IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CONSTITUTIONAL CASES NOs. 1 AND 2 OF 2005

BETWEEN:

HON. FRIDAY ANDERSON JUMBE…… 1ST PLAINTIFF

HUMPHREY CHIMPANDO

MVULA…….2ND PLAINTIFF

and

THE ATTORNEY GENERAL……..DEFENDANT

CORAM: **HON. JUSTICE F.E. KAPANDA**
HON. JUSTICE J. KATSALA
HON. JUSTICE M.C.C. MKANDAWIRE
Mr. K. Kaphale, of Counsel for the Plaintiffs
R. Z. Kasambara Esq. Honourable Attorney General of Counsel for the Defendant
Mr Fatchi, Official Interpreter

Place and dates of hearing: Blantyre 29th April 2005
3rd June 2005
10th June 2005
15th June 2005

Date of Judgment : 21st October 2005

JUDGMENT

Kapanda, J:

Introduction

The two Plaintiffs, Friday Anderson Jumbe and Humphrey Chimpando Mvula, are indicted with various offences under the Corrupt Practices Act as amended by Act No. 17 of 2004. In particular, inter alia, the State has separately charged the two with varying offences provided for in Sections 25 and 25B of the said Corrupt Practices Act.

As it were, the Plaintiffs, have applied to this Court, as a Constitutional Court, to determine whether a stipulation of Section 25B of the Corrupt Practices Act is constitutional or not. I wish to observe though that Mr Humphrey Chimpando Mvula had earlier on also wanted to challenge the constitutionality of Section 45(2) of the said Corrupt Practices Act but he has had to withdraw his application in respect of this provision. Accordingly, the only question before this Court is the one relating to the constitutionality or otherwise of Section 25B (3) of the said Corrupt Practices Act.

The application before us has rightly come by way of an Originating Summons where a number of issues have been raised in relation to some particular provision of the said Section 25B of the said Corrupt Practices Act.

The Originating Summons

As mentioned earlier, the Plaintiffs want some questions determined.[1] The essence of it is

[1]As regards Hon. Friday Anderson Jumbe the following are the material issues obtaining in the Originating Summons before this Court:

"**ORIGINATING SUMMONS**

that the Plaintiffs desire that this Constitutional Court should determine the following questions viz:

(a) Whether or not Section 25B (3) of the Corrupt Practices Act, Chapter 7:03 as mended by the Corrupt Practices (Amendment) Act, 2004 violates their rights as accused persons to a fair trial.

(b) Further, if Section 25B (3) the said Corrupt Practices Act violates their rights to a

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…..By this Summons, which is issued on the application of the Plaintiff, **HON. FRIDAY ANDERSON JUMBE**, the Plaintiff seeks the determination by the Court of the following questions namely:-

(a) Does Section 25(B)(3) of the Corrupt Practices Act, Cap 7:03 as amended by the Corrupt Practices (Amendment) Act, 2004 violate the right of an accused person to a fair trial, which includes the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial as provided for in Section 42(2)(f)(iii) of the Constitution?

(b) If it does, is Section 25(B)(3) of the Corrupt Practices Act, Cap 7:03, as amended by the Corrupt Practices (Amendment) Act 2004 such a limitation to the rights in Section 42(2)(f)(iii) of the Constitution as can be said to be reasonable, recognized by international human rights standards, necessary in an open democratic society and one that does not negate the essential content of the constitutional rights of an accused in Section 42(2)(f)(iii) of the Constitution?

Further, the Plaintiff, by the Summons seeks the following declarations against the Defendant;

(a) A declaration that Section 25(B)(3) of the Corrupt Practices Act, Cap 7:04 as amended by the Corrupt Practices (Amendment) Act, 2004 violates the rights of an accused person in Section 42(2)(f)(iii) of the Constitution.

(b) A declaration that the limitation to the constitutional rights in Section 42(2)(f)(iii) of the Constitution as is contained in Section 25(B)(3) of the Corrupt Practices Act, Cap 7:03 as amended by the Corrupt Practices (Amendment) Act, 2004 is not reasonable, is not recognized by international human rights standards; is not necessary in an open and democratic society, and negates the essential content of the rights in Section 42 (2)(f)(iii) of the Constitution.

(c) An order for costs.

In the Originating Summons on behalf of Humphrey Chimpando Mvula the following are the questions he wants determined:

(a) Do Section 25B (3) of the Corrupt Practices Act, Cap 7:03 as amended by the Corrupt Practices (Amendment) Act, 2004 and Section 45(2) of the Corrupt Practices Act violate the right of an accused person to a fair trial, which includes the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial as provided for in Section 42 (2)(f)(iii) of the Constitution?

(b) If they do, are Sections 25(B)(3) of the Corrupt Practices Act, Cap 7:03, as amended by the Corrupt Practices (Amendment) Act 2004, and Section 45(2) thereof, such limitations to the rights in Section 42(2)(f)(iii) of the Constitution as can be said to be reasonable, recognized by international human rights standards, necessary in an open democratic society and ones that do not

fair trial (the right to be presumed innocent and the right to remain silent) whether the said section can be said to be reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(c) Moreover, as I see it, the Plaintiffs are asking this Court to determine whether or not, in the event it is found that Section 25B (3) of the said Corrupt Practices Act does infringe upon the Plaintiff's right to a fair trial, it could still be said that the impugned provision does not negate the essential content of the rights of the Plaintiffs to be presumed innocent and to remain silent.

Accordingly, the Plaintiffs want this Court to make a number of declarations with regard to some sections of the Corrupt Practices Act. In particular some amendment that came with Act No. 17 of 2004. The declarations they want are as follows:-

(a) A declaration that the said Section 25B (3) of the Corrupt Practices Act violates the rights of an accused person to a fair trial (the right to be presumed innocent and the right to remain silent) as enshrined in Section 42(2)(f)(iii) of the Republic of Malawi Constitution.

(b) A declaration that the limitation to the constitutional rights allegedly contained in Section 25B(3) of the said Corrupt Practices Act is not reasonable, is not

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negate the essential content of the constitutional rights of an accused in Section 42(2)(f)(iii) of the Constitution?

Further, the Plaintiff, by the Summons seeks the following declarations against the Defendant;

(a) A declaration that Sections 25(B)(3) of the Corrupt Practices Act, Cap 7:04 as amended by the Corrupt Practices (Amendment) Act, 2004 and Section 45(2) of the said Act violate the rights of an accused person in Section 42(2)(f)(iii) of the Constitution.

(b) A declaration that the limitations to the constitutional rights in Section 42(2)(f)(iii) of the Constitution as are contained in Section 25(b)(3) of the Corrupt Practices Act, 2004 and Section 45(2) of the said Act are not reasonable, are not recognized by international human rights standards; are not necessary in an open and democratic society, and negate the essential content of the rights in Section 42(2)(f)(iii) of the Constitution and are therefore null and void.

(c) An order for costs…."

recognized by international human rights standards, is not necessary in an open and democratic society, and negates the essential content of the right to be presumed innocent and the right to remain silent.

Finally, the Plaintiffs pray that they be awarded costs of, and occasioned by, this application.

The Defendant is challenging the application by the Plaintiffs. Accordingly, the parties have joined issues on the questions raised in the Originating Summons.

Facts

The Plaintiffs and the Defendant have filed affidavits with the Court. It is from these affidavits that the pertinent facts obtaining in this matter are to be found. I am saying relevant facts because some of the matters put in the affidavits do not qualify to be facts. Indeed, some of the materials in the affidavits are essentially opinions of the parties and what their understanding of the law is on the Corrupt Practices Act and the Constitution. Additionally, in this Court's opinion some of the paragraphs in the affidavits contain arguments of the parties on the law. I will consequently ignore the said opinions and matters of law when I am summarizing the facts of the case under this subheading. I will do so because it is trite law that an affidavit is supposed to contain only matters of fact and not law or opinion.

In a summary, the facts of this case are as follows:-

The Plaintiffs

Hon. Friday Anderson Jumbe

Honourable Friday Anderson Jumbe, is currently a sitting Member of Parliament. He was formerly a Minister of Finance in the administration of the former President of this country – Dr Bakili Muluzi. Further, it has not been disputed that, apart from being a Member of Parliament, he is also a businessman. As regards what sort of business he is operating, the Court

has not been favoured with any information. Moreover, the Court has not been fovoured with any information concerning when he started operating his said businesses.

Humphrey Chimpando Mvula

Regarding Mr Humphrey Chimpando Mvula, the Court has observed that he has presented himself to us as a former Chief Executive of Shire Bus Lines. Further, the evidence on record shows that he asserts that he is a businessman. However, he does not advise us what line of business he is in and we are also in the dark as regards the time he started operating his said business(s).

It will suffice to put it here though that the Defendant does not deny that Mr Humphrey Chimpando Mvula is a businessman and former Chief Executive of Shire Bus Lines.

Indictment of the Plaintiffs

The State has preferred various counts of criminal charges against the Plaintiffs.[2] The

[2]In respect of Honourable Friday Anderson Jumbe the counts are as follows:-

"**C. CHARGES**

COUNT 1

Offence

Misuse of Office contrary to Section 25B(1)(3) of the Corrupt Practices Act Cap 7:04 as amended by Act No. 17 of 2004.

Particulars of Offence

Friday Jumbe on or about 5 May 2004 at the Ministry of Finance in the City of Lilongwe being a person employed in the public service as a Government Minister responsible for Government Finances used his public officer for the advantage of Phillip Bwanali and directed the arbitrary funding in the sum of 11 Million Kwacha (K11,000,000.00) to the Ministry of Youth Sports and Culture an act which resulted in the theft of such funding.

COUNT 2

Offence

Gross Negligence by a Public Officer in Preserving Money Contrary to Section 284(1)(2) of the Penal Code.

counts that are the subject matter of this constitutional matter are those stipulated under Section 25B of Corrupt Practices Act. Specifically, Honourable Friday Anderson Jumbe, inter alia, has been charged with the offence of misuse of office provided for in Section 25B(1)(3) of the Corrupt Practices Act Cap 7:04, as amended by Act No. 17 of 2004. And Mr. Humphrey Chimpando Mvula is being accused, inter alia, with the offences of Corrupt use of official powers and abuse of office set out in Section 25(1) and 25B(1) respectively of the said Corrupt Practices Act.

Particulars of Offence

Friday Jumbe on or about 5 May 2004 at the Ministry of Finance in the City of Lilongwe being a person employed in the public service as a Government Minister responsible for Government Finances and having by virtue of his employment had under control money in the sum of 11 Million Kwacha (K11,000,000.00) which was stolen and cannot be accounted for as a result of his gross negligence in arbitrarily making a funding to the Ministry of Youth Sports and Culture.

COUNT 3

Offence

Obtaining Money by False Pretences contrary to Section 319 of the Penal Code. Cap 7:01.

Particulars of Offence

Phillip Bwanali on or about 10 May 2004 at the Ministry of Finance in the City of Lilongwe being a person employed in the public service as a Government Minister responsible for Youth Sports and Culture with intent to defraud obtained 11 Million Kwacha (K11,000,000.00 from the Ministry of Finance by falsely representing that the money would be used for Youth Development Pro-Poor Programme activities in the Ministry of Youth Sports and Culture when in fact the Ministry of Youth Sports and Culture had planned no such activities.

