture was found constitutionally permissible even in the case of a joint owner of property as the court found that –
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> > historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied.

49. The clear inference from all these decisions is that the process of confiscation is a process *in rem*, which focuses on the tainted property itself rather than the individual convict. The tainted property itself is the evil that ought to be remedied. The remedy is to have it confiscated. This is demonstrated by the fact that even if a person dies and is not thereby convicted of a serious crime, under Section 52 of the MLA, a confiscation order *in rem* may still be made by the Court.

50. The *in rem* procedure applicable to cases of applications for confiscation of tainted property under the MLA, is to be distinguished from

the *in personam* procedure stemming from Section 48(1)(b) of the MLA. Under that provision, a pecuniary penalty order is made "against the person in respect of benefits derived by the person from the commission of the offence." Similarly, under Section 61(1) of the MLA, it is provides that:

> (1) Subject to this section, where the competent authority applies to the court under section 48 for a pecuniary penalty order **against a person in respect of the conviction of that person for a serious offence** the court shall, if it is satisfied that the person has benefitted from that offence, order him to pay to the Government an amount equal to the value of his or her benefit from the offence or such lesser amount as the Court certifies in accordance with section 64 (2) to be the amount that might be realized at the time the pecuniary penalty order is made. (my emphasis)

51. Once again, it is significant to note here that these provisions make it clear that a pecuniary penalty order is made "against the person" of the convict.

52. Sentencing is a process that goes to the person of the convict. It is the punishment that a person receives as the consequence of committing the crime.[4] It is a measure *in personam*. Under the MLA the general

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[4] According to Section 25 of the Penal Code (Cap 7:01 of the Laws of Malawi), The following punishments may be inflicted by a court—
(1) Death.
(2) Imprisonment.
(3) Corporal punishment.
(4) Fine.
(5) Payment of compensation.
(6) Finding security to keep the peace and be of good behaviour; or to come up for judgment.
(7) Liability to police supervision.

punishment is provided for under Section 35(3)(a). The Section provides that "A person who contravenes this section commits an offence and shall, on conviction, be liable— (a) in the case of a natural person, to imprisonment for ten years and to a fine of K2,000,000." However, a pecuniary penalty provided for under Section 48(1)(b) is also clearly a form of punishment. The imposition of punishment on a convict by a Court of law in a criminal case is what is called sentencing. The punishment received is the sentence. Since a pecuniary penalty is clearly imposed in the form of an order made "against the person" of the convict, it is punishment against the convict and clearly meets the criteria of a sentence as well. Indeed, under Section 67 of the MLA, where a person fails to comply with a pecuniary penalty Order, the Court may impose a prison term in default of the pecuniary penalty Order. This makes it clear that the pecuniary penalty order is part of punishment that may be imposed on a convict under the MLA, and it is additional to the punishment prescribed under Section 35(3) of the MLA. It adds another potential prison term of up to ten years imprisonment in default of payment of the pecuniary penalty, which prison term, if activated, is exempted from remission under the Prisons Act (in terms of Section 59(c) of the MLA).

53. However, back to Section 48(1)(a) of the MLA, it must also be mentioned that the MLA makes provision for a situation where, even though the Court forms the view that a confiscation Order ought to be made against the tainted property, it forms the view that for different reasons confiscation would be impossible, the Court then turns back, not to the person of the convict to make payment instead of a confiscation Order. Section 58 of the MLA provides that:

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(8) Forfeiture.
(9) Community service.
(10) Any other punishment provided by this Code or by any law or Act.

Where a court is satisfied that a confiscation order should be made in respect of the property of a person convicted of a serious crime but that the property or any part thereof or interest therein cannot be made subject to such an order and, in particular, the property—

(a) cannot, on the exercise of due diligence, be located;

(b) has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the confiscation of the property;

(c) is located outside Malawi;

(d) has been substantially diminished in value or rendered worthless; or

(e) has been commingled with other property that cannot be divided without difficulty,

the court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the convicted person to pay to the Government an amount equal to the value of the property, or part interest.

