**REPUBLIC OF MALAWI**
**MALAWI JUDICIARY**
**IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**CRIMINAL CASE NO. 68 OF 2014**

**THE REPUBLIC**

**V**

**LEONARD KARONGA**

**CORAM : MWALE, J.**

: Kachale DPP, Matemba DDG, Counsel for the State
: Theu, Counsel for Defendant
: Kaferaanthu, Court Interpreter
: Mthunzi, Court Reporter

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**Mwale, J**

# RULING

**1.0 Introduction**

1.1 This matter was set down for today, having been adjourned on 11th February, 2016 for the continuation of sentence hearing. At the last sitting, the matter was adjourned at the instance of the defence because there were contractual issues between the defendant and his counsel. Hanging over the Court, were a number of issues that had been raised at a

previous sitting, on 23rd November, 2013 when both the defence and the State had addressed the court on the need for more time in order to address the issues of:

(1) restitution;
(2) the time at which the defendant is said to have cooperated; and
(3) other facts relating to mitigation on which the parties were not agreed.

I ruled on the 11th of February that the matter had been adjourned enough times, and I would not be inclined to entertain any more adjournments.

1.2 Nonetheless, when the case was called, the State begun by requesting an adjournment. The reasons for their prayer was that after the parties had filed their submissions on sentence, the defence filed a Mitigation Statement on 25th February, 2016. Service was accepted by the office of the DPP on 29th February 2016, at 10.35 hours, just before the hearing. The State had previously refused to accept service of the document because it was not signed. Nonetheless, they did prepare Skeletal Arguments in response to it, which formed the basis of their prayer for an adjournment.

1.3 It is the State's contention that the issues raised in the Mitigation Statement are materially different from those raised in the Defence Submissions on Sentence and I was referred to specific paragraphs in both documents that are different. Most particularly, the State has taken grave exception to the allegation that the defendant was prevented from pleading guilty at the earliest opportunity because his efforts were "*ignored or frustrated by the State Machinery*" (para 3.8 of Mitigation Statement). In essence the State is of the view that if indeed the defendant wanted to plead guilty at the earliest possible opportunity, then such allegations should be pursued, occasioning an investigation into the internal affairs of the State machinery in its handling of this case, for the ultimate interests of justice. That way, if the defendant should have benefitted from an early guilty plea but for the thwarted efforts, he should still be able to do so.

1.4 Such internal investigation shall necessitate, according to the State the examination in chief of State counsel themselves and orders from the court to produce a certain document that may corroborate the defendant's story, that is said to have at some point been in the custody of the State, particularly the Anti-Corruption Bureau (ACB), but has since disappeared. The DPP is strongly of the opinion that any slur on these law enforcement offices needs to be seriously investigated to prevent a compromise of the criminal justice system and undermining the overall administration of justice. An adjournment would enable the State counsel themselves to not only investigate, but also to swear affidavits themselves, that would resolve this issue.

1.5 Counsel for the defendant however vehemently opposed the adjournment. In his view, the fact that one department, the Anti-Corruption Bureau, was not able to produce a document to the Director of Public Prosecutions upon request, should not be of concern to the defence. The prayer for an adjournment, he contended, was a serious request to vary the court order of 11th February, 2016 that the matter should no longer be subject to any adjournments. He further argued along the lines that ever since the defendant

pleaded guilty and was convicted on 26th August, 2015, the State have squandered opportunities to discuss the divergence of facts with the defence. Submissions for Sentence were filed on 19th November, 2015, the State knew what facts the defence sought to rely on for sentencing and made no effort to file the issues in divergence for the Court, this being the duty of the State. Counsel for the defendant has also argued that the Mitigation Statement has not brought out any new issues.

1.6 The foregoing is, in a nutshell, the crux of the issues before me. While it is so easy to be swayed by the weighty arguments in favour of the adjournment, it is very important to first separate the wood from the trees and isolate, what issue are essential for the disposition of the case and whether the wider interests of justice, however meritable, have a place in the scheme of the present proceedings. The most pressing consideration at this stage in the proceedings is that there is a divergence of facts. Upon noting such divergence, it was open to me to either on my own motion order a Newton hearing in which case it would be the duty of the prosecution to assist the court by calling evidence and testing any defence evidence (***R v Beswick*** **[1996] 1 Cr. App. R. (S) 343 and** ***R v Munson*** **[2008] EWCA Crim 1258**), or to direct the parties to file a Notice for a Newton hearing at which the parties would still have to call and test evidence. Having directed the parties to consider filing a notice, and upon the defence having done so, it is now for the parties, specifically the State, to isolate the issues in dispute.