COUNT 4

Offence

Uttering a False Document contrary to Section 360 as read with Section 356 of the Penal Code.

Particulars of Offence

Phillip Bwanali on or about 7 May 2004 at his farm in Thyolo District knowingly and fraudulently uttered a false document namely false delivery note and invoice purportedly from Lee General Suppliers which he produced and gave to Charles Gunsaru.

COUNT 5

Offence

Obtaining Money by False Pretences contrary to Section 319 of the Penal Code Cap 7:01.

Particulars of Offence

The Plaintiffs contend that the above mentioned Section 25B(1) of the Corrupt Practices Act, under which they are indicted, if read together with Subsection 3 of the said Section 25B, has the effect of negating their right to be presumed innocent and their right to remain silent.

The impugned statutory provisions

Phillip Bwanali on or about 10 May 2004 at the Ministry of Youth Sports and Culture in the City of Lilongwe being a person employed in the public service as a Government Minister responsible for Youth Sports and Culture, with intent to defraud obtained 11 Million Kwacha (K11,000,000.00) from the Ministry of Youth Sports and Culture by falsely representing that the money would be used for Youth Development Pro-Poor Programme activities at the National Sports and Culture Development Trust in paying for footballs procured from Lee General Suppliers when in fact Lee General Supplied no footballs to the National Sports and Culture Development Trust.

COUNT 6

Offence

Theft by a person employed in the Public Service contrary to Section 283(1)(4) of the Penal Code.

Particulars of Offence

Phillip Bwanali on or about 10 May 2004 at the Ministry of Youth Sports and Culture in the City of Lilongwe being a person employed in the public service as a Government Minister responsible for Youth Sports and Culture, and having by virtue of his employment received money in the sum of 11 Million Kwacha (K11,000,000.00) stole the said 11 Million Kwacha (K11,000,000.00) by being unable to produce such sum or make due account thereof.

COUNT 7

Offence

Misuse of Office contrary to Section 25B(1)(3) of the Corrupt Practices Act Cap 7:04 as amended by Act No. 17 of 2004.

Particulars of Offence

Vincent Amos Zumu Mpaluko between 7 May and 18 May 2004 at National Bank Capital City Branch in the City of Lilongwe being a person employed in the public service as a Chairman of the National Sports and Culture Development Trust used his public office as a public officer for the advantage of Phillip Bwanali in the arbitrary withdrawal of funding in the sum of 11 Million Kwacha (K11,000,000,.00) to the Ministry of Youth Sports and Culture which had been diverted to the account of National Sports and Culture Trust Fund and resulted into theft of such funding.

COUNT 8

Offence

As stated above, the Plaintiffs are challenging the provisions of Section 25B (3), as read with Section 25B(1), of the Corrupt Practices Act as being unconstitutional. The said Section 25B (1) of the Corrupt Practices Act states that:-

> "Any public officer who uses, misuses or abuses his public office, or his position, status or authority as a public officer, for his personal advantage or for the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest

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Gross Negligence by a Public Officer in Preserving Money contrary to Section 284(1)(2) of the Penal Code.

Particulars of Offence

Vincent Zumu Amos Mpaluko between 7 May and 18 May 2004 at National Bank Capital City Branch in the City Branch in the City of Lilongwe being a person employed in the public service as a Chairman of the National Sports and Culture Development Trust and having by virtue of his employment had under his control money in the sum 11 Million Kwacha (K11,000,000.00) which has been stolen as a result of his gross negligence in arbitrarily withdrawing and giving the money to Phillip Bwanali.

And Mr Humphrey Chimpando Mvula is answering the following charges:-

COUNT ONE

OFFENCE (SECTION AND LAW)

Receiving benefit to show favour contrary to Section 92 of Penal Code.

PARTICULARS OF OFFENCE

Humphrey Mvula being a person employed in the public service between the 19the day of August 2003 and the 29th day of July 2004 at Shire Bus Lines in the City of Blantyre received benefits from Mc Hendry Trading on the implied understanding that Humphrey Mvula would favour the said Mc Hendry Trading in the award of contracts for the supply of goods worth K7,492,0099.32 to the said Shire Bus Lines.

COUNT TWO

OFFENCE (SECTION AND LAW)

Receiving benefits to show favour contrary to Section 92 of the Penal Code.

PARTICULARS OF OFFENCE

Humphrey Mvula being a person employed in the Public Service between the 10th day of March 2003 and the 16th day of February 2004 at Shire Bus Lines Limited in the City of Blantyre received benefits from Monday Trading Agencies on the implied understanding that Humphrey Mvula would favour the said Monday Trading Agencies in the award of contracts for the supply of goods worth K33,053,706.92 to the said Shire Bus Lines Limited.

COUNT THREE

shall be guilty of an offence."

Further, Section 25B (3) of the said Corrupt Practices Act provides thus:-

"Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for the purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be

OFFENCE (SECTION AND LAW)

Corrupt use of official powers contrary to Section 25(1) of the Corrupt Practices Act.

Humphrey Mvula being a public officer and being concerned with the acquisition of goods from Transmotor Parts of South Africa on behalf of Shire Bus Lines between the 1st day of November 2002 and the 30th day of November 2002 corruptly obtained from Vincent Heap, of the said Transmotor Parts a Mercedes Benz C180 in relation to such acquisition of goods.

COUNT FOUR

Corrupt use of official powers contrary to Section 25(1) of the Corrupt Practices.

PARTICULARS OF OFFENCE

Humphrey Mvula being a public officer and being concerned with the acquisition of goods by Shire Bus Lines from Chiraz Ferreira between the 1st day of May 2002 and 30th day of August 2002 corruptly solicited for his benefit a guarantee for the payment towards the purchase of Nissan Champ registration Number BM 2377 from the said Shiraz Ferreira in relation to the said acquisition of goods.

COUNT FIVE

OFFENCE (SECTION AND LAW)

Failure to make a declaration of interest contrary to Section 25D(2)(a) of the Corrupt Practices Act.

PARTICULARS

Humphrey Mvula being a public officer between the 27th day of May 2003 and the 19th day of July 2004 at Shire Bus Lines Limited in the City of Blantyre failed to make a declaration of interest at a meeting where Humphrey Mvula was present and where to his knowledge proposed contracts for the supply of goods worth K5,359,878.02 to Shire Bus Lines in which Qita Alick Chimzimu Mvula, a member of his immediate family or his close associate had a direct interest was being considered.

COUNT SIX

OFFENCE (SECTION AND LAW)

Abuse of office contrary to Section 25B(1) of the Corrupt Practices Act.

PARTICULARS OF OFFENCE

presumed to have committed the offence charged." (emphasis supplied by me)

Having set out the impugned statutory provisions it is also important that the constitutional provisions that the Plaintiffs contend are being negated, by reason of the said statutory provisions, be set forth in this judgment.

The Constitutional provisions

The Plaintiff allege that some subsections of Section 25B, in particular a combined reading of subsections (1) and (3) of Section 25B of the Corrupt Practices Act, have the effect of negating their right to be presumed innocent and their right to remain silent. Indeed, the Plaintiffs allege that Section 25B (3) of the Corrupt Practices Act contains what has come to be popularly known a 'reverse onus' provision and that same is unconstitutional. The constitutional provisions respecting the right to be presumed innocent and the right to remain silent is contained in Section 42(2)(f)(iii) of the Republic of Malawi Constitution. It provides thus:-

> "Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right…as an accused person, to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial.."

As I understand it, from the affidavit of the Defendant, the Defendant's main averment is that the so called reverse onus contained in Section 25B(3) is permissible in terms of Section 44

Humphrey Mvula being a public officer, between the 1st day of May 2004 and the 31st day of May 2004 at Shire Bus Lines in the City of Blantyre abused his public office to obtain directly for himself a motor vehicle registration number BM1336 contrary to the recommendations of the Public Enterprise Reform and Monitoring Unit (PERMU)."

of the Republic of Malawi Constitution. In point of fact, the State asserts that the objective of Section 25B(3) of the Corrupt Practices Act is to reduce alleged appalling levels of corruption in Malawi. Unfortunately, the State has not offered statistical data to show the alleged appalling levels of corruption in Malawi. It would have been much better to give some data of the said levels of corruption in Malawi. I shall comment further on this observation later in this judgment.

Further, the Defendant depones that the presumption contained in Section 25B(3) of the Corrupt Practices Act is rationally connected to the so called objective of curbing the alleged appalling levels of corruption. Moreover, it is averred by the State that the presumption in Section 25B(3) of the Corrupt Practices Act only places an evidential burden upon the accused. Thus, the contention further goes, the said presumption requires an accused person to do no more than raise a reasonable doubt. Hence, the state says, the said presumption neither violate the said Section 42(2) (f)(iii) of our Constitution nor negate the said right to be presumed innocent and the right to remain silent.

The Court has observed that the Defendant is alleging that the presumption in Section 25B(3) of the Corrupt Practices Act is permissible under Section 44 of the Republic of Malawi Constitution. It is, therefore, important that we reproduce the relevant parts of the said Section 44 of the Constitution. The apposite parts of this Section, being Section 44(2) and (3) of the Constitution states that:-

> "(2)---No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
>
> (3) Laws prescribing restrictions or limitations shall not negate the essential content of the right in question, shall be of general application."

Finally, the Honourable the Attorney General has called upon this Court to declare that Section 25B(3) of the Corrupt Practices Act does not violate Section 42(2)(f)(iii) of the Constitution. Further, the State, through the Attorney General, prays for a declaration that the said Section 25B(3) of the Corrupt Practices Act is reasonable, recognized by international human rights standards, is necessary in an open and democratic society and does not negate the

essential content of the rights guaranteed under Section 42(2)(f)(iii) of the Constitution i.e. the right to be presumed innocent and the right to remain silent.

Issues for consideration

It is trite that the parameter of the issues for determination in this matter have already been stated in the Originating Summons. Indeed, I have previously set out the questions that the Plaintiffs want adjudicated.[3] It will not, therefore, be necessary to repeat them here except to observe that, as I appreciate them, the questions may be crystallized into one issue i.e. whether or not Section 25B(3) of the Corrupt Practices Act is unconstitutional. Further, it is my desire to add that if the answer to the above question is answered in the affirmative the Court must still consider whether the said Section 25B(3) of the Corrupt Practices Act would pass the test provided for in Section 44(2) of the Republic of Malawi Constitution.

Law and consideration of the issues

The arguments of the parties

The Plaintiffs and the Defendant filed skeleton arguments in support of their respective positions in this matter. Further, during the hearing of this case they made oral submissions to expand their said skeleton arguments. Space does not permit me to give a detailed narration of the said arguments. However, this does not mean that the parties' submissions will not be taken into account.