54. Where the Court adopts the process under Section 58 of the MLA, the consequence of default to pay the amount is provided for under Section 59 of the MLA. It provides that:

Where the court orders a person to pay an amount under section 58, that amount shall be treated as if it were a fine imposed upon him or her in respect of a conviction for a serious crime, and the court may—

(a) notwithstanding anything contained in any other written law, impose in default of the payment of that amount, a term of imprisonment—

(i) of two years, where the amount does not exceed K100,000;

(ii) of five years, where the amount exceeds K100,000 but does not exceed K500,000;

(iii) of ten years, where the amount exceeds K1,000,000;

(b) direct that the term of imprisonment imposed pursuant to subsection (a) be served consecutively to any other form of imprisonment imposed on that person or that the person is then serving;

(c) direct that the provisions of the Prisons Act regarding the remission of sentences of prisoners serving a term of imprisonment shall not apply in relation to a term of imprisonment imposed on a person pursuant to paragraph (a). Cap. 9:02

55. What emerges therefore is that once the Court decides that the convict must pay, instead of having the tainted property confiscated, then again the order becomes an order *in personam* against the convict, and assumes the nature of punishment just like a pecuniary penalty and the extent of liability for a prison term in default is the same in both instances, governed by Section 59 of the MLA. The amount ordered in both cases is treated, in principle, as a fine but subject to the qualifications in Section 59.

56. From the foregoing, one conclusion is easy and straightforward to draw. If the application sought to be made by the State is exclusively an

application for a confiscation order against property that is tainted with the proceeds of the money laundering crime for which the convict herein, Mr. Lutepo has been convicted, that application will be for an Order that is typically an Order *in rem* against the tainted property rather than *in personam* against the convict. There is a clear disconnect therefore between the process of sentencing him and that of confiscation. In this regard, if the State can rule out possible resort to the procedure for payment instead of confiscation under Sections 58 and 59 of the MLA, or for the imposition of a pecuniary penalty, then clearly sentencing can proceed whilst the application for confiscation of the tainted property pends.

57. The more difficult question though is what about the possibility of *in personam* orders which the DPP also seems to contemplate, as exemplified by application documents already filed with this Court? Indeed I imagine that in many cases, the need to resort to payment instead of confiscation in terms of Section 58 of the MLA will arise. Can sentencing proceed whilst these *in personam* orders pend, only for such orders to be made at a later date? What really, is the true import of Section 51(2) of the MLA? To recap, Section 51(2) provides that:

> Where an application is made for a confiscation order or a pecuniary penalty order to the court before which the person was convicted, and the court has not, when the application is made, passed sentence on the person for the offence, the court may, if it is satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined application for the order.

58. The only Malawian case where this issue has thus far been decided has been in the Senior Resident Magistrate Court at Lilongwe, the case of

Republic v Wyson Zinyemba Soko, Criminal Case No. 162 of 2014. I will revert to this decision later in my analysis.

59. There was a line of argument advanced by defence Counsel that I must now address and clear out. As stated earlier, it was Counsel's submission that proceeding to sentence the convict before the Court makes the confiscation order would entail double punishment because the Court would have proceeded to impose such sentence oblivious of the loss that the convict will suffer upon having his property confiscated, or being ordered to pay a pecuniary penalty. He submitted that the taking away of property by way of confiscation will present a punitive detriment on the part of the convict which should be taken into account for sentencing purposes.

60. In order to address Counsel's argument, we need to appreciate the true essence of a confiscation order. It has been said that confiscation is justified by a principle, deeply ingrained into the law, which is that people should not profit from unlawful activity in general and from crime in particular.[5]

61. The position of launderers vis-à-vis confiscation of their property was made clear by Lawton LJ in **R v Waterfield** [1975] 1 WLR 711, when he said:

> The first thing the law should do is to ensure that those who break it . . . should not make any money out of their wrongdoing. . . . This court is firmly of the opinion that if those who take part in this kind of trade know that on conviction they are likely to be stripped of every

[5] Goff and Jones, 'Benefits accruing to a Criminal from his crime' Chap. 37 in *The Law of Restitution*, 5th edn (London, Sweet & Maxwell 1999)

> penny of profit they make and a good deal more, then the desire to enter it will be diminished.

