



**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
FINANCIAL CRIMES DIVISION
CRIMINAL CAUSE NO. 05 OF 2023**

BETWEEN

THE REPUBLIC

-AND-

REYNECK MATEMBA

CORAM: HON. JUSTICE VIOLET PALIKENA-CHIPAO

Ms. Lapozo/Mr. Sambani, Counsel for the State

Accused Person present but unrepresented

Ms. Mkochi, Court Clerk

Chipao, J

RULING

1. Reyneck Matemba, was taken before the Chief Resident Magistrate Court on 5th August 2022 upon his arrest to be told of reasons for his arrest in compliance with section 42(2) of the Constitution. The State indicated that they could not proceed with plea before obtaining consent to prosecute from the Director of Public Prosecutions in line with section 42 of the Corrupt Practices Act. At that time the charge levelled against the accused person was that of corrupt use of official powers contrary to section 25(1) of the Corrupt Practices Act (the CPA) as read together with section 34 of the CPA.
2. The Accused Person was released on bail and the matter was adjourned pending the obtaining of consent from the Director of Public Prosecutions (DPP) by the Anti-Corruption Bureau. Later the matter was committed to this court for trial. Following the receipt of the file by the High Court, a date was fixed for plea and directions. A charge sheet was filed containing three counts namely corrupt use of official powers contrary to section 25(1) of the CPA as read together with section 34 of the CPA, misuse of public office contrary to section 25B (1) of the CPA as read together with section 34 of the CPA and failure to declare interest by a public officer contrary to section 25D(1)(a) of the CPA as read together with section 34 of the CPA.

3. When the Court convened for plea and directions, the Accused person raised a preliminary issue asking whether the State had obtained consent from the DPP to prosecute him. The State's response was that consent was not necessary in view of the repeal of section 42 of the CPA. Since the issue was raised orally and without prior notice, the Court directed that the Accused Person should formally raise the issue with supporting arguments to enable the State respond. The issue raised by the Accused Person is whether the ACB needs to obtain consent of the DPP before instituting the prosecution of the Accused Person.
4. At the time the Accused Person was arrested and brought before the court, it was a requirement under section 42 of the CPA for the ACB to obtain consent to prosecute from the DPP before instituting proceedings. This is the reason why the Chief Resident Magistrate's Court (CRM's) court could not proceed with plea taking on the 5th of August when the Accused Person appeared before the court. Section 42 of the CPA provided as follows;
 - (1) *No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Director of Public Prosecutions.*
 - (2) *Where under subsection (1) the Director of Public Prosecutions withholds consent to any prosecution under this Act, he shall—*
 - a. *provide to the Director reasons in writing, devoid of any consideration other than those of fact and the law, for the withholding of consent; and*
 - b. *in addition to providing reasons to the Director, inform the Legal Affairs Committee of Parliament of his decision within thirty days of the decision.*
 - (3) *The Director of Public Prosecutions shall give consent under subsection (1), or reasons in writing under subsection (2) (a), as case may be, within thirty days, failing which the Director shall be entitled to proceed as if consent to prosecute had been given under subsection (1).*
 - (4) *Notwithstanding the provisions of subsection (1), a person may be arrested and charged with an offence under Part IV or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he is charged has not been obtained, but no such person shall continue to be remanded in custody or on bail for a period longer than fourteen days on such charge unless in the meantime the written consent of the Director of Public Prosecutions aforesaid has been obtained.*
 - (5) *When a person is brought before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him is obtained, the charge shall be explained to the person accused but he shall not be called upon to plead*
 - (6) *No proceedings for an offence under Part IV shall be commenced after the expiry of twelve months from the date the written consent of the Director of Public Prosecutions is given.*

5. Section 42 of the CPA was however repealed by the Corrupt Practices (Amendment) Act, 2022. The Corrupt Practices (Amendment) Act, 2022 was passed in Parliament on 28th July 2022 and came into effect on the 13th of September 2022.
6. It is argued by the Accused Person that according to section 74 of the Constitution and section 9(1) of the General Interpretation Act that the Corrupt Practices (Amendment) Act, 2022 which repealed section 42 of the CPA and therefore removed the requirement of obtaining consent from the DPP was not yet operational at the time he was arrested and brought to court.
7. The Accused Person further argues that according to section 14 of the General Interpretation Act, the repeal of section 42 notwithstanding, the position of the law is that unless the contrary intention appeared, the ACB was still legally bound to obtain written consent from the DPP before instituting the prosecution of the Accused Person. He further argued that there being no contrary intention in the Corrupt Practices (Amendment) Act, 2022, the enactment of the Corrupt Practices (Amendment) Act, 2022 did not affect the previous operation of that section.
8. Section 74 of the Constitution and section 9 of the General Interpretation Act makes provision in relation as to when laws come into force. Section 74 of the Constitution provides as follows;