The Plaintiff's main argument is that in as much as they are aware that the right to presumed innocent and the right to remain silent are derogable rights but what Section 25B(3) of the Corrupt Practices Act provides is not acceptable if read in the light of the provisions of Section 44(2) and (3) of the Republic of Malawi Constitution. It is the further contention of Counsel for the Plaintiffs that Section 25B(3) of the Corrupt Practices Act reverses the legal burden of proof. As a matter of fact, the Plaintiffs are of the view that the said Section 25B(3) of the Corrupt Practices Act reverses the said burden in the sense that it provides that where the state proves that an accused did an arbitrary act then the Court should find the accused guilty of any of the offences stipulated in Section 25B of the Corrupt Practices Act. In the further opinion

[3]See footnote 1.

of the Plaintiffs, the said Section 25B(3) of the Corrupt Practices Act creates a legal, and not an evidential, burden on the part of an accused person charged with an offence under the said Section 25B of the Corrupt Practices Act. Accordingly, so the contention goes, the effect of this legal burden so created by Section 25(B)(3) of the Corrupt Practices Act is that it infringes on the Plaintiffs' right to be presumed innocent and the right to remain silent. Indeed, the Plaintiffs have argued that the reverse onus provision created by Section 25(B)(3) of the Corrupt Practices Act is most suited for strict liability offences which corruption offences are not.

Further, the Plaintiffs are of the view that once it is found that Section 25(B)(3) of the Corrupt Practices Act does infringe the said rights mentioned above, the court should also consider whether the said Section 25B of the Corrupt Practices Act meets the criteria set out in Section 44(2)(3) of the Republic of Malawi Constitution. The Plaintiffs further submit that Section 25B(3) does not comply with the criteria in Section 44(2)(3) of the Constitution and it must therefore be declared invalid. In showing that Section 25B(3) of the Corrupt Practices Act is not justifiable, the Plaintiffs contend that to them what this does is that it allows the prosecution simply prove an arbitrary act if they have to prove the commission of an offence. The Plaintiffs further argue that the State does not have to prove that an accused person did an arbitrary act with an intention to acquire a benefit for himself, or for the benefit of another person, if it is to establish the Commission of an offence under Section 25B of the Corrupt Practices Act. It is the further submission of the Plaintiffs that the reverse onus provision and the offence of abuse of office in the Corrupt Practices Act are not necessary in an open democratic society for it allows the State not to prove all the elements of the offence yet a person could end up being convicted. Actually, the Plaintiffs say that if it is a necessary reverse onus provision then it is incumbent upon the State to demonstrate that but it has not done so in view of the fact that there is yet another alternative provision in Section 95 of the Penal Code[4] that deals with the same offence of abuse of office and punishes arbitrary acts of public officers.

The State is of the view that there is nothing unconstitutional with the reverse onus provision in Section 25B(3) of the Corrupt Practices Act. In point of fact, the Honourable the Attorney General accepts that Section 25B(3) of the Corrupt Practices Act contains a reverse onus provision but that it is a rebuttable one and therefore acceptable in terms of Section 44(2)(3) of the Constitution. The state further contends that the said presumption only casts an evidential

[4]The relevant part of Section 95 of the Penal Code states that:

> "Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another shall be guilty of a misdemeanour.
>
> If the act is done or directed to be done for the purposes of gain he shall be guilty of a felony and shall be liable to imprisonment for three years---"

burned on the accused thus same is acceptable as is the case in many Commonwealth jurisdictions. In this regard the Attorney General has purported to rely on decided cases from, inter alia, Zimbabwe and the Privy Council. Moreover, the state, through the Attorney General, opines that this provision (Section 25B(3) of the CPA) is necessary because it is not easy for an outsider to prove that a person abused his office. It is therefore his argument that the said Section is intended to assist the prosecution deal with the difficult task of proving the mental element in the offence of Abuse of Office. That, in the view of the State, does not amount to placing any legal burden on an accused person.

In its further support of the said Section 25B(3) of the Corrupt Practices Act the State submits that corruption is evil and it requires a reverse onus provision to deal with it. The Honourable the Attorney General further argues that cases of corruption, of the nature of abuse of office, are difficult to prove so much so that it is necessary that there be a presumption like the one in issue here to make it easier for the State to prove such cases.

Finally, the State is of the opinion that the said reverse onus provision in Section 25B(3) of the Corrupt Practices Act does not infringe the stipulation in Section 44(2) and (3) of the Republic of Malawi Constitution. Indeed, as earlier mentioned, the Honourable the Attorney General has said that such reverse onus provision in matters concerned with corruption also obtain in other democratic countries like, inter alia, Zimbabwe, Republic of South Africa, Canada and the United Kingdom. Moreover, the state asserts that reverse onus provisions have been upheld by the European Court of Human Rights thereby demonstrating that same are acceptable in international human rights jurisprudence.

The above are the essential features of the submissions of the parties through their respective Counsel in this matter.

Consideration of the Issues

I should now proceed to give the Court's opinion on the issues raised in the matter before this Court. As mentioned earlier, the principal issue to be determined in this case is whether Section 25B(3) of the Corrupt Practices Act is constitutional or not.

Is Section 25B(3) of the Corrupt Practices Act Constitutional?

As a starting point in answering the above question it is well to observe that it is common knowledge that the Honourable the Attorney General has conceded that the said Section 25B(3) of the Corrupt Practices Act does not create an offence. Be that as it may be, sight should not be lost of the fact that this subsection is intended to augment the provisions of Section 25B(1) of the Corrupt Practices Act. In other words, Section 25B(3) of the Corrupt Practices Act is intended to assist the state, indeed it makes it easier for the state, to prove the offence created in Section 25B(1) of the Corrupt Practices Act. Actually, the wording of the subsection itself clearly speaks volumes of what the objective of the said subsection is. Indeed, in my view, this subsection is intended to complement the other provisions of Section 25B of the Corrupt Practices Act. The words "where in any proceedings for an offence under this section (meaning Section 25B) the prosecution proves that the accused did nor directed to be done or was in any way party to the doing of an arbitrary act--unless he gives proof to the contrary, be presumed to have committed the offence charged"are intended to mean that the Court would be entitled to draw an adverse inference from the decision of the accused not to testify during trial if he is charged with any offence under the said Section 25B. For sure, the Attorney General appeared to have made an admission in his submissions before this Court when he said that corruption offences (of the nature of abuse of office) are difficult to prove thus the State requires a reverse onus provision to avert that problem.

The question that immediately comes to mind is whether such should be the purpose of the laws that our legislature should pass under the new constitutional Order. I am saying this because of the observations that I wish to make very shortly.

As I see it, the basis of our criminal law is the Penal Code and the Criminal Procedure and Evidence Code. I would go so far as to say that all our criminal matters were, before the present Constitution came into effect, governed solely by the Criminal Procedure and Evidence Code. In actual fact, as regards matters of proof in criminal cases, Section 187(1) of the Criminal Procedure and Evidence Code is instructive and provides thus:-

> "The burden of proving any particular fact lies on the person who wishes the Court or jury, as the case may be, to believe in its existence, unless it is provided by any written law that the proof of such fact lie on any particular person:

Provided that subject to any express provision to the contrary in any written the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution." (emphasis supplied by me)

As it is understood by this Court, the above quoted subsection encompasses two things viz the burden and the standard of proof. Now, it is trite knowledge that the burden of proof always remains with the prosecution save in a few exceptional cases. Regarding the standard of proof, it is common place that in criminal cases the State is required to prove any criminal allegation against a Defendant beyond reasonable doubt.

Then our Section 187 of Criminal Procedure and Evidence Code, in subsection 2 states that:-

> "The burden of proving any fact necessary to be proved to enable any person to give evidence of another fact is on the person who wishes to give such evidence."

In the above quoted section, in my opinion, is where one finds the evidential burden. This evidential burden only rises where, inter alia, the accused raises the defence of self defence, duress, automatism, mistake or intoxication. The law expects him to fulfill an evidential burden of adducing sufficient cogent evidence as to the existence of facts constituting the defence raised. However, the Defendant has to do this on a balance of probabilities which must be differentiated from the burden that the prosecution has of proving a case beyond reasonable doubt.

It is, nevertheless, of paramount importance to observe that when Section 187 of the Criminal Procedure and Evidence Code talks of "any provision in any written law" the legislature must have had in mind, except in a few cases, both the burden and standard of proof which might be found in other statutes creating penal liability than the Penal Code and/or the Criminal Procedure and Evidence Code. However, if you look at our legal history, it is clear that both the Penal Code and the Criminal Procedure and Evidence Code pre-date the current Republic of Malawi Constitution. Accordingly, one would be correct if he said that the words "any provision in any written law" used Section 187 of the Criminal Procedure and Evidence Code should be read to include the provisions of the Constitution. So that if the Constitution has any provision that tended to detract from the effect of Section 187 aforementioned the same would be enforceable. Conversely, should the constitutional provision have the effect of detracting the effect of Section 187 of the Criminal Procedure and Evidence Code then that as well should be good law. This is the case since the Constitution is the supreme law and all other laws must conform to it.

I have deliberately discussed the provisions of Section 187 of the Criminal Procedure and

Evidence Code as it would appear to this Court that that is the premise upon which the so called reverse onus provision rests. Actually, both Counsel avoided to mention this provision which governs the conduct of criminal trials in Malawi. Indeed, that is perhaps the roundabout way of dealing with the issue raised by Section 25B(3) of the Corrupt Practices Act and in my view all the Sections of the Corrupt Practices Act which generally have the "reverse onus" provisions.

I now wish to turn to the stipulation in subsection 3 of the said Section 25B of the Corrupt Practices Act and give my thoughts on it. I am of the view that, on the face of it, the provision has the effect of reversing the burden of proof in criminal matters and thereby limiting the right to be presumed innocent and the right to remain silent. As a matter of fact, there is an implicit admission by the state that there is such a reversal if the submission of the Honourable the Attorney General is anything to go by. It will be recalled that he said that such a provision is necessary if Malawi has to make strides in combating the alleged prevalence of the crime of corruption in Malawi. However, in saying this I am alive to the fact that there is no particular decision of this Court, or the Malawi Supreme Court that has dealt with a reverse onus provision so as to find out whether such a provision is constitutional or not. For that reason, I will therefore have to have recourse to the jurisprudence in the neighbouring jurisdictions[5] to find out how they have dealt with reverse onus provisions where an issue of their constitutionality has arisen. As rightly pointed out by Mr Kaphale, when considering these foreign decided cases one has to be aware of the fact that various countries have different constitutional frameworks. In this regard, the Court has been persuaded to take the South African approach. This is so because the provisions in the South African Constitution, on how one should test the constitutionality and/or validity of any written law that derogates entrenched rights, are very similar to what is obtaining in the Republic of Malawi Constitution. Indeed, the stipulation in the South African Constitution is almost in pari materia with the Malawi Constitution. It must further be observed that the situation obtaining in the United Kingdom or Zimbabwe or other so-called Commonwealth countries, which the Honourable the Attorney General seemed to place much reliance on, appear to this Court not to be close to Malawi in so far as their constitutional provisions are concerned. As mentioned above, the Republic of Malawi Constitution provisions appear to be similar to the South African Constitution. Accordingly, the preferred foreign decided cases that this Court should have resort to must be those from South Africa. It can not be United Kingdom decisions where there is no written Constitution or cases on the European Union Convention that has no semblance to our provisions. The same is true with the court decisions from Zimbabwe which has no similar constitutional provision like ours.

I have earlier on made some observations on the provisions of Section 187 of the Criminal Procedure and Evidence Code which, although not mentioned by either Counsel, appear to give validity to reverse onus provisions. However, since the advent of the 1994

[5] *Commercial Union Assurance (plc) vs Alfred Waters* MSCA Civil Appeal No 46 of 1995 (unreported) where the MSCA said that this Court is entitled to look at construction of similar provision in foreign jurisdiction, and if the reasoning is correct, there is no reason why a Court should depart from such construction.