62. In the case of **Cleaver v Mutual Reserve Fund Life Association:3 Cleaver v Mutual Reserve Fund Life Association** [1892] 1 QB 147 at 156, Fry, LJ stated that:

> It appears to me that no system of jurisprudence can, with reason, include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person.

63. Fried put it correctly and succinctly when he stated, in his work 'Rationalizing Criminal Forfeiture' (1988) 79 *Journal of Criminal Law & Criminology* 328, that the reason tainted property is forfeited is "that there is something criminal about the thing. Because the thing is guilty, the State can seize it and arguments from double jeopardy can be side-stepped. Forfeiture, in addition to criminal sanctions is not, on this account, double punishment"[6]

64. It therefore does not lie in the mouth of a convicted money launderer like Mr. Lutepo, to start arguing that he will suffer loss when his tainted property is confiscated. Or that he will suffer detriment when such confiscation takes place. The property is tainted with criminality. There is no justification in law or common sense why that should be regarded as a factor to be considered in mitigation when it comes to the general sentence.

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[6] David J Fried, 'Rationalizing Criminal Forfeiture' (1988) 79 *Journal of Criminal Law & Criminology* 328 and Leonard Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill, NC, University of North Carolina Press, 1996).

This is why, in the South African Supreme Court of Appeal's decision of **NDPP v Gardener** (above) the Court said that:

> It is plain that confiscation and sentence are to be treated separately – for good reason. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant's culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect but this is not its rationale. The severity of a sentence, therefore, generally ought not to have a bearing on the exercise of a court's discretion whether to make a confiscation order; especially so in this case because, in the sentencing proceedings, the high court had taken into account the repayments as an indication of remorse on the respondents' part, ie a mitigating factor. In my view the high court should therefore not have had regard to the prison sentences it imposed on the respondents in deciding on the appropriateness of a confiscation order.

65. I must highlight here, the approach taken by His Worship Magistrate Chirwa in **Republic v Wyson Zinyemba Soko.** In that case, the State brought an application for confiscation under the MLA. The application came after the court had already convicted and sentenced Mr. Zinyemba Soko of Money Laundering contrary to Section 35 of the Money Laundering Act and Theft contrary to Section 278 of the Penal Code. The amount in issue, in respect of both offences, was K40, 953,287.47. Just like in the

present case, Counsel for the defence argued that the application should have properly come before the court passed sentence so that the court could have taken into account of all this factor having first before sentencing the offender. Like in the present case, defence Counsel also cited Section 51 of the Act as authority for his submission.

66. The learned Magistrate made certain interesting observations. He found that Wymbanso General Suppliers (the business entity that was targeted by the State for confiscation) was tainted by the fact of the use of its account to deposit the cheque that was found to have been stolen from Malawi government. The Magistrate observed that the court found in its judgment that the crime of money laundering had been committed by that fact. He concluded that there was, therefore, a connection such that Wymbanso General Suppliers was tainted property on that ground. He then stated that "I would proceed to order its confiscation on that ground if it had not been for the submission by the State that the Malawi government does not have the capacity to run this going concern."

67. The learned Magistrate then concluded by saying that:

> The next question for me therefore is whether it would be appropriate in the circumstances to order the offender to make this payment, i.e. the value of the tainted property. The nature of this payment is the same as a fine. I believe at the core of making a determination whether the payment should be made is to look at the means of the offender to meet the requirement to make the payment. The State has not shown the Court that the offender is capable of making the payment. On the contrary Counsel for the Defence argued that things are not all in order for the offender

> regard being had to the fact that he is currently in custody serving the sentence which this court imposed. Ordering him to make this payment would ordinarily entail the attachment of the application of Section 59 of the Act which imposes a default sentence for non-payment of the value required to be paid. The offender is already serving what may be termed a long cumulative sentence and when passing that sentence I took into account the non-recovery of the money stolen. There is no evidence to suggest that that money is available as we now speak. In my opinion, it would be sentencing him twice for non-recovery of money if I ordered him to make the payment and he happened to fail to meet it. I therefore fail to find the real ground for ordering him to make the payment prayed for.

