IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE NO. 108 OF 2002

THE STATE

-VS-

DENNIS SPAX JOHN KAMBALAME

CORAM: THE HON. MR. JUSTICE F.E. KAPANDA

M/S Tembenu and Masumbu of Counsel for the State

M/S Dokali and Kalekeni Kaphale of Counsel for the Accused

Miss Vokhiwa, Official Interpreter/ Recording Officer

Dates of hearing: 18th November 2002 and 22nd November 2002

Date of ruling: 20th January 2003

Kapanda, J

RULING

Introduction

Following an order of this court, this matter was called for plea hearing on 18th November 2002. On the appointed day, the 18th of November 2002, the defendant was not asked to plead to the counts that were preferred against him. This was as a result of the fact that the accused raised a preliminary objection to the indictment. The objection was in relation to the substance and form of the counts. At that time the state had charged the suspect with ten counts of the offence of corruption by a public officer. The counts were based on the stipulations in the Corrupt Practices Act (No. 18 of 1995).

The state later reduced the number of the counts to six. This notwithstanding the defendant did not take his plea. He still challenged the propriety of the counts in the charge sheet. This ruling therefore deals with the preliminary objection raised by the defendant.

The Counts in the Indictment

The following are the proposed new counts that the state has proffered against the defendant:

"COUNT ONE

Offence (Section and Law)

Corruption by a public officer, contrary to Section 24(1) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being General Manager of Petroleum Control Commission between the 1st day of January 1996 and 31st January, 2000, at Barclays Bank, Guernsey in the Channel Islands corruptly accepted gratification for himself amounting to US$1,339,730.90 (being an equivalent of MK102, 757,360 at the exchange rate of MK76.7 to US$1.00) from **persons unknown** as a reward for the said Dennis Spax John Kambalame having corruptly awarded contracts for the supply of fuel and other fuel related contracts **to the said persons unknown**, the said awarding of the aforesaid contracts being a concern of the Petroleum Control Commission.[emphasis supplied by me]

COUNT TWO

Offence (Section and Law)

Corruption by a public officer contrary to Section 25(1) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being General Manager and being concerned with the award of fuel contracts and other fuel related contracts of Petroleum Control Commission between 1st day of January 1996 and the 31st day of January 2000, at Barclays Bank, Guernsey in Channel Islands, corruptly accepted gratification for himself amounting to US$1,339,730.90 (being an equivalent of MK102, 757,360 at the exchange rate of MK76.7 to US$1.00) **from persons unknown** as a reward for the said Dennis Spax John Kambalame having corruptly awarded contracts for the supply of fuel and other fuel related contracts.[emphasis supplied by me]

COUNT THREE

Offence (Section and Law)

Corruption by a public officer contrary to section 24(1) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being General Manager of Petroleum Control Commission between 1st day of January 1996 and the 31st day of January 2000, at Barclays Bank, Guernsey in the Channel Islands corruptly accepted gratification for himself amounting to US$216,507.60 (being an equivalent of MK16, 606,132.92 at the exchange rate of MK76.7 to US$1.00) from Europetrol Limited as a reward for the said Dennis Spax John Kambalame having corruptly awarded contracts to Europetrol for the supply of fuel to the Petroleum Control Commission the awarding of the aforesaid

contracts being the concern of the Petroleum Control Commission.

COUNT FOUR

Offence (Section and Law)

Corruption by a public officer contrary to section 25(1) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being General Manager of Petroleum Control Commission and being concerned with the award of a consultancy contract to Hamble Energy Limited between the 1st day of October 1997 and the 31st day of July1998, at Barclays Bank, Guernsey in the Channel Islands corruptly accepted gratification for himself amounting to US$27,500 (being the equivalent to MK2, 109,250 at the exchange rate of MK76.7 to US$1.00) from Hamble Energy

Limited in relation to the award of consultancy contract to Hamble Energy Limited by the Petroleum Control Commission.