Malawi Constitution it is common cause that all laws are subject to Section 5 of the Republic of Malawi Constitution. If I might be allowed to quote, the said Section 5 of the Republic of Malawi Constitution reads:-

> "Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid."

Therefore, it is the opinion of this Court that Section 187 of the Criminal Procedure and Evidence Code now has, above everything else, to be read in context of Section 5 of the Republic of Malawi Constitution. Accordingly, if the reverse onus provision in Section 25B(3) of the Corrupt Practices Act has its origins from Section 187 of the Criminal Procedure and Evidence Code then I am afraid that it is not resting on solid ground. As said above, the stipulations of Section 25B(3) of the Corrupt Practices Act must be tested against the provisions of the Constitution to see if it is not inconsistent with the stipulations in the latter.

> What is the effect of Section 25B(3) of the Corrupt Practices Act on the right of an accused to be presumed innocent and the right to remain silent?

It is common knowledge that one of the rights that is accorded to an accused person in Section 42(2)(f)(iii) of the Constitution is the right to a fair trial. The said right to a fair trial encompasses, inter alia, the right to be presumed innocent and the right to remain silent and not to testify during trial. In my judgment, any law that has the result of either detracting from this right to be presumed innocent or to remain silent and not testify during trial is on the face of it unconstitutional for falling foul of Section 5 of the Constitution. As a matter fact, such law also runs counter to the right to a fair trial and therefore unconstitutional.

It is necessary that observations should be made regarding why, in my view, the framers of our Constitution decided to entrench the right to a fair trial i.e. right to be presumed innocent and the right to remain silent. Firstly, there is nobody who can deny the obvious fact that government has got all the machinery to investigate offences and indeed those it thinks are responsible for the commission of those offences. If it fails to come up with evidence then surely it would be prudent that no case be preferred by the state against a person or any person suspected of having committed the offence. Therefore, the state can not be expected to place

reliance on a suspect to give it evidence required to enable it charge him with an offence when it ought to carry out investigations using its machinery. Indeed, if that were allowed it would be like giving a rope to a person to hang himself. Secondly, it will be idle talk for anybody to deny that the State used to torture suspects because we, as a nation, did not recognize the right to remain silent. Actually, it was the practice then that at the closure of the prosecution's case, if there was a prima facie case raised, the courts would almost invariably require to testify in his defence. Surely, the observation I make can only sound horrow to those people who were either not born during the one party era or were not in this country during the one party state. In order to address these problems our framers decided to entrench the right to a fair trial. The drafters of the current Republic of Malawi Constitution must be applauded for the decision they made to deliberately embed the right to remain silent and the right to be presumed innocent.

It is my understanding that the effect of subsection 3 of Section 25B of the Corrupt Practices Act is that the Court would be entitled to drawn an adverse inference from the decision of the accused not to testify during trial where the State proves the doing of any arbitrary act. Yet, it is important to observe by way of analogy as follows: if a police officer were to obtain a confession statement through torture a Court of law would not use such a statement to convict a suspect. In my view the same should be true where a suspect is told that if you do not say anything on an allegation made against you then you should be convicted. That would be torture albeit not a physical one. Indeed, this subsection apparently does not give a choice to an accused. It forces the accused to testify in his defence. That is psychological torture which must not be allowed just like physical torture. Put differently, what the subsection does is to require that the defendant testifies during trial or else the person risks being convicted. I fear that might invariably arise especially where, at the close of the prosecution case, the Court finds that there is a prima facie case for a Defendant to answer. In my view that would clearly offend the right to be presumed innocent and the right to remain silent which are enshrined in the Republic of Malawi Constitution.

In coming up to this conclusion I have been guided by the decision of the Constitutional Court of South Africa in **S vs Bhulwana, S vs Gwadiso**.[6] In **Bhulwana's** case the Constitutional Court had to consider a provision in the Drugs and Drug Trafficking Act, 140 of 1992. Section 21(1)(a)(i) of the Act had stipulated:-

[6][1995](5) BCLR 5

"If in the prosecution of any person for an offence--- it is proved that the accused was found in possession of dagga [Cannabis] exceeding 115 grams; it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance."

The said constitutional court observed that the clear language of the above quoted text suggests that the presumption will stand unless proof to the contrary is produced. The court further noted that presumptions phrased in such a way have consistently been held to give rise to a legal burden and therefore a breach of the right to be presumed innocent. Further, the presumption of innocence, inter alia, along with the broader concept-encompassing the right to a fair trial, was considered by the Constitutional Court of South Africa in the **State vs Zuma and two Others**[7]. The question for determination was in connection with a provision in the South African Criminal Procedure Act that in effect presumed, unless the contrary was proved, that a confession made by an accused has both made voluntarily, if it appeared ex facie that the document containing the confession that such confession was indeed made freely and voluntarily. The Court found that it had not been shown that it was impossible or unduly burdensome for the State to discharge the onus proving that a confession was freely and voluntarily made. Furthermore, the Court found and concluded that nothing showed that the common law rule, placing the onus on the prosecution, impaired the administration of justice. It was held that that the provision did not meet the criteria in Section 33(1) of the South African Constitution (the equivalent of Section 44(2)(3) of the Republic of Malawi Constitution) and that it was inconsistent with the South African Constitution and was therefore invalid.

As will be appreciated, the way the above cited provision, in Section 21(1)(a)(i) of the Drugs and Trafficking Act of South Africa is couched, is the same as our Section 25B(3) of the Corrupt Practices Act. The only difference is that in South Africa the Constitutional Court was dealing with a section that provided a presumption of dealing in cannabis arising from proof that an accused had been found in possession of cannabis (chamba) exceeding 115 grammes. In our case there is a presumption of the commission of the offence by a public officer misusing or abusing his office arising from proof that the accused did or directed to be done or was in any way party to the doing of an arbitrary act which results in the loss or damage of government property or property of a public body.

Now, in **Bhulwana's**case the Constitution Court of South Africa expressed an opinion that the plain effect of the presumption is to burden the accused with the onus of establishing, on balance of probability, that he is not guilty of the offence of dealing, once it is proved by the State that he was in possession of more than 115 grammes of dagga, and that that was in direct conflict with the accused's right to be presumed innocent.[8] I adopt the opinion

[7][1995](4) BCLR 401
[8]See also ***State vs Sixaxeni*** [1994](3) BCLR 75

of the Constitutional Court in South Africa and conclude that our Section 25B (3) of the Corrupt Practices Act infringes on an accused's right to remain silent and to be presumed innocent. For the avoidance of doubt, this Court finds and concludes that Section 25B (3) limits an accused's right to a fair trial which includes the right to be presumed innocent and the right to remain silent and not to testify during trial. As mentioned earlier, the essence of this provision is that it calls upon an accused person to establish that he did not abuse or misuse his office when he/she did an act which in the eyes of the law as it stands now is an arbitrary act. Indeed, there is a risk of an accused person being convicted of an offence if he/she does not testify in his/her defence or if he does not establish the contrary of what the State is alleging against him/her in a charge sheet. Further, I must point out that this section, if allowed to stand, like so many other sections of the Corrupt Practices Act, would encourage the erosion of another element of a right to a fair trial. It, together with the other sections, will have the effect of allowing the use of self incriminating evidence. As will be appreciated the right to a fair trial also encompasses the right not to incriminate oneself. Accordingly, it is important that the courts should be courageous and vigilant in protecting people's rights enshrined in the Republic of Malawi Constitution. Unless the courts maintain their vigilance the state will not be stopped in its adventure of trampling on people's rights.

Is the limitation of the right to a fair in Section 25B(3) of the Corrupt Practices Act protected?

The position at law, as I understand it, is that because the presumption of innocence and the right to remain silent is entrenched in Section 42(2)(f)(iii) of the Constitution, in order to be valid in terms of Section 44(2) and (3) of the Constitution, any limitation of these rights would have to be shown to be, inter alia, both reasonable and necessary and would also have to be shown not to negate the essential content of these rights.[9] Put differently, it is trite knowledge that Section 42 rights must be read subject to Section 44(2) and (3) of the Constitution. Hence, any limitation, or abridgement, of any of the rights contained in Section 42 of the Republic of Malawi Constitution will only be valid if it passes the tests set out in Section 44(2) and (3) of the said Constitution[10].

Further, there are decided case authorities, both from within and outside Malawi, for the proposition that evidence has to be led to establish compliance with what is contained in Section 44 of the Constitution. As a matter of fact, this Court is also of the same view that the limitation of right to a fair trial contained Section 25B (3) to pass the test of validity there is need for evidence to be led to show that the said abridgement meets the requirements of the Constitution[11]. I can do no better than quote some dicta to demonstrate what the State ought to do where the

[9]An instructive and illuminating authority on this observation is the case of ***State vs Zuma and two Others*** [1995] LRC 145

[10] see foot note 11 below

[11]***Nelson John vs Republic*** Criminal Appeal No. 14 of 1997 adopting the dictum in the Canadian case of ***Regina vs Oakes*** [1986]19 C.R.R. 308; See also the South African cases of ***State vs Mbatha*** [1996]2 LRC 208 ***The State vs Zuma and two Others*** [1995]1 LRC 145 and ***Scagell vs Attorney General*** [1997]4 LRC 98.

abridgement of rights is raised as in the present case. In **Regina vs Oakes** Dickson CJC said the following at page 335 which is instructive:

> "The onus of proving that a limit on a right or freedom granted by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation"

Further, in **Whyte vs. The Queen** Dickson CJC made these remarks:

> "The Respondent crown and the Attorney General of Canada argued strongly that the objective of S.237(1)(a) is sufficiently important to warrant overriding a Charter right. The section, along with the related sections concerning the use, case or control of a motor vehicle while the ability to drive is impaired by alcohol or while the proportion of alcohol in the blood exceeds certain limits, is a response to a major social problem. Counsel for the respondent submitted affidavit evidence outlining the number of people charged annually with these offences, the number of accidents where alcohol is a factor, and the cost to the public through insurance, hospital care and the operation of the justice system. Counsel for the Attorney General referred the Court to the debates in the House of Commons when the predecessor of Section 237(1)(a) was first introduced in 1947…"

And in **State vs. Mbatha** Langa J. had the following to say at pages 217 to 218 which I found instructive:

> "The State characterized the objective of the presumption in the present case as being to assist in combating the escalating levels of crime as part of the government's duty to protect society generally. The contention was that the provision is intended to ensure effective policing and to facilitate the investigation and prosecution of crime as well as to ease the prosecution's task of securing convictions for contraventions under the Act. Such an objective is truly laudable and its importance, in the current climate of very high levels of violent crime, cannot be overstated. Information in papers submitted to us reveals that during the period 1990 to 1994 there was a distress increase in crimes of violence. The common denominator in most of them is the involvement of firearms. In a discussion document entitled Recent Crime Trends, Dr Lorraine Glanz of the Human Sciences Research Council observed that "the face of crime is becoming increasingly violent and more serious," and that the rampart crime levels must have- 'profound negative effect on the quality of life in communities. If left unchecked, a protracted increase in violent crime in particular is a threat to social stability'.

