

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CRIMINAL CASE NO. 108 OF 2002**

**THE REPUBLIC**

**Versus**

**DENNIS SPAX JOHN KAMBALAME**

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

Tembenu and Masumbu, of Counsel for the State

Chokotho, of Counsel for the Defendant

Mangisoni, Official Interpreter

Date of hearing : 16<sup>th</sup> August 2004

Date of judgment : 16<sup>th</sup> August 2004

## **JUDGMENT ON SENTENCE**

**Kapanda, J**

### **Introduction**

The convict has been found guilty of the offence of corruption use of official powers by a public officer as provided for in Section 25(1) of the Corrupt Practices Act. This finding was made after a full trial. It is now my duty to impose an appropriate sentence on the Defendant.

The Court has to proceed to sentence the convict basing on the un amended Section 34 of the Corrupt Practices Act. Indeed, both the State and the Defence agree that Section 34 of the Corrupt Practice (Amendment) Act, 2003 (Act No. 17 of 2004) does not apply to the instant case. Indeed, there can be no retrospective application of the said Act No. 17 of 2004.

### **Mitigation**

Counsel for the convict has addressed me at length on mitigation. In point of fact, Counsel submitted that the following mitigating factors should be considered by this Court when passing sentence viz that the convict is a first offender, the Defendant's age, the fact that the convict lost his job and terminal benefits, that the trial of the Defendant took a long time to be completed and that his movements were restricted; that he suffers from hypertension and ulcers. As regards the health of the convict it is the view of this Court that that can be taken care of by the prison authorities as is required by the provisions of 42(1)(b) of the Constitution which provides, inter alia, that every sentenced prisoner shall have the right to medical treatment at the expense of the State. Thus, the prison authorities have an obligation to assist the Defendant access medical facilities for his ailment at the State's expense. If it can not provide such medical facilities I would think there is no law that would bar the Defendant accessing such facilities at his own expense.

Further, defence Counsel has called upon this Court to exercise mercy on the Defendant and not impose the maximum sentence. I agree with Counsel that there are mitigating factors in this matter. Moreover, I am alive to the fact that the maximum penalty is to be imposed for the worst offence and offenders. Additionally, I accept what others have said that a worst offence might not be committed in our life time. The Court will, therefore, not impose the maximum

penalty. It will reserve that to be imposed in future.

However, the Court would wish to put it here that, as shall be seen shortly, there are aggravating circumstances that must be looked at when imposing a sentence in this matter. Further, it must be pointed that the exercise of mercy can not be at the expense of the clear provisions of the CPA as regards the penalty for this offence. In saying this I am mindful that the penalty provision to be applied does not give this Court discretion.

### **The Penalty**

Section 34 of the CPA prescribes the penalty for the offence of corrupt use of official powers by a public officer. The said Section 34 of the CPA is, inter alia, in these terms:

“Any person who is guilty of an offence under this part (section 25(1) is one of them) shall be liable to imprisonment for a term of not less than five years and not more than twelve years---“

My understanding of this Section is that the legislature enjoins the Courts to impose a custodial sentence. In that regard, the starting point is five years. Accordingly, with this minimum mandatory sentence there is no question of suspending the sentence this Court finds to be appropriate in this matter. This will be the case notwithstanding the fact that the convict is a first offender. Indeed, the provisions of Section 339(1) as read with Section 340(1) of the Criminal Procedure and Evidence Code will be of no application[1].

### **Aggravating factors**

The Court wishes to point out that, as against the mitigating factors pointed by Counsel there are aggravating factors as well. Firstly, I wish to point out that the convict did not only attempt to receive gratification. He actually accepted and received gratification. Secondly, it is important to remember that the Defendant was a public officer who enriched himself from the public coffers. Further, the amount involved is not a small sum. Indeed, this Court is alive to the fact that when funds, especially those originating from the public purse, is siphoned off into private bank accounts of public officials, there is mistrust that arises in the members of the public.

Finally, and more importantly, the Court would like to observe that corruption is morally repugnant and has the effect of economically disempowering a nation and its people. Furthermore, corruption has the undesirable consequence of distorting the faith that people have in their public officials. Indeed, corruption undermines trust and credibility in institutions and procedures. Additionally, corruption, if not punished adequately, has the tendency of creating a bad impression on a country especially a developing country like ours. Indeed, experts have said, and this Court accepts that analysis, that corruption effects a country's economy by

undermining growth and development in that it hinders or deters foreign or local investment. Besides, I am mindful that commentators have said that corruption affects the quality and composition of public expenditure projects. Moreover, corruption if left unpunished, or punished insufficiently, may lead to unproductive spending and it may also lead to distortion and weakening of the economy in that it increases poverty and inequality. This may further slow the growth of an economy.

For the reasons given above, the Court must impose a meaningful sentence that reflects these concerns. In point of fact, after considering the above and the circumstances under which the offence was committed I find that a sentence that would result in the loss of liberty on the part of the Defendant would be appropriate.

### **The appropriate sentence**

As I mentioned above there are mitigating factors in this matter. I will definitely take these factors into account when I am considering the appropriate sentence that would fit the circumstances of the Defendant. However, the Court will also consider the circumstances of the crime and its attendant consequences discussed above.

Accordingly, and after considering both the mitigating and aggravating circumstances, I find that a custodial sentence of 6 years imprisonment with hard labour would be appropriate. As mentioned above, there will be no suspension of this sentence notwithstanding the fact that the Defendant is a first offender. It is so ordered that the convict shall serve a custodial term of imprisonment of 6 years IHL. It is so ordered.

This now disposes of the question of sentence and this matter.

**Pronounced** in open Court this 16<sup>th</sup> day of August 2004 at the Principal Registry, Blantyre.

F.E. Kapanda

**JUDGE**

[1] Section 339(1) provides that :

“When a person is convicted of any offence (not being an offence the sentence for which is fixed by law) the court may pass sentence of imprisonment but order the operation thereof to be suspended for a period not exceeding 3 years, on one or more conditions, relating to compensation to be made by the offender for damage or pecuniary loss, or to good conduct, or to any other matter whatsoever, as the court may specify in the order.”

Section 340(1) is in the following terms:

“Where a person is convicted by a court other than the High Court of an offence (not being an offence the sentence for which is fixed by law) and no previous conviction is proved against him, he shall not be sentenced for that offence, otherwise than under section 339, to undergo imprisonment (not being imprisonment to be undergone in default of the payment of a reasonable fine) unless it appears to the court, on good grounds (which shall be set out by the court in the record), that there is no other appropriate means of dealing with him.”