No law made by Parliament shall come into force until it has been published in the Gazette, but Parliament may prescribe that a law shall not come into force until some later date after its publication in the Gazette
9. Section 9 of the General Interpretation Act is also instructive on the issue. The section provides as follows;
 - (1) *Subject to subsections (2) and (3), an Act assented to by the President shall come into operation immediately on the expiration of the day next preceding the day on which it is published in the Gazette.*
 - (2) *Where it is enacted in the Act, or in any other written law, that such Act or any provision thereof shall come or be deemed to have come into operation on some specified day, the Act or, as the case may be, such provision shall come or be deemed to have come into operation immediately on the expiration of the day next preceding such day.*
 - (3) *Where it is enacted in an Act, that such Act shall come into operation on such date as may be appointed by any person, such person may, by notice or order, bring the Act into operation on a day specified in the notice or order, or may by the same or by different notices or orders bring different provisions of the Act into operation on different dates.*
10. My reading of the two sections is that a law comes into force either on the expiration of the day next preceding the day on which it is published in the Gazette or on a day specified in the Act or on a date specified by notice or order where an Act specifies that it shall come into operation on such date as may be appointed by any person.
11. According to the Accused Person, there is no provision in the Corrupt Practices (Amendment Act) providing for a date as to when the Act shall come into operation and that as such, the Act came into operation on 13th September 2023 upon being published in the Gazette. It is therefore the argument of the Accused Person that there is no retrospective

application of the law and that as such in his case, the ACB is still obliged to obtain consent of the DPP to prosecute him.

12. The State has argued on the authority of the case of *Stanbic Bank Limited v. Mwalwanda* [2008] MLR 361 that the rule against retrospective application of a statute is not a rigid rule. The State has also relied on cases of *Blyth v. Blyth* (1966) All ER; *Rodway v. R* [1990] 169 CLR 515 and *Republic v. Kamwangala (Application for Jury Trial)* Criminal Case No. 43 of 2013. It has been argued by the State that the requirement in the repealed section 42 was a procedural requirement and not a substantive requirement and that alterations in the form of procedure are always retrospective unless there is good reason why that cannot be the case.
13. The State has further argued on the authority of section 83 of the CP & EC, section 42(1) of the CPA and cases *R v. Goldan Lambert* [2009] EWCA Crim 700; *DPP v. Bull* (1994) 4 All ER 411 and *R v. Welsh (Snr) and 17 Others* [2015] EWCA 1516 that proceedings are deemed to have been instituted when the Accused comes to court to answer the charge. It was argued by the State that the Accused Person was merely presented before the court for purposes of conforming with section 42 of the Constitution and was never charged and did not take plea. It was argued by the State that the State only intended to institute the proceedings on 28th June 2023 when it presented its chargesheet to the court, when the requirement of the consent had already fallen off. It was thus submitted that the applicable law is the Corrupt Practices (Amendment) Act which does not require the obtaining of consent.
14. In reply, the Accused person relying on section 42(2)(b) of the Constitution and section 83 of the CP & EC argued that the State instituted prosecution of the Accused Person under section 83(1)(c) of the CP & EC. The Accused person argued that the State did not bring the accused person to court to be informed of reasons for his further detention but to be charged.
15. Relevant to the issue of commencement of proceedings is section 42(1), (4) and (5) of the CPA which provides as follows;
 - (1) *No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Director of Public Prosecutions.*
 - (4) *Notwithstanding the provisions of subsection (1), a person may be arrested and charged with an offence under Part IV or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he is charged has not been obtained, but no such person shall continue to be remanded in custody or on bail for a period longer than fourteen days on such charge unless in the meantime the written consent of the Director of Public Prosecutions aforesaid has been obtained.*
 - (5) *When a person is brought before a court before the written consent of the Director of Public Prosecutions to the institution of a prosecution against him is obtained, the charge shall be explained to the person accused but he shall not be called upon to plead.*

16. Whilst, subsection (2) provides that no prosecution of an offence shall be instituted without the consent of the DPP, under subsections (4) and (5) of section 42 of the CPA, the law clearly allows the prosecuting authority to bring an accused person before the court of law to be remanded in custody or on bail pending the obtaining of the consent suffice to say that where no consent has been obtained, the accused person is not required to plead to the charge.