COUNT FIVE

Offence (Section and Law)

Corruption by a public officer contrary to section 29(1) (a) (i) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being the General Manager of Petroleum Control Commission between the 1st day of January 1996 and 31st day of January 2000, Barclays Bank, Guernsey in the Channel Islands corruptly accepted gratification for himself amounting to US$ 216,507.60 (being the equivalent of MK 1,660,132.92 at the exchange rate MK76.7 to US$1.00) from Europetrol Limited as a reward for having given assistance in the procurement of a contract by Europetrol Limited to supply fuel and other fuel products to the Petroleum Control Commission by Europetrol Limited, the procurement of the said contract being the concern of the Petroleum Control Commission.

COUNT SIX

Offence (Section and Law)

Corruption by a public officer contrary to section 29(1) (a) (i) of the Corrupt Practices Act.

Particulars of Offence

Dennis Spax John Kambalame being the General Manager of Petroleum Control Commission between the 1st day of January 1996 and 31st day of January 2000, at

Barclays Bank, Guernsey in the Channel Islands corruptly accepted gratification for himself amounting to US$ 216,507.60 (being the equivalent of MK1, 660,132.92 at the exchange rate MK76.7 to US$1.00) from Europetrol Limited as a reward for having used his influence in the procurement of a contract by Europetrol Limited to supply fuel and other fuel products to the Petroleum Control Commission by the Europetrol Limited, the procurement of the said contract being the concern of the Petroleum Control Commission…."

The above counts have been proposed as an answer to the objections raised by the accused. Despite the reduction in the number of counts, from ten counts to six counts, the defendant still maintains his preliminary objection to them.

The Motion

As stated earlier, the defendant has raised a preliminary objection regarding the counts. The challenge as to the form and substance of the counts has been made pursuant to Section 151(1) of the Criminal Procedure and Evidence Code. Subsection 1 of the said Section 151 provides that:

"Every objection to any charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later"

The defendant has raised the preliminary objection herein before taking plea. Actually, the defendant refused to plead to the counts. He contends that he can not do so on the following grounds viz.: firstly, there is multiplicity of counts. Secondly, the defendant argues that some of the counts are wrongly drafted. Thirdly, the accused has taken issue with the particulars of some of the counts in the indictment. Lastly, the defendant claims that the state has erred in that it has preferred several and distinct counts based on the same facts. The defendant, through Counsel, is therefore moving this court to quash some of the counts in the charge sheet. The motion by learned Counsel is made pursuant to the said Section 151(1) of the Criminal Procedure and Evidence Code. The state is opposing the motion.

The Parties'Points of Contention

The arguments of both parties are very long. It is not feasible to put down every argument that was made by Counsels. If I were to do that this ruling would be unnecessarily long. For this reason, I will only give a sketch of the submissions of Counsels. As I understand it, the parties' points of argument may be summarised as follows:

The defendant's

Firstly, it is the submission of defendant that there is a multiplicity of counts in the bill of indictment. The contention in this respect is that this multiplicity of counts has come about because some counts, although charged under separate sections of the CPA, are founded on the same facts. Learned counsel for the accused further argued that as a result of preferring separate counts in respect of the same transaction there has been overloading of the charge sheet.

Secondly, the defendant is of the opinion that some counts lack sufficient particulars. The defence has particularly taken issue with the particulars of offence in counts one

and two in the charge sheet. The

particulars of offence in these two counts, so the argument goes, contravene the provisions of Section 42(2)(f)(ii) and (iii) of the Republic of Malawi Constitution.

Lastly, learned counsel for the defendant contends that a number of counts in the charge sheet have been wrongly drafted. In this connection the defendant, through counsel, submits that wrong terms have used to describe some of the offences and/or in giving the particulars of some of the counts in the bill of indictment.