**2.0 Newton Hearing: Focus of the Present Proceedings**

2.1 The decision to conduct a Newton hearing is premised on a finding that the facts in dispute would have a significant bearing on sentence. From the submissions of the prosecution and the differences in the facts as set out, I find that such divergence does indeed have a bearing on the sentence. As alluded to earlier, the present proceedings for sentencing have been preceded by a Notice, filed pursuant to my earlier directions for the parties to consider filing the same, for a Newton hearing. As the learned DPP pointed out in her Skeletal Arguments, this mode of procedure, obtaining in the United Kingdom, has no precedence in Malawi and as such, reliance must be placed on the case law of England as we build on our own jurisprudence. This manner of hearing which gets its name from the case of ***R v Newton*** [1982] 77 Cr. App. R. 13 CA sets out the methods to resolve disputed issues in cases where it is not possible to resolve a factual dispute, material only to sentence, from the verdict. In such cases, it may be appropriate to conduct a Newton hearing after the verdict has been returned (***R v Derek Malcolm Finch*** [1993] 14 Cr. App. R. (S) 226.

2.2 Two options are open to the judge in a Newton hearing for the resolution of the dispute:
(a) the judge himself/herself hears evidence and comes to his own conclusion, namely:
(b) the judge listens to submissions (but hears no evidence). However if this course is adopted and there is substantial conflict between the two versions then the defence version would be accepted.

The case of ***Jordan Sheard v R*** [2013] EWCA Crim 1161 demonstrates the difficulty in relying on the second course of action. The Court of Appeal in the case of ***Jordan***

***Sheard v R*** (above) felt unable to disturb a sentence referred to it for being unduly lenient, as no evidence had been called following a plea which contained assertions that the prosecution did not accept. The wisdom from this case is that if there is a factual dispute, the calling of witnesses is usually the best way of establishing the facts. In the matter before me, therefore, the first option shall be employed. As has been requested by the State, in the interests of efficient case and time management, affidavit evidence may be tendered and the witnesses shall be available for cross-examination should any of the parties wish to test the evidence of the opposite party.

**3.0 The Procedure**

3.1 General guidance about the procedure to be adopted immediately after the defendant pleads guilty was set down in ***R v Underwood*** [2005] 1 Cr. App. R. (S) 90. The key points are:

(a) It is the responsibility of the defence to take the initiative and alert the prosecution to areas of dispute. In the case before me, this does not seem to have been done at the outset.

(b) The prosecution should not be taken by surprise and can take time to consider its position and the interests of justice (in the present case, the Mitigation Statement has taken the State by surprise).

(c) On ascertaining there is a dispute, if the prosecution rejects the defence version the areas of dispute should be identified in writing. The State in the present case seems to be rejecting the defence version, although this version has not been properly articulated. The State however, as counsel for the defendant correctly argued, is obliged to identify the areas in dispute in writing and file the same in advance of the hearing.

3.2 As we shall be continuing on the basis of hearing evidence, at the Newton hearing, the prosecution should call appropriate evidence and should test the evidence advanced by the defence. Similarly the defence should call relevant evidence. If the issue is within the exclusive knowledge of the defendant he should be prepared to give evidence. Where he fails to do (and subject to any explanation) the judge may draw such inferences as he thinks fit. Where the guilty plea is a late one, an adjournment to hold a Newton hearing is usually unnecessary as all witnesses would already be in court. In the present case, where the guilty plea came at the beginning of the trial at which there were no witnesses, it would be impossible to proceed immediately and an adjournment becomes a necessity.

3.3 Whilst I ordered that I would not be inclined to entertain any more adjournments in this matter, such order was made in relation to the type of adjournments sought for matters that were exclusively in the party's control and ought to have been taken care of privately without delaying the proceedings. Once a decision is reached that the matter proceed by hearing evidence, an adjournment is necessary to ensure that the procedural matters incidental to proceeding in that manner are complied with.

3.5 The issue of contention which has necessitated the prayer for adjournment by the State is that the issues in the Mitigation Statement do not tally with the issues in the Defence Submissions for sentence. It should however be noted that generally matters of

mitigation are not dealt with by a Newton hearing. This is because a Newton hearing is concerned about disputes in the immediate circumstances of the offence which the prosecution witnesses have knowledge and which can be tested in cross-examination. Matters raised in mitigation are extraneous matters about which the prosecution witnesses are unlikely to have any knowledge and as such the prosecution can hardly be expected to challenge or disprove them by cross-examination. The onus of satisfying the judge in matters of mitigation rests with the defence but in matters under dispute in a Newton hearing, the burden of proof is on the prosecution to satisfy the judge beyond reasonable doubt that their own version of the facts is the correct one (***R v Ahmed*** [1984] 80 Cr App R 295). Technically therefore, the Mitigation Statement filed by the defendant is ill placed at this stage of the proceedings. If however the Statement is to be adopted as the defendant's witness statement or affidavit for the purposes of the Newton hearing, then it behoves the State to reduce all issues of dispute in it and any other document filed by the defendant as the basis of the evidence they wish to tender.