68. A few things can be said about the approach adopted by the Magistrate. Firstly, his approach not to order the confiscation of Wymbanso General Suppliers, after finding that this entity was tainted property within the meaning of the MLA, on the basis that the State had stated that the Malawi government did not have the capacity to run the business which was going concern, was clearly wrong in principle. It amounted to saying that since the State did not wish to run this tainted piece of property as a business, then the convict could as well be left to enjoy the same. I am mindful here that the Magistrate clearly stated that: "I would proceed to order its confiscation on that ground [that it was tainted property] if it had not been for the submission by the State that the Malawi government does not have the capacity to run this going concern." As the authorities above have shown, the primary concern of the law should be to ensure that those who break it should not make any money, and I would add should not derive any advantage or benefit, out of

their wrongdoing. This court is likewise of the firm opinion that if those who take part in money laundering and other forms of serious property or financial crimes know that on conviction they are most likely to be stripped of any money they make out of it and a good deal more, then the desire for them and would-be offenders to engage in these crimes will be diminished.

69. Secondly, a fair interpretation of his ruling would be that whilst it is possible to sentence a convict before an application for confiscation or imposition of pecuniary penalty is considered, once that is done, then the Court should preclude itself from in future entertaining such an application. In other words, his approach is the same as that espoused by Counsel Mtupila in the instant case.

70. I am afraid that this approach cannot be supported either. In addition to the South African decision in **NDPP v Gardener** above which came out clearly on the point, I also make reference to the instructive commentary of Archbold, *Criminal Pleading, Evidence and Practice*, (London: Sweet & Maxwell, 2008) (Archbold). Archbold makes commentaries in respect of Section 14 of the Proceeds of Crime Act 2002 in England. To put Archbold's analysis in context, I set out Section 14 of that Act in full:

> 14 Postponement
> (1)The court may—
> (a)proceed under section 6 before it sentences the defendant for the offence (or any of the offences) concerned, or
> (b)postpone proceedings under section 6 for a specified period.
> (2)A period of postponement may be extended.

(3)A period of postponement (including one as extended) must not end after the permitted period ends.

(4)But subsection (3) does not apply if there are exceptional circumstances.

(5)The permitted period is the period of two years starting with the date of conviction.

(6)But if—

(a)the defendant appeals against his conviction for the offence (or any of the offences) concerned, and

(b)the period of three months (starting with the day when the appeal is determined or otherwise disposed of) ends after the period found under subsection (5), the permitted period is that period of three months.

(7)A postponement or extension may be made—

(a)on application by the defendant;

(b)on application by the prosecutor or the Director (as the case may be);

(c)by the court of its own motion.

(8)If—

(a)proceedings are postponed for a period, and

(b)an application to extend the period is made before it ends,

the application may be granted even after the period ends.

(9)The date of conviction is—

(a)the date on which the defendant was convicted of the offence concerned, or

(b)if there are two or more offences and the convictions were on different dates, the date of the latest.

(10)References to appealing include references to applying under section 111 of the Magistrates' Courts Act 1980 (c. 43) (statement of case).

(11)A confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.

(12)But subsection (11) does not apply if before it made the confiscation order the court—

(a)imposed a fine on the defendant;

(b)made an order falling within section 13(3);

(c)made an order under section 130 of the Sentencing Act (compensation orders).

71. What one notices from a thorough reading of this Section, is that whilst, just like the MLA, it provides that the Court may defer sentence to consider an application for confiscation, it provides no explicit guidance on whether it is necessary that the hearing of the application for confiscation must always precede the sentence hearing. The learned authors of Archbold, whose work has for many years been regarded as a work of authority before Malawian courts, have elucidated on these issues. They comment in this regard as follows, starting at page 798, Para. 5 – 541:

> The Court is given the option to deal with confiscation matters before it sentences the defendant, or to postpone them for a specified period. The assumption of the earlier legislation [which] was that confiscation would come first is not repeated, but it is clear that the court must address the question of confiscation before sentencing the defendant and either proceed with the

confiscation hearing under subsection (1)(a) prior to sentence, or postpone confiscation under subsection 1(b), and proceed to sentence. The Court may not sentence the defendant without making any reference to confiscation, and then deal with confiscation matters on a subsequent occasion, but a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or granting of a postponement (s. 14(11)...)