17. In the present case, the Accused Person was brought before the lower on 5th August, 2022 before consent was obtained from the DPP as required by the law as it then was. This is what the State indicated on record as to the purpose for bringing the accused before the court;

In line with section 42(2) of the Constitution, the law demands that not later than 48 hours, an arrested person must be brought before a court of law to be told of the reasons of his arrest. We have brought the Defendant so that he is informed of the reasons for his arrest but not to take plea. Section 42 of the Corrupt Practices Act, demands that consent must be obtained for the Bureau to prosecute the case.

18. The provision which makes reference to the 48hour rule in section 42 of the Constitution is subsection (2)(b) which provides as follows;

Every person arrested for, or accused of an alleged omission of an offence shall, in addition to the rights which he or she has a detained person, have the right ... as soon as it is reasonably possible, but not later than 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an independent and impartial court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she must be released.

19. As rightly argued by the Accused Person, the reasons for bringing an accused person to court under section 42(2)(b) of the Constitution is to either charge him or to inform him of reasons for further detention or to have him released if there are no reasons for further detention. My reading of the provision is that the accused person must be charged and if not charged, he must be told of the reasons why he has to continue in detention and if the person is not charged and there are no reasons for further detention, he must be released. The law does not demand that an accused be brought to court within 48 hours to be informed of the reasons of his arrest but rather to be informed of the reasons for further detention or to be charged.

20. Reasons for arrest need to be furnished at the time of arrest. The duty of to inform an accused person of reasons for his arrest is immediate upon arrest. The State does not need to wait until the time the accused will be taken to court to inform him of the reasons of his arrest. This is clear from section 42(1)(a) of the Constitution which provides as follows;

Every person who is detained, including every sentenced prisoner, shall have the right to be informed of the reason for his or her detention promptly, and in a language which he or she understands.

21. The fact that the Accused Person was taken before the court in this case did not mean that the accused was charged with any offence more so when the State clearly indicated that the accused would not proceed to take plea. This was also in line with section 42(5) of the CPA which clearly provides that where no consent is obtained, an accused person should not be

called upon to plead. So, the question to ask is whether when the Accused Person was brought before the court on 5th August 2022, the State had instituted the proceedings prosecution of his case.

22. In the **R v. Goldan Lambert Case**, the appellant was charged under the Terrorism Act of 2000 where section 117 required consent either of the DPP or the Attorney General for most of the offences. In some cases, the DPP's consent could only be given after permission from the Attorney General. A plea before venue hearing took place on 28th June 2007. Permission of the Attorney General was granted on 3rd August 2007 and Accused was committed for trial on 3rd August 2007. The Appellant contended that the proceedings were a nullity since plea before venue hearing took place before permission of the Attorney General was granted. The Crown tried to rely on section 25 of the Prosecution of Offences Act 1985. The said section provided as follows;

(1) This section applies to any enactment which prohibits the institution or carrying on of proceedings for any offence except

(a) with the consent (however expressed) – of a Law Officer of the Crown or the Director;

(b)

and so applies whether or not there are other exceptions to the prohibition (and in particular whether or not the consent is an alternative to the consent of any other authority or person).

(2) An enactment to which this section applies –

(a) shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence; and

(b) shall be subject to any enactment concerning the apprehension or detention of children or young persons.

23. The Court in that case considering the question as to when proceedings are deemed to commence for matters requiring consent to prosecute and in referring to its earlier decisions, held that provisions requiring consent to prosecute before instituting proceedings in the light of the predecessor to section 25(2) be read as meaning that instituting proceedings relates to the time at which the person comes to court to answer the charge. In the **Goldan Lambert Case**, the court referred to earlier decisions which tackled the question of when are proceedings considered instituted in cases requiring consent in the light of section 25 of the Prosecution of Offences Act, 1985 including the case of **R v Bull** (1994) 99 Cr. App. R. 193.