> I could not agree more. A further ugly feature allied to the actual deeds of violence is the incidence of illegal smuggling, sale and possession of arms. We were told that trafficking in arms and drugs from neighbouringcountries into South Africa is taking place on a significant scale. There is a proliferation of illegal firearms throughout the country and this, no doubt, contributes in no small measure to the high incidence of violent crime. This state of affairs is obviously a matter of serious concern, not only for the Courts, but for legislature, the police and the entire population which is affected by it. There is no doubt that, whatever the causes, crimes of violence particularly those involving firearms, have reached an intolerably high level and hat urgent corrective measures are warranted.

The problems which the government has to contend with in fulfilling its duty to protect society were given to us in some detail. We were informed that the detection of people in possession of illegal arms and ammunition is often very difficult. Police have to depend on informers or pure chance to trace offenders. The use of informers who infiltrate gun-smuggling networks is a helpful but often time-consuming and dangerous process. Gunrunners make extensive use of couriers to transport arms; some of the couriers, especially women and children, are used without their knowledge. Even vehicles such as ambulances and official government cars are sometimes used, without the people in control of the vehicle knowing it. Sometimes aircraft and motor vehicles equipped with false panels and compartments for storage are used in the illegal transportation of arms. The problem of policing is compounded by geographical factors; the borders of South Africa are extensive and impossible to patrol effectively 24 hours a day, making it easier for cross-border dealers and smugglers of arms to ply their trade and evade detection. The severe shortage of trained personnel has adverse effects on the capacity of the police to conduct raids and searches in places like hostels and informal settlements, to look for places used for concealment of illegal arms and to trap motor vehicles in illegal conveyance of arms. Ordinary members of the community withhold information because they are too terrified and intimidated by armed gangsters and traffickers in narcotic drugs and illegal arms. It is difficult not to have sympathy for representations of this nature, coming as they do from officials of the State whose task it is to deal with what has become a truly serious problem. These are real and pressing social concerns and it is imperative that proper attention should be given to finding urgent and effective solutions."

In **Scaggell vs Attorney General**(1997) 4 LRC 98 at page 106 O'Regan J. said at paragraph 9, which I find illuminating:

> "[9] In this case, the State filed written evidence to establish the purpose and effects of the Act. In his affidavit, Mr C.L. Fismer, then Minister for General Services, pointed to the negative effects on our society of unlicensed gambling and the consequent need to control such gambling. No evidence was produced as to particular difficulties faced by the police or the Attorney General in investigating and prosecuting people for illegal gambling. No evidence was led concerning the need for a sweeping presumption of the sort contained in S. 6(4) or for that matter any of the presumptions. Nor was any convincing evidence provided to suggest that conventional policing tactics, such as, for example, the use of plain-clothes police officers, could not provide the necessary evidence after the prosecution of such offences. Evidence lodged to meet the requirements of S. 33 needs to persuade us that the particular provisions under attack are justifiable in terms of S. 33, not merely address the justifiability of the overall legislative purpose sought to be achieved by the statute."

Finally, in **State vs Zuma**at page 164 the Court put it thus:

> "…the rights interfered with are fundamental to our concepts of justice and…fairness. They have existed in this country for over 150 years. A drastic consequence of the alteration to the law brought about by Section 217(1)(b)(iii) is the possibility that an accused may be convicted over the reasonable doubt of the Court. Nor has it been shown that it is in practice impossible or unduly burdensome for the State to discharge its onus. It has done so in innumerable trials under the common law rule."

The remarks of the various judges cited above, in my judgment, have one thing in common. They suggest, and this court adopts same, that there is need on the part of the state to offer evidence if it has to carry the day in its argument on a challenge concerning the constitutionality of a statute. This court finds and concludes that, it is not enough for the state to just say that in its opinion it is convinced that the limitation is reasonable or necessary or that it obtains in some European convention. Additionally, it is not adequate for the State to just say it is necessary to have the so-called "reverse onus" clause in Section 25B(3) because it helps in combating the crime of corruption or that same is necessary purportedly on the supposed fact that corruption offences are difficult to prove. Actually, as stated earlier, this Court is of the view that in this day and age one can not use a statute to water down civil liberties so that the State is given an easier option of proving corruption cases. That thinking is of the old order. It is dead

and buried not expected to resurrect again until dooms day if it ever comes.

The observations that have been made above are not without basis. In point of fact, there was an argument by the Honourable the Attorney General to the effect that the provision in Section 25B(3) of the Corrupt Practices Act is necessary if Malawi has to make strides in curbing the prevalence of corruption in our society. In essence what the state is suggesting is that to a large extent, in Malawi, most of the reverse onus provisions in the Corruption Practices Act are premised on the following: firstly, that it is difficult to prove corruption because it is mostly done in secret; secondly, that most of the information relating to such offences is with suspects themselves; that the best way to fighting corruption therefore is to, to some extent, reverse the burden of proof or water down the standard of proof so that suspects should effectively prove themselves innocent. Such an approach, as mentioned earlier, goes against the provisions of Section 187 and is in any event against the spirit and intendment of the right to a fair trial ingrained in our Constitution. If the argument by of the Honourable the Attorney General were to be accepted it would set a dangerous precedent. If I may add, it is actually a lazy way of fighting against corruption. The state would abdicate from its duty of investigating corruption cases in the hope that a suspect would prove the state's case when the former is offering the said contrary proof mentioned in Section 25B (3) of the Corrupt Practices Act. Indeed, a lot of foolish, but all the same innocent people, will go to prison. Fortunately, the law is meant to protect the foolish as well as the clever suspect.

Further, the argument that was being advanced by the State might appear good on first being heard but if evaluated against the law, and the evidence on record, comes to nothing. As a matter of fact, there is no empirical evidence offered on behalf of the State to demonstrate that such a provision as Section 25B(3) of the Corrupt Practice Act will have the effect of reducing or curbing the crime of corruption. I hasten to add that it has not been shown that it is impossible or unduly burdensome on the part of the State to discharge the onus of proving the offence of Misuse of office or Abuse of office in a Court of law and thereby allegedly curb the commission of this offence.

As a last observation let me say the following: what the Honourable the Attorney General has essentially contended in the matter before us is analagous to what the States' contention was in **State Bhulwana, S. vs**

Gwadiso.[12] The substance of which was that the purpose of the reverse onus was to assist in controlling the illegal drug trade. O'Reagan, J. found that:-

> "Although the need to suppress illicit drug trafficking is an urgent and pressing one, it is not clear how, if at all, the presumption furthers such an objective."[13]

What O'Reagan,J. said is in my view true of what is obtaining here in Malawi as regards the purported objective of Section 25B (3) of the Corrupt Practices Act. The State has not demonstrated how Section 25B(3) of the Corrupt Practices Act will further the objective of curbing corruption. Indeed, I for one I am alive to the fact that the Courts in Malawi have found suspects guilty of offences of corruption even in the absence of the "reverse onus provisions." Further, it would appear that the State thinks that this Court would accept an argument that is not even supported by any evidence that prior to the said Section 25B(3) of the Corrupt Practices Act it was difficult to prove the offence of Misuse of Public Office provided for in Section 25B of the Corrupt Practices Act. As a matter of fact, the offences in the said Section 25B appear to be similar to the offence that is provided for in Section 95 of the Penal Code. The said Section 95 of the Penal Code provides:-

> "Any person who, being in the public service, abuse of office does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another shall be guilty of a misdemeanor.

If the act is done or directed to be done for purposes of gain he shall be guilty of a felony and shall be liable to imprisonment for three years…."

As will be observed, the offence of Abuse or Misuse of Public Office has always been there in our Penal Code but no evidence was led to suggest, or demonstrate, that it was difficult to prove such offence as provided for in the Penal Code.

Conclusion

In conclusion, this Court finds and concludes that Section 25B (3) of the Corrupt

[12][1995] (5) BCLR 5
[13]Ibid

Practices Act is incapable of being used within our constitutional framework. It violates the rights of an accused person in Section 42 (2) (f) (iii) of the Constitution. Accordingly, in terms of Section 5 of the Constitution, Section 25B (3) of the Corrupt Practices Act is hereby declared invalid and of no force for being unconstitutional. It is further declared that the said Section 25B (3) of the Corrupt Practices Act is neither reasonable nor necessary in an open and democratic society. Furthermore, this Court hereby declares that Section 25B (3) of the Corrupt Practices Act negates the essential right to be presumed innocent and the right to remain silent. Actually, it is a serious infringement of the right to a fair trial as provided for in Section 42(2) (f) (iii) of the Republic of Malawi Constitution.

As regards the issue of costs this Court orders that each party should bear their own costs. I make this order whilst realizing that there was a discontinuance of part of the questions raised by Mr. Humphrey Chimpando Mvula. It is not my wish to condemn him to pay the costs of the discontinuance after he has successfully challenged the State on another aspect.

Katsala J,

The plaintiffs seek the court's determination of two questions, namely: -

a) Does section 25B(3) of the Corrupt Practices Act, Cap 7:03 as amended by the Corrupt Practices (Amendment) Act, 2004 violate the right of an accused person to a fair trial, which includes the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial as provided for in section 42 (2)(f)(iii) of the Constitution?

b) If it does, is section 25B(3) of the Corrupt Practices Act, Cap 7:03, as amended by the Corrupt Practices (Amendment) Act 2004, such limitation to the rights in section 42(2)(f)(iii) of the Constitution as can be said to be reasonable, recognized by international human rights standards, necessary in an open democratic society and ones that do not negate the essential content of the constitutional rights of an accused in section 42(2)(f)(iii) of the Constitution?

Further the plaintiffs seek a declaration that –

a) Section 25B(3) of the Corrupt Practices Act as amended by the Corrupt Practices (Amendment) Act 2004 violates the rights of an accused person in section 42(2)(f)(iii) of the Constitution?

and

b) That the limitations to the constitutional rights in section 42(2)(f)(iii) of the Constitution as are contained in section 25B(3) of the Corrupt Practices Act as amended by the Corrupt Act (Amendment) Act 2004 are not reasonable, are not recognized by international human rights standards; are not necessary in an open and democratic society, and negate the essential content of the rights in section 42(2)(f)(iii) of the Constitution and are therefore null and void.

My Lords, I do not wish to narrate the facts of this case because you have ably done so in your judgments. I therefore find it unnecessary to repeat them. I thus wish to go straight into a discussion of the law on the questions raised, as I understand it.

Section 25 (B)(3) of the Corrupt Practices (Amendment) Act 2004 provides:

"Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged."

The plaintiffs are attacking this section on the basis that it imposes a burden of proof on the accused, a so-called 'reverse onus' provision, which they allege is contrary to the provisions of section 42(2)(f)(iii) of the Constitution. This section provides:

"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right -

(f)….to a fair trial, which shall include the right –

(iii) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial".

My Lords, the parties herein agree that section 25B(3) is indeed a reverse onus provision. They also agree that the right to be presumed innocent as contained in section 42(2)(f)(iii) of the Constitution is not absolute, or non derogable, non restrictable or non limitable. It is one of those rights under Chapter IV of the Constitution which can be derogated from, limited or restricted, in

accordance with section 44(2) and (3) of the Constitution. This section provides as follows:

> "44(2) without prejudice to subsection (1), no restriction or limitation may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.
>
> (3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application".