The Prosecution's

In response to the submissions, made on behalf of the defendant, the state made the following arguments:

Firstly, on the contention that the bill of indictment is overloaded it is argued by the state that the same is to the advantage of the defendant. It is urged on behalf of the state that the accused will, in a single trial, answer all the possible allegations against him. The state says this will guard against a further trial in future. The prosecutors further contend that the charging of several offences cannot be avoided because the relevant sections of the CPA create distinct and several offences. It is also the view of counsel for the state that there is nothing offensive in separately charging the defendant with several counts of offences in respect of a related and/or single transaction in view of the fact that the counts preferred have a common origin. Counsel for the state has further submitted that the multiplicity question should not concern this court. They contend that the cases that were cited in support of the defendant's argument in this regard have no relevance to the matter before this court which is not a subordinate court. The state further urges this court to ignore the said case authorities because the trial in the instant case will not be with a jury who would have had difficulties in dealing with a multiplicity of counts.

Secondly, with regard to the argument about lack of particulars, the state opines that this submission is not made out. The state takes the view that to call upon the prosecution to furnish further particulars of the offences, in counts one and two, would be tantamount to demanding that evidence be disclosed in the charge sheet. The prosecution further submits that it should not be doubted that before the charges were preferred against the accused there was an investigation. This investigation, the argument continues, must have satisfied the investigators that the accused's wealth, as disclosed by the bank accounts at Guernsey, exceeded his known sources of income or official emoluments. For this reason, learned counsel for the state argues, there was suspicion that the defendant had engaged himself in corrupt practices covered under Section 24(1) of the CPA. Hence the charges in counts one and two.

Further, the state has also submitted that since the counts were reduced, from ten (10) to six (6), the question of multiplicity of counts does not arise anymore.

The above is a sketch of the assertions of the parties. I do not intend to give my views on the arguments now. I will do so later in this ruling when I am making my findings on the issues for consideration in this matter. I must point out though that the court will not make specific reference to the arguments that I have summarised above. Nevertheless, when I am considering the said issues the court's position, on the said submissions, will be known.

It is now necessary that the court should move on to point out the facts in issue, and determine the issues, which have arisen in this matter.

Issues For Determination

It is clear to me that the principle question that has arisen herein, and needs to be determined, is whether the preliminary objection by the defendant has been made out. Further, I am alive to the fact that when determining this main issue I will have to deal with other issues that were raised during submissions of Counsel for both parties.

I will now, without delay, proceed to consider the issues for adjudication in the preliminary application before me.

Consideration of the Issues

Statutory Framework of the offences under the relevant Sections of the Corrupt Practices Act

As a starting point, in adjudicating upon the application herein, it is essential that I should make some observations with regard to Sections 24(1), 25(1) and 29 of the Corrupt Practices Act [the CPA]. These are the sections that feature in the charges preferred against the accused. Such an approach will assist us in better understanding how to properly draft charges to be preferred against the suspect herein. Firstly, let me say that I very much apprehend the pressures under which the prosecutors are operating. This, however, should not make us lose sight of the special underpinnings of the Corrupt Practices Act and most importantly the principles regulating prosecutions. At this juncture let us analyse the sections under which the accused has been indicted.

Section 24(1) of the CPA

The court's understanding of section 24(1) of the CPA is that at the very least it creates three different offences. The first refers to the public officer who corruptly solicits gratification. Secondly, it speaks of a public officer who corruptly accepts gratification, and thirdly it makes reference to a public officer who corruptly obtains gratification as an inducement or reward for, inter alia, doing something in relation to, inter alia, a transaction that is the concern (business) of a public body. Further, the section envisages a public officer acting alone or in concert with others in corruptly accepting gratification as a reward for doing, or for not doing, something in relation to some business of a public body.

Section 25(1) of the CPA

This provision is, to some extent, an extension of section 24 discussed above. Section 25(1) does also create three offences. It targets the public officer who, among other things, corruptly solicits, accepts or obtains gratification in relation, inter alia, to any transaction falling within or connected with his jurisdiction, powers, functions and duties.