24. Section 25(2) of the Prosecution of Offences Act is similar to our section 42 (3) of the CPA which provides as follows;

Notwithstanding the provisions of subsection (1), a person may be arrested and charged with an offence under Part IV or a warrant for his arrest may

be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the written consent of the Director of Public Prosecutions to the institution of a prosecution for the offence with which he is charged has not been obtained, but no such person shall continue to be remanded in custody or on bail for a period longer than fourteen days on such charge unless in the meantime the written consent of the Director of Public Prosecutions aforesaid has been obtained

25. The provisions are similar in that they all allow for preliminary processes to take place notwithstanding the absence of consent to prosecute without nullifying the processes taken.
26. On the authority of the cases of ***R v. Goldan Lambert and Welsh*** and in view of section 42 of the CPA, it is this court's conclusion that for purposes of provisions requiring consent to prosecute, proceedings are deemed instituted when the Accused is called to answer the charge not simply when the charge sheet is presented before the court.
27. The court is aware that under section 83(1) of the CP & EC, proceedings can be commenced by bringing before a magistrate a person who has been arrested without a warrant or by a public prosecutor or police officer signing and presenting a formal charge to a magistrate. However, considering that under section 42 of CPA, the law allows such procedural steps like arrest, charging and bringing to court for remand or bail to take place prior to obtaining of consent without rendering the processes void, it is this court's understanding that such steps do not amount to instituting prosecution. This is why under section 42(5) of the CPA, if no consent is obtained, an accused person cannot be called to plead.
28. In view of the foregoing, it is this court's view that that the prosecution of the accused had not been instituted at the time he appeared before the magistrate court on 5th August 2022 as he did not appear to answer the charge(s) levelled against him. The prosecution was only instituted on 28th June 2023 when the Accused person was called to court to answer the charges levelled against him, the matter having been for plea and directions on the 28th of June 2023.
29. On the issue of consent, there is no dispute that the requirement to obtain consent of the DPP before instituting criminal proceedings is no longer required, the provision which provided for the requirement having been repealed. The issue is whether the effect of such an amendment in the law can be applied retrospectively. In relation to the Accused, the question is whether the fact that his case was brought to court in August 2022 which is before 13th September when the law came into force mean that consent should not be obtained.
30. In as far as the prosecution of the accused is deemed not to have been instituted when the Accused Person appeared before the court on 5th August 2022, then the requirement for consent in as far as the CPA was concerned prior to 13th September 2022 did not arise as the Accused Person was not called to answer the charge(s) against him. As he has only been called to court to answer the charges post 13th September 2013, the requirement for consent only arose at this time when he was expected to take plea and not time earlier than that. With this reasoning, since the requirement no longer exists now, it is not necessary for the ACB to obtain consent for the prosecution of the Accused person. The issue of retrospective application of the law therefore does not arise in this regard.

31. In reply to the State's submissions, the Accused went further to argued that the case of **Republic v. Kettie Kamwangala** conforms to section 14 of the General Interpretation Act that **unless contrary intention appears in the law itself**, all proceedings commenced under any repealed provision shall be continued under and in conformity with the provisions so repealed and that where a written law repeals any other written law, the repeal shall not affect the previous operation of any written law so repealed. The Accused referred to section 14(1)(a) of the General Interpretation Act which provides as follows;

*Where a written law repeals and re-enacts with or without modification, any provisions of any other written law, then unless a contrary intention appears—
(a) all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed.*

32. The Accused person has argued that there is no contrary intention in the repealing law but simply repealing section 42. What comes clear from section 14(1)(a) is that proceedings commenced under any provision which has been repealed, shall be continued in accordance of the repealed law. This would mean that if the proceedings against the accused had been instituted, then they can only continue as per the requirements of section 42 of the CPA. However, in view of this court's reasoning that the prosecution of the Accused person had not been instituted until the 28th of June 2023, the prosecution of the Accused person is not caught by the provisions of section 14(1)(a) of the General Interpretation Act.

33. But in case I am wrong in my understanding of when proceedings are deemed to commence in as far as consent for prosecution provisions are concerned, I will proceed to deal with the issue whether the law can apply retrospectively, the accused having been arrested and brought to court prior to the amendment of the CPA which saw the repeal of the provision requiring consent.

34. In the case of **Mwalwanda v. Standbic** [2007] MLR 198, the court stated the law on retrospective application of statutes as follows;

I must say that the law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or it arises by necessary and distinct implication. The rule against retrospectivity of statutes or laws is fundamental rule of law but one that is not rigid or inflexible. This means therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule. Being an exception to the general rule therefore there must be clear terms on retrospectivity or it must arise by necessary or distinct implication.

35. When the matter went to the Supreme Court on appeal in **Stanbic Bank Limited v. Mwalwanda** [2008] MLR 361, the Court affirmed the decision of the High Court. This is what Tambala JA stated at page 363;

We agree with the learned Judge in the Court below and we are satisfied that he correctly stated the law on the retrospectivity of a statute or law.

36. The Accused Person in reply argued that the decisions referred to by the state are all civil cases except one and that they all deal with procedural issues and not substantive matters.