The issue before your court My Lords is two pronged – whether section 25B(3) of the Corrupt Practices Act violates or indeed derogates from or limits or restricts the right to a fair trial which includes the right to be presumed innocent contained in section 42(2)(f)(iii) of the Constitution; and if the answer is in the affirmative then whether such derogation, limitation or restriction passes the test laid down in section 44(2) and (3) of the Constitution. If your response to the first question is in the negative then My Lords, you do not have to go to the second limb of the issue, for to do so would be superfluous. I therefore propose that I look at the issue in this order.

The right to a fair trial, which includes the right to be presumed innocent has been recognized in the English common law for a long time. I do not wish to trace the history of this right but suffice to say that the statement of Viscount Sankey LC in *Woolmington v Director of Public Prosecutions*[1935] AC 462 is always considered to be classical. At p.481 he said:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Judicial pronouncements in many jurisdictions have emphasized the importance of the presumption of innocence in the criminal trial. In Canada, in *Regina v Oakes*[1986] 19 CRR 308, Dickson CJC said at 322:

> "The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in section 11(d) of the Charter, the presumption of

> innocence is referable and integral to the general protection of life, liberty and security of the person contained in section 7 of the Charter…. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in human kind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

In the Republic of South Africa, in *State v Mbatha*(1996) 2 L.R.C. 208 the court emphasized on the importance of the presumption of innocence. At 218 Langa J said:

> "The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If, in particular cases, what is effectively a presumption of guilt is to be substituted for the presumption of innocence, the justification for doing so must be established clearly and accordingly."

And in *State v Coetzee*[1997] 2 LRC 593 Sachs J eloquently explained the significance of the presumption of innocence. At 677 he said:

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignomity and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book…. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and

> severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption…the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."

In the United Kingdom, the courts have made many pronouncements upholding the presumption of innocence. I have already referred to the dictum of Viscount Sankey in *Woolmington v DPP*(supra) as representing a classical pronouncement on the presumption of innocence. In *Regina v Lambert*(2001) UKHL, 37 Lord Steyn agreed with the views expressed by Sachs J in the South African case of *Coetzee*(supra) I have reproduced herein. In *Re Attorney General's Reference No 4 of 2002*[2004] UKHL 43 Lord Bingham of Cornhill at paragraph 9 said:

> "The right to a fair trial has long been recognized in England and Wales although the conditions necessary to achieve fairness have evolved, in some ways quite radically, over the years, and continue to evolve. The presumption of innocence has also been recognized since at latest the early 19th century, although (as shown by the preceding account of our domestic law) the presumption has not been uniformly treated by Parliament as absolute and unqualified. There can be no doubt that the underlying rationale of the presumption in domestic law and in the convention is an essentially simple one: that it is repugnant to ordinary notion of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation the more objectionable it is likely to be."

My Lords, I can go on and on to cite cases from many other jurisdictions on the presumption of innocence, but I do not find it necessary to do so. Suffice to say that the right to a fair trial and to be presumed innocent is recognized almost in all civilized societies. This is evidenced by its inclusion in major international human rights documents. For example, the Universal Declaration of Human Rights, 1948,in Article 11(1) provides:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The African Charter on Human and Peoples' Rights, adopted on June 27 1981, in Article 7(1) (b) provides:

"7.1 Every individual shall have the right to have his cause heard. This comprises:

(b) the right to be presumed innocent until proved guilty by a competent court or tribunal.

The International Covenant on Civil and Political rights, ,Article 14(2) provides:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

The Convention on the Rights of the Child, 1989 enjoins States Parties to ensure that children accused of committing offences are guaranteed the right to a fair trial and to be presumed innocent. Article 40(1) provides: -

"40(1) States Parties recognize the right of every child alleged as, accused of or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's reintegration and the child's assuming a constructive role in society.

(2) To this end, and having regard to the relevant provisions of international instruments, Stats Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of

legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians."

The Rome Statute of the International Criminal Court, signed in July 1998, which established the International Criminal Court, a court with jurisdiction over the most serious crimes of concern to the international community as a whole, also recognizes the presumption of innocence. Article 66 provides: -

"Article 66(1) Everyone shall be presumed innocent until proved guilty before the court in accordance with the applicable law.

(2) The onus is on the prosecutor to prove the guilt of the accused".

Still in Europe the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1953, provides in Article 6(2) that:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

The European Parliament proclaimed in Article 48(1) of the Charter of Fundamental Rights of the European Union (2000/c 364/01) that: -

"Every person accused of a criminal offence has the right to be presumed innocent so long as his guilty has not been proven according to law…."

My Lords, these are but a few examples of international instruments expressly providing for the right to fair trial and right to be presumed innocent. In my view all this only goes to stress the importance of this right and also to show how committed the human race is in ensuring that this right is upheld at all times. It is a right which, in my view is the foundation of an acceptable criminal justice system; a justice system that would earn and command the trust and confidence of the society. As such by providing for the right to a fair trial and right to be presumed innocent in section 42(2)(f)(iii) our constitution is not conferring on the citizens a new right. No. It is only recognizing a right that has existed under common law, statute and indeed international instruments. All that the constitution has done is to give this right the force and supremacy

characteristic of all constitutional provisions.

> Let me now proceed to attempt to answer the issues raised before your Lordships. The first issue as I have already said is whether section 25B(3) of the Corrupt Practices Act violates the right to a fair trial which includes the right to be presumed innocent. I reckon My Lords, you should find this question not difficult to answer.

As I have endeavoured to demonstrate above, the presumption of innocence entails at least that the prosecution bears the burden of proving the guilt of the accused beyond a reasonable doubt in criminal proceedings. See *Leary v US*,U.S. 6 (1969). Let me say before I proceed further, that section 187(1) of the Criminal Procedure and Evidence Code recognizes this. It provides:

> "The burden of proving any particular fact lies on the person who wishes the court or jury, as the case may be, to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person.
>
> Provided that subject to any express provision to the contrary in any written law the burden of proving that a person who is accused of an offence is guilty of that offence lies upon the prosecution."

This provision reinforces the standing principle that "He who alleges must prove." So the prosecution, which alleges that an accused is guilty of an offence he is charged with, must prove such guilt. The section recognizes that there may be exceptions to this standing principle – i.e. where some written law provides that the burden of proof is on some person other than the one making the allegation. Probably this exception is taking cognisance of the exceptions recognized by Viscount Sankey in the *Woolmington*(supra).

Section 25B of the Corrupt Practices Act provides:

> (1) Any public officer who uses, misuses or abuses his office, or his position, status or authority as a public officer, for his personal advantage or the advantage of another person or to obtain, directly or indirectly, for himself or for another person, any advantage, wealth, property, profit or business interest shall be guilty of an offence.
> (2) Any person who uses his influence on, or induces or persuades, a public officer to use, misuse or abuse his public office, or his position, status or authority as a public officer, for such person's advantage or for the advantage of another person or to

obtain, directly or indirectly, for such person or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(3) Where in any proceedings for an offence under this section the prosecution proves that the accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

(4) For purposes of this section "arbitrary", in relation to actions of a public officer concerning the duties of his office, or directing the doing, of anything contrary to -

(a) procedures prescribed by or under any written law; or

(b) established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.

In my understanding the State must prove the following in order to establish an offence under section 25B(1), that the accused:

a) was a public officer

b) used, misused or abused his public office, position, status or authority;

(i) for his personal advantages, or

(ii) for advantage of another person; or

(iii) obtained directly or indirectly for himself or for another person any advantage, wealth, property, profit, or business interest.

It has been argued by the plaintiffs that in so far as section 25B(3) of Corrupt Practices Act is concerned once the State proves that the accused did an arbitrary act and as a result whereof there was loss or damage of the property of the Government or a public body or the diversion of such property for unintended purposes, the accused will be presumed to have committed the offence under section 25B(1) of Corrupt Practices Act, unless he gives proof to the contrary. The presumption will take effect notwithstanding that the State will not have proved that the accused or the other person benefited from the arbitrary act or from the loss or damage or diversion of the property. If at the close of the State's case the accused opts not to testify, he may be convicted of the offence under section 25B(1) despite the State's failure to prove all the essential elements of

the offence, including benefit accruing to the accused or another person. Or indeed that he may be convicted despite the existence of reasonable doubt as to his guilt.

Let me agree with the Attorney General in his submission that section 25B(3) does not create any offence. The offences in section 25B are in subsections 1 and 2 only. The elements of these offences are apparent from the wording of the subsections. Under subsection 1, as has been submitted by the applicants, to make out its case, the State must prove that:

(a) the accused is/was a public officer,

(b) the accused used, misused, or abused his public office, or position, or status of authority.

(c) Such abuse etc was for his personal advantage or advantage of another person; or alternatively,

(d) the accused obtained directly or indirectly for himself or another person an advantage, wealth, property, profit or business interest.

For an offence under subsection 2, the prosecution must prove that:

(a) the accused used his influence on, or induced or persuaded an pubic officer to use, misuse or abuse his office, position, status or authority as a public officer,

(b) such use, misuse, or abuse of office position, status or authority by the public officer was for the advantage of the accused or another person; or

(c) such use, misuse, or abuse of office position, status or authority by the public officer was to obtain directly or indirectly for the accused or another person any advantage, wealth, property, profit or business interest.

My Lords, under subsection 3 on a charge under subsection 1 or 2 or indeed both, once the prosecution proves that the accused did or directed to be done or was party to the doing of an arbitrary act which resulted in the loss or damage of Government property or property of a pubic body or the diversion of the property to or for purposes for which it was not intended, the accused shall be presumed guilty of the offence unless he gives proof to the contrary. My understanding of this provision is that it relieves the prosecution of proving all the elements of the offences under subsection 1 and 2. It is clear in my judgment that the presumption of guilt

will arise even if the prosecution has not proved that the arbitrary act was done for the benefit or intended benefit of the accused or any other person. And if the accused does not give proof to the contrary, then he shallbe convicted of the offence. I do not think that in such a scenario, it can be said that the prosecution will have proved its case beyond a reasonable doubt. It is clear to my mind that in such a case the conviction will ensue even when there is doubt that the accused or some other person benefited from the arbitrary act. Ordinarily, in a criminal trial any doubt as to the culpability of the accused results in his acquittal. But in this case because of the presumption, the accused will be convicted even when there is such reasonable doubt. I would therefore agree with the applicants in their submission on this point.

It has been argued by the Attorney General that subsection 3 only imposes on the accused an evidential burden and not a legal burden. That is, the accused is required to adduce evidence sufficient to raise an issue as to whether he is guilty of the offence of abuse or misuse of office (the presumed fact). The accused is not required to demonstrate on a balance of probabilities that he is not guilty of abuse of office in order to be acquitted of that offence, which would be the case if the accused were saddled with a legal burden.