**5.0 Counsel for the State Testifying in this Matter**

5.1 I am persuaded that the implications of the Mitigation Statement are to cast a slur on the conduct of the State in this matter and as such, internal investigations into the matter are necessary. Such investigations though in the wider interests of justice and the proper functioning of the criminal justice system only become relevant to this case upon the State satisfying the Court that the outcome of such investigations has an impact on the sentence. The learned DPP lucidly argued that the defendant can only benefit from the remission in sentence that a guilty plea attracts if offered at the earliest opportunity if it can be proved that the defendant could have in fact pleaded guilty earlier than he did but was in fact prevented from doing so by the State. Compelling State Counsel and other law enforcement agents to testify is the State's preferred way of doing this.

*5.2* I have noted that the 2004 Malawi Law Society Code of Ethics (Chapter 18) does not tackle the issue of whether a lawyer can testify as a witness at a client's trial. Since this Code of Ethics has yet to be adopted it may very well be that changes have been made to it since. Whilst I am aware that in its current form the Code of Ethics is not legally binding, it is nonetheless a useful indicator of the prevailing thoughts on the subject within the profession. Whilst I have not, in the time since we adjourned the day before yesterday to source the most recent version of the proposed Code of Conduct, I have sourced Codes of Conduct for numerous jurisdictions across the Commonwealth and beyond and the unanimous consensus seems to be that "lawyers appear to recognize, whether by rules or common sense, that merging the role of the advocate and witness is not a wise idea"[1] but it is subject to exceptions. Thus, a lawyer may be disqualified from continuing to act for a client where it becomes apparent that he or she may be needed to testify as a witness in the client's matter if he or she does not fall under the exceptions. The American Bar Association Model Rules of Professional Conduct which are similar to the rules in the Commonwealth such as Australia, New Zealand and India speak to this issue in Rule 3.7a. as follows:

[1] Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 Fordham L. Rev. 945 (2001). Citing the case of United States v Prantil, 764F.2d548,553 (9th Cir. 1985) ("The rule envisions that as soon as soon as the dilemma is anticipated the attorney will promptly discharge his ethical obligations by electing one of two mutually exclusive paths before him".

*(a) A lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness unless;*

*(1) The testimony relates to an uncontested issue;*

*(2) The testimony relates to the nature and value of legal services rendered in the case; or*

*(3) Disqualification of the lawyer would cause substantial hardship to the client.*

American case law abounds in support of these elements, with the inclusion of a fourth, that "the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony."[2]

Following this model in the absence of our own, the only permissible reason for not requiring State counsels to disqualify themselves from proceeding with this trial if they give evidence would most likely be the third ground, that hardship would be caused to the client because of the distinctive value of the lawyer as counsel in that particular case. The rationale behind this exception is that once litigation has reached an advanced stage, the loss of counsel who is familiar with the case and his replacement by another who is unprepared may jeopardize the interests of his client and contribute to a miscarriage of justice.[3] In order for this exception to apply, most courts have required that the matter requiring counsel to give evidence should be one that could not have been discerned before the inception of the trial and the lawyer must be genuinely surprised by it.[4] It is therefore quite possible for the State counsel in this case to give evidence upon an application being made to the court at the appropriate time, after the issues in dispute have been filed and either in the course of, or before the Newton hearing. It may very well be that after the State has properly analysed the disputed facts, it may the facts giving rise to the current necessity for them to give evidence may no longer be in issue. If it is still in issue, the State will have to properly apply for leave counsel to give evidence and that application shall be considered on its merits on the basis of the issues in dispute that would have been filed previously as well as on a thorough analysis of the ethical implications raised by such a course of action.

**6.0 Order**

6.1 For all I have reasoned above, I am adjourning the matter to a fixed date for the following purposes:

1) The State is to file a written notice of all the issues in dispute within 2 days of the order hereof.
2) Both parties should file and serve affidavits of the witnesses it wishes to provide the evidence in support of their version of the facts within seven days of the order hereof.
3) Upon service of the affidavits, each party is to file its intention to cross-exam any of the deponents within 14 days of service of the affidavits. This period of time is necessary to ensure that counsel for the defendant is able to travel to the prison where the defendant is incarcerated in order to take instructions.

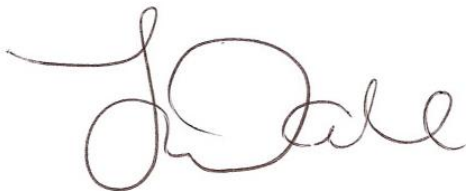
[2] Robbins v Hannen, 194 Kan 596, 400 P.2d.733 1965
[3] Montgomery v First Nat'l Bank of Newport. 246 Ark.502
[4] Montgomery v First Nat'l Bank of Newport cited above

4) Should any witness be unwilling to swear an affidavit the party may apply to the court for an order compelling that witness to swear the affidavit and avail themselves for cross-examination.
5) Should the State still consider it necessary that evidence be given by State counsel, leave shall have to be applied for, with skeleton arguments justifying the same and the defence shall file their arguments in opposition appropriately. The application shall be heard in chambers.

6.2 The matter is adjourned to 25th March 2016.

6.3 I so order

Made in in Lilongwe this 2nd day of March 2016.



**Fiona Atupele Mwale**

**Judge**