37. It will be important to note that in the **Stanbic Bank Limited v. Mwalwanda** [2008] MLR 361, the court did consider the criminal case of **Director of Public Prosecutions v Lamb**

and Others [1941] 2 All ER 499 where the court applied a statute retrospectively in a criminal matter where the liberty of a person was clearly at stake. In the **DPP v. Lamb and Others Case**, the accused persons were convicted of contravening some currency regulations. A law prescribing the maximum penalty of three times the value of the currency connected with the commission of the offence, came into force after the accused had committed the offence but before they were convicted. It was argued on behalf of the defendants that since at the time that they committed the offence the relevant penal provision was not in force, they could not be sentenced in terms of that law. That argument was rejected by the Court which held that the clear and ordinary meaning of the words of the penal provision required that the defendants should be exposed to a maximum of three times the value of the currency involved, in the event that the Court properly preferred the option of imposing a fine on the defendants. The provision was as follows;

"Where any person is convicted of an offence against any of these regulations in relation to ..., the maximum fine which may be imposed on him shall be ... a fine equal to three times the value of the security, currency ..."

38. It is important to note the Supreme Court of Appeal in the case of **Stanbic Bank Limited v. Mwalwanda** [2008] MLR 361) held that the rule against retrospective operation of a statute is not rigid and that there will be situations where a law would be construed to have retrospective operation. Such exceptions include where the statute is dealing with matters of procedure. The case of **Roadway v. R** [1990] 169 CLR 515 is on point where the court had this to say

"It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure."

39. Similar views were taken in the case of **Blyth v. Blyth** [1966] 1 ALL ER where Lord Denning stated as follows;

The rule that an Act of Parliament is not to be given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which the courts give to evidence."

40. In the case of **Republic v. Kettie Kamwangala** Criminal Case No. 43 of 2013 where the court was considering whether the question of retrospective application of the Ministers order amending the Criminal Procedure (Trials Without Jury) Order, the court referring to the cases of **Stanbic Bank Limited v. Mwalwanda** [2008] MLR 361), **Roadway v. R** [1990] 169 CLR 515 and **re Athlumney; Ex parte Wilson** (1898) 2 QB held the rule against retrospective application may apply where it is clearly stated in the Act itself or from necessary implication as well as where it concerns matters of procedure as opposed to substantive rights and obligations. This is what the court said in paragraph 5.8

It is clear therefore a statute may have retrospective operation by covering situations that prevailed before the law came into force expressly provided in the statute itself or by necessary implication and including where it is affecting matters of procedure as opposed to substantive rights and obligations."

41. The Accused person argued that the cases cited by the State support his proposition that retrospective application of a statute is not permissible in cases which deal with substantive matters, including rights and obligations. He is correct in saying so and I wish to add that the cited authorities also state that retrospective application is permissible in certain circumstances including where the change in a statute only alters procedural requirements. The question in the present case would be whether the alteration in the CPA is a substantive matter or a matter of procedural requirement.
42. This court's view is that the requirement of consent to prosecute is more of a procedural requirement than a substantive rights and obligations. In distinguishing matters of substantive law and procedural law this is what Black's law dictionary (Deluxe ninth edition) say on page 1567 quoting John Salmond;
- 'So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and the conditions of the application of the one to the other.'*
43. The requirement prescribes the procedure that has to be taken before proceedings can be commenced. It does not alter the rights of the Accused person. The obligation it created for the ACB was a matter of procedural requirement in regard to commencement of prosecution and not a matter of substantive rights. This is more so considered in the right of section 42(3) of the CPA where the Director was entitled to proceed as if consent was granted where the DPP withholds his consent. The section is as follows;
- The Director of Public Prosecutions shall give consent under subsection (1), or reasons in writing under subsection (2) (a), as the case may be, within thirty days, failing which the Director shall be entitled to proceed as if consent to prosecute had been given under subsection (1).*
44. My understanding is that although under subsection 1, no prosecution can be instituted without consent of the DPP, where the ACB applies for consent and 30 days expire and without receive a grant of the consent or reasons in writing denying the grant of consent, the ACB can proceed with the matter as if consent to prosecute has been granted.
45. All in all, I find the preliminary objection not attainable. It is my conclusion that the ACB can proceed to institute criminal proceedings against the Accused Person without requirement of obtaining consent from the DPP.

Delivered in Open Court this 11th Day of **July**, 2023 at Lilongwe.


V. Palikena-Chipao
JUDGE