My Lords, a similar argument was made in the South African case of *State v Bhulwana & others*[1996] ICRC 194. The accused were convicted of dealing in dagga by reason of the operation of the presumption in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 1992, which provided that where it was proved that an accused had been found in possession of dagga exceeding 115g “it shall be presumed, until the contrary is proved, that the accused dealt in such dagga.”The accused contended that this reverse onus provision violated their presumption of innocence and was unconstitutional. The State asked the court to read down the section by interpreting it as merely imposing an evidential burden rather than a legal burden of proof on the accused, in the event that the section is held to be unconstitutional. O’Regan J. delivering the judgment of the Constitutional Court of South Africa said at 199 and 200;

> “It can not be accepted that the subsections impose an evidential, not a legal burden. Section 2 1(1)(a)(i) provides that, where an accused is found in possession of a quantity of dagga in excess of 115g, it shall be presumed, ‘until the contrary is proved’, that the accused was guilty of dealing in dagga. The clear language of the text suggests that the presumption will stand unless proof to the contrary is produced. Presumptions phrased in

such a way have consistently been held to give rise to a legal burden since the judgment of the Appellate Division in *Ex p Minister of Justice: Re R v Jacobson and Levy,*1931 AD 466. On several occasions the Appellate Division has held that provisions in the legislation antecedent to this Act which gave rise to the presumption of facts 'unless the contrary is proved' imposed a legal burden upon accused persons: see *State v Guess*(4) SA 715(A) at 719, *State v Radloff*1978 (4) SA 66(A) at 71. There is no significant difference between the formulation of the earlier presumptions considered in these cases and section 21(1)(a)(i), although the formulation in the earlier legislation was 'unless' rather than 'until' the contrary is proved. In the court, a quo in *Bhulwana's*case Marais J was of the view that s.21(1)(a)(i) plainly gave rise to a legal burden (see 1995(1) SA 509(C) at 510, 1995 (5) BCLR 566(C) at 567). I agree that there can be no doubt that s.21(1)(a)(i) is a reverse onus provision which imposes a burden of proof on the accused.

The effect of the provision is that, once the State has proved that the accused was found in possession of an amount of dagga in excess of 115g, the accused will, on a balance of probabilities, have to show that such possession did not constitute dealing as defined in the Act. Even if the accused raised a reasonable doubt as to whether he or she was dealing in the drug, but fails to show it on a balance of probabilities, he or she must nevertheless be convicted. The effect of imposing the legal burden on the accused may therefore result in a conviction for dealing despite the existence of a reasonable doubt as to his or her guilt."

In *R v Lambert*[2001] UKHL 37, [2002] 2AC 545, a majority held that imposition of a legal burden on a defendant to prove lack of knowledge undermined the presumption of innocence to an impermissible extent.

There are several cases from Canada on the presumption of innocence vis-à-vis reverse onus provisions that are worth mentioning. Section 11(d) of the Canadian Charter of Rights and Freedoms provides that:

(11 Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

In *R v Oakes*(1986)C.R.R. 308 the Supreme Court of Canada considered section 8 of the

Narcotic Control Act which provided that if the crown was able to prove beyond a reasonable doubt that the accused had been in possession of a narcotic then the accused was to be "given an opportunity of establishing that he was not possession of the narcotic for the purpose of trafficking." The section in effect required the accused to establish on a balance of probabilities that he did not have possession of the narcotics for purposes of trafficking. Dickson C.J.C. at pp 132-33 said:

> "In general one must, I think conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was true."

The principles in *Oakes*(supra) were applied in *R v Vaillancourt*(1987), 32 C.R.R.18 where section 213(d) of the Canadian Criminal code was questioned. The section provided that the offence of murder was committed if the accused used a weapon or had it on his person at the time he commits or attempts to commit an offence or during flight after committing or attempting to commit the offence. Thus a conviction of murder was possible although the accused had neither an objective nor subjective intent to kill the victim. Lauer J speaking for the majority of the Canadian Supreme Court held that any provision which created an offence which allowed for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes section 11(d) of the Charter of Rights and Freedoms. Lauer J referred to the dictum of Dickson CJC set out above and said, at 33:

> "It is clear from this passage that what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to provide an essential element."

Probably the most important decision from the Supreme Court of Canada on section 11(d) of the

Canadian Charter of Rights and Freedoms is *R v Whyte*(1988), 35 CRR 1. The accused was charged with having the care and control of a motor vehicle while impaired. The accused was found in the driver's seat of an automobile, slumped over the steering wheel. The keys were in the ignition but the engine was not running. The court considered a presumption that required the accused to establish a state of affairs. The presumption provided:

> "…where it is proved that the accused occupied the seat ordinarily occupied by the driver of a motor vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion….."

The accused argued that this provision infringed the presumption of innocence in section 11(d) of the Charter. The Crown argued that the section only required proof of an excuse rather than a disproof of any element of the offence. The court did not accept this argument. Dickson CJC said:

> "In the case at bar, the Attorney General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, section 237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from *Oakes*quoted above, with its reference to an "essential element", to support this argument. The accused here is required to disprove a fact collateral to the substantive offence, unlike *Oakes*where the accused was required to disprove an element of the offence. The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the section 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterization of a factor as an essential element, a collateral factor, and excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on a balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the tier of fact as to the guilt of the accused."

In *R v Downey*C.R.R.1 again the Supreme Court of Canada dealt with a statutory presumption that a person who lives with or is habitually in the company of prostitutes, is, in the absence of evidence to the contrary, committing the offence of "living on the avails of another person's prostitution. The court held that this presumption infringed the presumption of innocence since it could result in the conviction of an accused despite the existence of a reasonable doubt.

My Lords, section 11(d) of the Canadian Charter of Rights and Freedom to a great extent is similar to our own section 42(2)(f) of the Constitution. It is for this reason that I find the decisions of the Supreme Court of Canada on the presumption of innocence vis-à-vis reverse onus provisions to be good guidance. Let me mention as well that section 25 of the Constitution of the Republic of South African also contains provisions similar to section 11(d) of the Canadian Charter and our own aforesaid section. That is why the decisions of the South African Constitutional Court on these provisions can also offer useful guidance in the task before your court today. I am however awake to the fact that these authorities are merely persuasive and not binding on this court. I have therefore considered them in that respect only.

> Having said so much it is imperative at this juncture, before your patience wears out, that I answer the first question before you. From the authorities I have cited and of course many others that I have read but for the sake of brevity have chosen not to cite, and the law as it stands today, it is clear that there is only one answer to this question. The right to a fair trial which includes the right to be presumed innocent is an established principle of our law which saddles the burden of proof squarely on the shoulders of the prosecution. The entrenchment of this right in section 42(2)(f) of the Constitution must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of an offence the accused is charged with. A presumption that relieves the prosecution of this burden or part of it could result in the conviction of an accused despite the existence of a reasonable doubt as to his culpability. Such a presumption is in breach of the presumption of innocence and therefore offends section 42(2)(f)(iii) of the Constitution. In my judgment section 25(B)(3) of the Corrupt Practices Act carries such a presumption. It creates a legal burden of proof and not an evidential burden of proof as submitted by the Attorney General. As I have already said earlier in this judgment an accused would be liable to conviction despite the existence of a reasonable doubt as to his guilt if he opted not to give evidence (in exercise of his constitutional right to remain silent) after the prosecution establishes that he did or was party

to the doing of an arbitrary act. The answer to the first question is therefore that section 25(B)(3) clearly violates the right to a fair trial which includes the right to be presumed innocent contained in section 42(2)(f) (iii) of the Constitution.

I now turn to the second question. Is section 25(B)(3) of the Corrupt Practice Act such a limitation of the rights in section 42(2)(f)(iii) as can be said to be reasonable, recognized by international human rights standards, necessary in an open and democratic society and one that does not negate the essential content of the right in the said section 42(2)(f)(iii) of the Constitution? This is the question the plaintiffs have put before you which must be answered without fail.

As I have already mentioned, the rights in section 42(2)(F)(iii) are not absolute. They can be limited, derogated from, or restricted. The only requirement is that such restriction or limitation must satisfy the test in section 44(2) and (3) of the Constitution. That is, it must:

a) be prescribed by law;

b) be reasonable;

c) be recognized by international human rights standards;

d) be necessary in an open and democratic society; and

e) not negate the essential content of the right or freedom in question; and

f) be of general application.

My Lords, there is no doubt and indeed it was conceded in argument by the plaintiffs that the limitation in section 25(B)(3) is prescribed by law and is of general application. I would therefore not wish to spend any more time on this aspect of the test.

In the exercise of determining whether a reverse onus provision is constitutional or not the courts in various jurisdictions have come up with guidelines. The courts in United States of America, Canada, United Kingdom, South Africa and many other jurisdictions have developed the 'rational connection test', that is, there must be a rational connection between the proved fact and the presumed fact. *Tot v U.S.*, US 463(1943),*Ulster County Court v Allen*, US 140 (1979),*Leary v U.S.*,U.S. 6 (1969),*R v Oakes*(supra),*R v Whyte*(supra),*R v Downey*(supra),*R v Lambert*(supra),*State v Zuma*, (1995) 1LRC 145,*State v Bhulwana*, (supra),*State v Mbatha*, (supra).

In *Ulster County Court v US*, the United States Supreme Court said that the presumption must not undermine the fact finder's responsibility at trial to find the ultimate facts beyond reasonable doubt. In *Leary v US*,the Supreme Court said that it must be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend. In Hong Kong, in *Attorney General of Hong Kong v Lee Kwong Kut*[1993] 3 All ER 939, the Privy Council was of the view that whether an exception will be justifiable will depend on whether it is the primary duty of the prosecution to prove the guilt of the accused to the requisite standard and whether the exception is reasonably imposed. And that there must also be a rational connection in the sense that the presumed fact is more likely to flow from the proved fact.

In the United Kingdom, the courts also recognize the sanctity of the presumption of innocence. In *Lambert*(supra) the House of Lords called for reverse onus provisions to be confined to within reasonable limits. In *Attorney General's Reference No. 1 of 2004*it was held that the presumptions will be justified if the over all burden of proof is on the prosecution and the exception does not go further than is reasonably necessary, in other words, it must be proportionate. The House said that the easier it is for the accused to discharge the burden the less offensive will the presumption be. Let me mention that the jurisprudence from the English courts on this matter must always be understood in the light of the Human Rights Act 1998 which mandates the courts to read down a reverse onus provision so as to make it compatible with Article 6(2) of the European Convention. This article provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Therefore when interpreting reverse onus clause the courts in England and Wales have followed the guidance from the European Court in *Salabiaku v France*(1988) 13 EHRR 379. At paragraph 28 of the judgment it said:

> "presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting States to remain within certain limits in this respect as regards criminal law.

….Article 6 paragraph 2 (Article 6 – 2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and

maintain the rights of the defence."

Thus to the courts in England and Wales and indeed all the contracting States, the question in any case where a reverse onus clause is challenged is whether on the facts, the reasonable limits to which a presumption must be subject have been exceeded –*Attorney General's Reference No 4 of 2002*.Obviously, this is far less than what the courts in Malawi are enjoined to do. My Lords, you are required to go further and determine whether the presumption passes the other tests in section 44 (2) and (3) of the Constitution which I have already set out earlier in this judgment. On this score I would hazard to say that the decisions by the courts in England and Wales and indeed Europe may not be good guidance. It would be hazardous to base one's decision simply on the strength of such decisions. In my judgment the decisions from the Supreme Court of Canada and the Constitutional Court of South Africa should be preferred. These jurisdictions have got provisions similar to our section 44(2) and (3) of the Constitution.