Section 29 of the CPA

Again at the very least this section creates three distinct offences. It targets the public officer who directly or indirectly corruptly solicits, accepts or obtains any

gratification as an inducement or reward on account of giving, inter alia, assistance or using his influence in the procurement or execution of any contract with a public or private body. The officer's involvement is clearly different from that envisaged in sections 24 and 25 of the CPA. He is not the one concerned with the award, for instance, of the contracts. He is instead the one who, in exchange for money, or other form of gratification, uses his position or information to assist in the procurement or execution of some contract. The catchword is that the officer is only assisting.

Differences between sections 24(1), 25(1) and 29 of the CPA

Notwithstanding the observation made above, to the effect that section 25(1) of the CPA is an extension of Section 24(1) of the CPA, it is important to note that there is a difference between the two provisions. This comes out clearly when one considers the use of the word 'concern.'

In section 24 of the CPA the matter or the transaction on the basis of which the public officer corruptly accepts gratification is not his concern. It is that of a public body. For this reason it is obvious that the public officer who commits this offence must be one who has some say as regards the direction the transaction goes hence his/her being given and accepting gratification.

With regard to section 25 of the CPA the matter/transaction, the essence of which gratification is corruptly accepted, is the concern of the public officer. This officer has, in my judgment, the ultimate power to award or not to award contracts. Indeed, this public officer then solicits, accepts or obtains gratification in order to award or not to award the contract.

Further, it could be argued that whatever an officer does under the said sections 24(1), 25(1) and 29 of the CPA amounts to assistance. This argument can not be entirely correct. There is a difference in the nature of assistance given by the public officer in sections 24 and 25 of the CPA on the one hand, and section 29(1) of the CPA on the other hand. In respect of the said sections 29(1) of the CPA the transaction in issue is neither the public officer's concern nor one falling within or connected with his jurisdiction, powers, duties or functions. The public officer, as a matter of fact, just finds himself in a position where for money he can assist in the procurement or execution of some contract. Indeed, the public officer would be described as peddling his influence if his actions fall within Section 29 of the CPA.

The matter at hand

Choice of the charge to prefer against a defendant: overloading of the charge sheet

The discussion above shows that the section(s) under which an officer will be charged will depend on the role played by the officer in a particular transaction(s), the evidence and policy considerations in operation. What this court finds equally clear is the fact that the creation of a proliferation of offences was not aimed at allowing the state to bring, at the flimsiest excuse, a plethora of counts against accused persons but to ensure that every conceivable situation is taken care of. Accordingly, whereas it is clear that in

one transaction one can solicit, accept or obtain gratification, it could never have been intended by the legislature that an officer should be prosecuted separately for accepting, soliciting and obtaining in respect of one transaction. Similarly, one can in one transaction assist in the procurement, execution or promotion of some contract but it could never have been intended that one should therefore be prosecuted on all three heads in respect of one transaction. The following statement of Edmund-Davies, L.J., in **R. vs. Harris** [1969] 2 ALL ER 599 @ G-H is very illuminating:

"[I]t does not seem to this court right or desirable that one incident should be made the subject matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this to be permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue…"

Further, in **R. vs. Staton** [1983] Crim. L. R 190 it was rightly observed that the shorter and more direct the indictments the better and swifter the process of justice.

It is observed that in the instant case the prosecution has charged the defendant twice on the same facts. That is under both sections 24 and 25 of the CPA in relation to first four counts. With regard to counts five and six the prosecution has, on the same set of facts and under the same section 29(1) (a) of the CPA, charged the defendant twice. What the prosecution has done is against the principles governing prosecution. I am saying this because an impression has been created that the accused is being persecuted and not being prosecuted. Further, charging the defendant under both sections 24 and 25 of the CPA, on the same facts, gives the strong impression that the prosecution is not sure as to which offence the accused committed. In point of fact, one would think that they have done this and then they come to court in the hope that the accused will somehow trip himself in the wide net cast by the charging legislation and get caught on at least one offence. That is bad prosecuting practice that should not be encouraged. As a matter of fact, if what the prosecution has done is allowed then there is going to be unfairness of these proceedings thereby flying in the face of the provisions of Section 42(2)(f) of the Republic of Malawi Constitution. The said Section 42(2)(f) of the Constitution guarantees fair trial to suspects.