72. Archbold proceeds, at page 800, para. 5 – 545, to stated that:

If the Court postpones the confiscation proceedings under Section 14, it may sentence the defendant in the normal way, but must not make any of the orders specified in subsection (2) (fine, compensation, forfeiture, etc)... If the Crown Court makes a confiscation order before sentencing the defendant, it must, when sentencing the defendant, take account of the order before imposing a fine, making any order involving payment by the defendant other than a compensation order, or any of the other orders of forfeiture or deprivation specified in section 13(3): s. 13(2). A confiscation order may, however, be left out of account in deciding whether to make a compensation order, and in deciding its amount. It is open to the Crown Court to make s confiscation order and a compensation order in respect of the same offence, even though this means the defendant will be required to pay twice the amount involved in the offence.

73. Archbold then concludes on the issue, which we are squarely dealing with here, by stating, at the same Paragraph, that:

> Subject to this, in deciding the appropriate sentence for the offence, the confiscation order must be left out of account. The defendant cannot claim that his sentence should be mitigated because a confiscation order has been made.

74. When I look at Section 51(2) of the MLA, my impression is that the scheme envisaged is the same as Archbold describes in terms of the Proceeds of Crime Act, 2002 above. I therefore make the following directions:

(1) Section 51(2) of the MLA gives the Court the option to deal with confiscation and pecuniary penalty matters before it sentences the defendant, or to postpone them for a specified period;
(2) The Court may not sentence the defendant without making any reference to the possibility of confiscation or pecuniary penalty, and then deal with confiscation matters on a subsequent occasion; but a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or granting of a postponement;
(3) If the Court postpones the confiscation proceedings, it may sentence the defendant in the normal way, but must not make any orders of payment such as fine, compensation, payment in lieu of confiscation, etc.
(4) Subject to the foregoing, in deciding the appropriate sentence for the offence, the confiscation order must be left out of account. The

defendant cannot claim that his sentence should be mitigated because a confiscation order has been made or is likely to be made.

(5) Where the application for a confiscation order or pecuniary penalty Order is postponed, and the sentencing proceeds, the Court may not impose a fine during sentencing.

(6) Where a fine, an Order of payment in lieu of confiscation and/or a pecuniary penalty Order is made after sentence has already been passed, the Court will take into account any punishment it may already have imposed in making these subsequent Orders.

75. In the premises, I Order that the sentencing process herein can continue, as prayed for by the State, but in accordance with these directions.

76. The Court recalls that another issue that arose during argument related to the non-compliance with Paragraph 2.4(h) of the Order of this Court of 15 June 2015 by the convict. The explanation provided by the convict was that (1) he is in custody and thus finds it difficult to access some documents; and (2) that the Bank Statements that he was served with by the State on 8 June 2015 did not have accompanying cheque images that would assist him to recall to whom certain payments were made and why. In this regard, Counsel Mtupila for the convict prayed that this Court should issue an order obliging Standard Bank Malawi Ltd to release Cheque images corresponding to the transactions of O & G Construction Ltd and International Procurement Services (IPS) from 1 April 2013 to 30 November 2013 so that he may comply with this Court's Order of 15 June 2015. Counsel undertook on behalf of the convict that upon receiving such Cheque images, the convict would comply with paragraph 2.4(h) aforersaid within seven (7) days. The Court grants this prayer and orders that Standard Bank Malawi Ltd should furnish the required cheque images corresponding to transactions of the accounts of

O & G Construction Ltd and International Procurement Services held with the said bank for the period above-mentioned; within 7 days from the date hereof. I further Order that the convict must comply with Paragraph 2.4(h) of this Court's Order of 15 June 2015 within seven (7) days from the date of receipt of the said cheque images from Standard Bank Malawi Ltd.

77. I so Order.

Made in Open Court at Zomba this 3rd Day of August 2015

RE Kapindu, PhD

JUDGE