The prosecution should not charge the defendant twice on the same facts: **R. vs. Harris** (supra.). The stipulation in Section 129 of the CP and EC is also instructive on the observation that it is wrong to charge a defendant twice, under two different sections, on the same factual premise. The state should instead, on one set of facts, make up their mind as to which charge stands the greatest chance of success and proceed accordingly. Or if the state wishes then it may try to charge the accused in the alternative for another of the offences. As a matter of fact, in the Certificate for Summary Procedure Trial, and the charge sheet that was presented to the court below, the state had intimated that other counts would be preferred in the alternative. That approach seems to have been abandoned when the matter was brought before this court for the actual trial of the criminal action. In making this observation I am aware that the law creates various offences on the same facts but the aim, as was said above, was not to allow the state to charge an accused person with a myriad offences but rather to cover every eventuality.

The most the prosecution can do is as was put by Chatsika, J., as he then was, in **Bvungo vs. Republic** 8MLR 349 @ 350 lines 26-34, when he said that:

"…[T]he proper procedure to be adopted when so many counts are preferred against an accused person is that the prosecutor should proceed against the accused person only in a few counts on the record. If convictions are obtained on those counts, the rest may only be taken into account for purposes of sentence. If this procedure is not adopted one can well imagine absurd situations being reached-where, for example, a person may be awarded a total sentence which may be well out of all proportion…"

I must add that even if the prosecution was allowed to proceed

as they wish, which they will not be permitted, they ought to know that on conviction the court would only impose concurrent sentences.

Statement, and particulars, of offence

Section 126 of the Criminal Procedure and Evidence Code (the CP and EC) provides that:

"Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

And Section 128(a) (ii) and (iii) of the CP and EC stipulates, inter alia, that:

"The statement of offence shall describe the offence shortly in ordinary language, avoiding so far as possible the use of technical terms.

After the statement of offence, particulars of such offence shall be set out in ordinary language in which use of technical terms shall not be necessary."

Further, and most importantly, Section 42 (2) (f) (ii) of the Republic of Malawi Constitution says that one of the rights of an accused person is a fair trial, which includes the right: to be informed with sufficient particularity of the charge [preferred against him]. The provisions quoted above must always be borne in mind when drafting charges against an accused person. Did the prosecution take into account these provisions at the time it was drafting the charges against the defendant? I am afraid the answer to this question is in the negative. Why do I say so?

Statements of offence

It is noted that the statements of offence, in all the six counts in the charge sheet, are identical. The said statement used to describe all the offences in the charge sheet is 'corruption by a public officer'. Whereas it might be correct to charge an officer with ' corruption by a public officer' under section 24(1) of the CPA it is wrong to do that with respect to sections 25(1) and 29(1) of the said CPA. As I have already demonstrated above the offences in sections 24, 25 and 29 of the said CPA are totally different and distinct. This comes out clearly when one reads the marginal notes to these sections. Thus by indicting the statement of offence as 'corruption by a public officer' in all the counts, as has been done here, fails to send across the differences inherent in the offences created by the different sections as shown by the words used in the marginal notes. The words

used in the marginal notes to sections 24, 25, and 29 of the CPA are different. Section 24 of the CPA states 'corrupt practices by or with public officers'. Section 25 says 'corrupt use of official powers and procuring corrupt use of official powers.' Then the marginal note to section 29 of the CPA refers to 'gratification for giving assistance etc. in regard to contracts'. The drafting of offences under these sections, especially where the defendant is indicted with so many counts, must be differentiated so that the accused knows from the very beginning that he faces three different offences. This will be achieved by using the words in the marginal notes. I say this while appreciating the status of marginal notes. To this end I am aware of the instructive dictum of Jere,J., as he then was, in **Republic vs.Ali Umali White** 8 MLR 340 @ 342 lines 2-9 when he said:

"…In other sections, marginal notes are used to comply with the provisions of section 126 of the Criminal Procedure and Evidence Code…This practice must be used with care…"

In the instant case the marginal notes, if read with the provisions of sections 24, 25 and 29 of the CPA properly and clearly describe the offences. By not using the marginal notes the charges preferred against the defendant, in counts two; four; and six; have been wrongly described. Indeed, as noted earlier, the statements of offence as drafted leaves one thinking that there is no difference in the offences that were allegedly committed by the defendant.

If we follow the marginal notes, the statement of offence for the offence under section 25(1) of the CPA ought to have been 'corrupt use of official powers' and not 'corruption by a public officer'. The use of the words 'corruption by a public officer' is suitable for the offence provided for in section 24(1) of the CPA. With regard to the offence under Section 29(1) of the CPA the statement of offence should not be the same as the one used in respect of Sections 24(1) and 25(1) of the CPA. The use of the relevant marginal note to Section 29 of the said CPA might be of assistance.

Particulars of offence: counts one and two

In counts one and two the state has basically alleged that 'persons unknown' bribed the defendant. The state further alleges that in return the accused awarded contracts to the said 'persons unknown' to supply fuel and other fuel related products. As I understand it, the use of the term 'a person unknown' may be allowed if the name of the person, to whom reference is made, is not known or where for any other reason it is impracticable to give such a description or designation. An instructive statutory authority on this proposition could be Section 128(d) of the CP and EC.

The above statement notwithstanding, it must be pointed out that whilst the use of the term could not have caused consternation in the past the same is not true today. I am making this observation advisedly due regard being had to a pertinent stipulation in our current Republic of Malawi Constitution. As shall soon be demonstrated the use, in counts one and two, of the term "persons unknown" runs foul to the provisions of Section 42(2)(f)(iii) of our Constitution, the relevant parts of which are in the following terms:

"Every person arrested for, or accused of, the alleged commission of an offence shall… have the right, as an accused person, to a fair trial, which shall include the right to be presumed innocent…"

In coming up to the conclusion that the term ‘person unknown’, as used herein, offends the provision mentioned above the court has been guided by the proposition of law made by Lord Wilberforce in **Minister of Home Affairs vs. Fisher** [1979] 3 All E.R. 21 @ 26d-e. The essence of the said proposition of law is that when interpreting the constitutional provisions dealing with fundamental freedoms and rights the courts should give those provisions a generous interpretation and avoid what has been called “the austerity of tabulated legalism.” It is in recognition of this principle of law that this court is of the view that the lack of sufficient particulars, in counts one and two, to identify the person who it is alleged bribed the defendant, offends the fundamental right provided for in Section 42(2)(f)(iii) of the Constitution. Why do I say so?

There is a danger that we could have an unfair trial in this matter if the state is allowed to proceed with counts one and two as presently drafted. If we do not know the persons who gave gratification to the defendant how do we then know, much less conclude, that the payment and the acceptance of the money was corrupt or that it was in relation to the award of contracts to supply fuel and fuel related products? Isn’t the prosecution fishing? As a matter of fact, the use of the term ‘unknown persons’ has the effect of calling upon the accused to prove that the money he allegedly received is not a bribe. Put in another way, the state wants the defendant to prove himself innocent of an allegation of corruption. Indeed, it is the opinion of this court that the prosecution hopes to prove its case just by the mere fact that the accused has a huge amount of money or that he allegedly received similarly huge amounts of money from persons or sources unknown. The court is fortified in this view because of what the state had earlier on indicated in the Certificate for Summary Procedure Trial that was presented to the court below. In the committal proceedings, where the defendant was committed for trial before the High Court, the state intended to charge the defendant with a non-existent offence under Section 32 of the CPA. The state will not be allowed to bring the same count through the back door. The framing of the charges in counts one and two is dangerously close to being unconstitutional if one takes into account the provisions of the said Section 42(2)(f)(iii) of the Constitution.

The long and short of it is that the use of the term’ persons unknown’ has the potential of offending or violating the defendant’s right to be presumed innocent as set out in the said Section 42(2)(f)(ii) and (iii) of the Republic of Malawi Constitution. The defendant has a right to be informed with sufficient particularity of the charges against him. He also has the right to be presumed innocent. By not giving the description or designation of the persons who allegedly bribed the accused, the first two proposed counts do not adequately inform the defendant of the charges against him. Moreover, as already observed, by using the term ‘persons unknown’ there is a threat that the burden of proof in respect of these two counts will be reversed. It is in appreciation of the observations made above that this court agrees with learned Counsels for the defendant that counts one and two lack sufficient particulars to enable the accused put up his defence or have a fair trial. There is lack of sufficient particulars when the state alleges that unknown persons gave the defendant a graft and the latter then allegedly awarded a contract to these unknown persons. Further, if the burden of proof were to be reversed which, as we have seen above, is likely to happen in respect of counts one and two, then the right to be presumed innocent will be seriously compromised and undermined. There is a threat that the defendant’s right to a fair trial, including his rights to be presumed

innocent and to be informed with sufficient particularity, will be violated if counts one and two are allowed to stand as they are. Despite calls to have the two counts amended the prosecutors insist that counts one and two must remain as they are. Do we have to wait, without giving a remedy, until when the threat manifests itself during trial? I do not think so. Indeed, if we waited it would be too late to protect the accused's said fundamental rights. This is most especially so when the matter before this court is a criminal action. Furthermore, Section 151(1) of the CP and EC demands that an objection as to the form and content of the charge sheet must be made at an earlier stage in the proceedings.

Now, where there is an existing threat to a fundamental right guaranteed under our Constitution the court is enjoined to give an effective remedy to a complainant. One such remedy is an order that is necessary and appropriate to prevent that right from being unlawfully denied or violated in the circumstances of a particular case: see Section 41(3), as read with Section 46(2) and (3), of the Constitution. The court has already found that counts one and two threatens the enjoyment of the defendant's right to a fair trial, including the right to be presumed innocent and the right to be informed with sufficient particularity of the charges against him in the said counts one and two. Considering that the state has not amended counts one and two, the only effective remedy that the court can think of, as of now, is to quash the said counts.

Conclusion

In view of the foregoing observations and findings, the defendant can and should only answer the charges in respect of the allegation concerning Hamble Energy Limited and Europetrol Limited. As to the nature of the offences that is left to the prosecutors. For the avoidance of any doubt counts one and two are hereby expunged. Further, this court finds and concludes that in relation to counts 3,5 and 6 the state should drop any two of the said counts or the prosecution must prefer one of the three and all the other two offences must be charged in the alternative. Finally, with regard to count four Counsels for the state is advised to change the statement of the offence to "corrupt use of official powers".

I am mindful that the court had set the time limit within which some processes were to be taken. Through partial fault on the part of the state, in that they brought defective counts, it has not been possible to comply with the earlier order of the court. It therefore follows that the said earlier order should be, and is hereby, varied accordingly. The defendant will now take his plea on the 27th of January 2003. The trial of this case shall commence on 17th February 2003. This will allow both parties to adequately prepare for the trial of the criminal action herein.

Pronounced in open court this 20th day of January 2003 at the Principal Registry, Blantyre.

F.E.Kapanda

JUDGE

Crim. Case No. 108 of 2002