> In *OakesR v Whyte*the Canadian Supreme Court expressed a dislike for over inclusive or overbroad presumptions. In *Downey*Supreme Court said that legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the other element. But the presumption will infringe the right to be presumed innocent as enshrined in section 11 of the Charter if it requires the trier of fact to convict despite the existence of a reasonable doubt.
>
> In South Africa, as I said earlier, the court has also applied the rational connection test, see *State v Zuma and Others*, *Bhulwana*, *Scaggell*, and *Mbatha* (supra). In *Mbatha*the court placed some emphasis on the need for limitations to be properly focused and appropriately balanced to avoid subjecting accused persons to "open ended jeorpady" as a result of overbroad or overinclusive presumptions.

My Lords, I have said all this just to demonstrate that the issue before us is not peculiar to us. It has come before courts in various jurisdictions where it has been ably resolved. My intention is only to show how our colleagues have resolved it and what principles they have come up with that may be of assistance to us. I have done this bearing in mind the provisions of section 11 of the Constitution which expressly empowers the courts to develop principles of interpretation to

be applied in interpreting the Constitution. And;

> "The principles we develop must promote the values which underlie an open and democratic society; we must take full account of the provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the Constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the Constitution."

See *Attorney General v Fred Nseula and Malawi Congress Party*, MSCA Civil Appeal Number 32 0f 1997 (unreported).

My Lords I do not believe that it can be said with substantial assurance that the presumed fact in section 23B(3), that is, the fact that the accused is guilty of the offences in subsection 1 or 2, more likely than not flows from proof of the fact that the accused did or was party to the doing of an arbitrary act which resulted in the loss or diversion of government property. I have already said that proof of the facts in suction 3 cannot leave a trial court in no doubt as to the guilt of the accused. In other words it is my considered view that there is no rational connection between the proven facts and the presumed fact.

It has been submitted by the Attorney General that the objective of section 25B(3) of the Corrupt Practices Act is of sufficient importance to warrant overriding a constitutionally protected right. That the objectives of the presumption relate to concerns which are pressing and substantial in a democratic society and characterized as sufficiently important. He further submitted that the measures adopted are carefully designed to achieve the objective in question; they are not arbitrary, unfair or based on irrational considerations and are rationally connected to the objective. They impair the right as 'little as possible' and there is a proportionality between the effects and measures limiting the right. He cited the decisions of the Canadian Supreme Court in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 and *R v Oakes*(supra) among others, in support of his argument.

> My Lords, the presumption in section 25B(3) in my judgment seriously violates the right to be presumed innocent. In effect what the presumption means is that once it is proved that the accused did or was party to the doing of an arbitrary act which resulted in the loss or

diversion of government property then he mustbe found guilty and be convicted of the offence of abuse or misuse of office he gives proof to the contrary, which in my understanding means, he proves that he is not guilty to be more explicit he proves that he is innocent. To require an accused person to prove his innocence or else suffer conviction in a criminal trial is contrary to the values of an open and democratic society. I fail to see what reasons could justify such a draconian stance in our criminal law. The Attorney General has not presented to this court any evidence in whatever form to demonstrate or indeed support his submission that the measures taken by the legislature in limiting the right to be presumed innocent are reasonable and justifiable. Admittedly corruption is bad. It is evil and it has to be rooted out of our society. It is counter productive and it seriously retards development. Those that engage in corruption in a way violate the citizens' right to development as enshrined in section 30 of the Constitution. They, among other things, divert for their own use public resources thereby depriving the general public the benefit from such resources. Such people are selfish and greedy at the expense of everyone else. Surely, if caught, they must be dealt with firmly.

However, inasmuch as we may harbour hatred for such people, we can only show and prove to the whole world and indeed to ourselves that we are an open and democratic society and that we cherish and promote the values that underlie such a society if we treat those we suspect of committing heinous crimes with dignity as fellow human beings and afford them all the protection that accused persons enjoy under the Constitution. I do not see any justification for limiting their right to be presumed innocent bearing in mind that they are mere suspects and have not been convicted of the alleged crimes. If the limitation is on account of the seriousness of the offence or how despicable it is to us as a society, then I would have thought that those accused of murder, for instance, which I consider to be the most heinous crime under our law, should be more vulnerable to suffer such a limitation. But with such a thought the words of Sachs J in *State v Coetzee*(supra) which I have already referred to above instantly come to mind. He said:

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become."

It would appear to me that we may even be accused of discrimination if we are to treat those accused of corruption differently from those that are accused of committing other crimes which as I have just said are equally or even more heinous. Such form of discrimination, which is what section 25B(3) has brought into our criminal law, in my view is unjustified and contrary to our belief in the equality of all persons before the law which is one of the underlying principles on which the Constitution is founded, see section 12(v) of the Constitution.

In short my Lords, and without mincing words, the justification for the limitation in section 25B(3) has not been proved and further the limitation seriously impairs the very essence of the right to be presumed innocent. It cannot therefore be said to be proportionate as submitted by the Attorney General, see *Belgian Linguistic Case*(1968) 1 EHRR 252.

My Lords, I do not find it necessary to go on and consider if the limitation is necessary. But for the sake of avoiding any doubt I wish to say that in my considered opinion the limitation is not necessary. As you are aware my Lords, we have always had the offence of abuse of public office in our penal code, see section 95. And many people have been charged and convicted of this offence in the past without the aid of the presumption in section 25B(3). It has not been shown why it is now necessary to have this presumption to prove an offence we have always had and been able to prove.

It has been argued by the Attorney General that in the vast majority of cases the state has no information or evidence concerning the circumstances in which, and the persons whom the accused corruptly transacted with or how. Almost always all the information relevant to the determination of the case is peculiarly within the knowledge of the accused which makes it extremely difficult for the state to demonstrate a case beyond reasonable doubt unless there is evidence emanating from the accused. And that in these circumstances, there is nothing unreasonable, oppressive or unduly intrusive in asking an accused who has already been shown to have acted corruptly to produce the requisite evidence, namely that he was so involved in the abuse of office. My Lords, the answer is simple. As it was said in Chinua Achebe's *Things Fall Apart*,when men learnt to shoot without missing, birds learnt to fly without perching. If the perpetrators of corruption have become discreet and sophisticated in their dealings, then all it means is that the state's investigators and prosecutors should be ingenious in their work. When I think of the resources at the disposal of the state that can be used to fight crime, I do not think

that it can be said with open eyes that there is no other way the crime of corruption can be dealt with firmly other than by infringing on the rights of the accused. To answer specifically, in my judgment it would be wrong and contrary to the golden thread in our criminal law and procedure as described by Viscount Sankey LC in *Woolmington's* to compel an accused person to testify in order to assist the state to prove its case. It would also infringe the accused person's right to remain silent and not to testify during trial and the right not to be a compellable witness against himself as enshrined in section 42 (2) (f) (iii) and (iv) of the Constitution.

> My Lords, international human rights standards do recognise the existence of presumptions of fact or law in every legal system. But what states are required to do is to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defense, *Salabiaku v France*(supra). I have already said that the limitation at stake is unreasonable, unjustifiable and that it seriously impairs the very essence of the right to be presumed innocent. I do not therefore wish to say more than what I have already said.
>
> Section 44 (3) of the Constitution provides that laws prescribing restrictions or limitations must not negate the essential content of the right or freedom in question. I have already said what I could have said on this and it is not my intention to repeat myself. All I wish to say is that section 25B (3) requires an accused person to prove that he is not guilty of the offence presumed, that is, to prove his innocence. Obviously what comes to mind are the words of Lord Bingham of Cornhill in *Re Attorney General's Reference No.4 of 2002*(supra) that:
>
> > "There can be no doubt that the underlying rationale of the presumption in domestic law and in the convention is an essentially simple one: that it is repugnant to ordinary notion of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation the more objectionable it is likely to be."

Surely section 25B (3) is such a provision. What it has introduced into our criminal law is repugnant to the ordinary notion of fairness in a criminal trial. The section fundamentally takes away what is benevolently conferred by section 42 (2) (f) (iii) of the Constitution. It in fact renders this constitutional provision nugatory. It therefore offends section 44 (3) of the

Constitution. It cannot be allowed to continue to exist in our statute books.

> My Lords, on the foregoing, I would therefore answer the plaintiffs' second question in the negative. The plaintiffs' action therefore succeeds. And I join my brother Kapanda J in making the declarations sought by the plaintiffs in the originating summons.

I now turn to the issue of costs. The plaintiffs having succeeded in their action I do not see why they should be deprived of costs. I would therefore award costs of the proceedings to the plaintiffs. However, the second plaintiff, Mr Humphrey Chimpando Mvula initially wanted to challenge the constitutionality of section 45 (2) of the Corrupt Practices Act in his summons but decided to discontinue that aspect of his claim after the originating summons had already been served on the defendant. In my considered view justice and fairness would demand that costs occasioned by the discontinued claim be for the defendant. And I so order.

Mkandawire, J.

This matter was brought before the High Court (constitutional division) through originating summons. The two plaintiffs who were separately indicted before the Chief Resident Magistrates are seeking this Court to review Section 25 (B) (3) of the Corrupt Practices Act (CPA) for Constitutionality on the basis that it infringes the presumption of innocence.

The 1st Plaintiff Hon Friday Anderson Jumbe was indicted before the Chief Resident Magistrate's Court in Lilongwe on various charges, which include an offence under section 25 (B) (1) of he Corrupt Practices Act (Amendment) Act, 2004. ("the CPA"). Before hearing commenced, Hon Friday Jumbe sought the leave of the Court and leave was accordingly granted for him to refer to the High Court (Constitutional Division) the issue as to whether section 25 (B) (3) of the CPA which contains a reverse onus provision does not infringe his constitutional right to a fair trial by infringing the presumption of innocence. He is seeking an order declaring the said section 25 (B) (3) of the CPA invalid.

Similary, Mr. Humphrey Chimpando Mvula the 2nd plaintiff was indicted before the Chief Resident Magistrate's Court in Blantyre of various offences under the CPA, one of which was an

offence under Section 25 (B) (1) of the CPA. He sought leave to move the High Court (Constitutional Division) to review Section 25 (B) (3) of the CPA for Constitutionality on the basis that it infringed the presumption of innocence. Mr. Mvula also got leave of the High Court to review the Constitutionality of Section 45 (2) of the CPA on the basis that it contained a reverse onus provision which, he feared, infringed his presumption of innocence. When the matter came for hearing, the 2nd Plaintiff Mr. Mvula elected to drop the challenge to Section 45 (2) of the CPA and only proceeded with a challenge to Section 25 (B) (3) of the CPA alongside the 1st Plaintiff Hon Friday Jumbe. There is also an affidavit sworn by one Tamando Chokotho, deposing that the charge under section 25 (B) (1) against Hon Jumbe was withdrawn under section 81 of the Criminal Procedure and Evidence Code ("CP & EC"). He states that though this is the case, the state is free to try the accused under the same section of the CPA.

The two Plaintiffs are represented by Mr. Kalelani Kaphale of Counsel whilst the Defendant is represented by the Attorney General Mr. Ralph Kasambara.

In arguing their case, Counsel for the plaintiffs relied on the skeleton arguments which he had filed with the court. As already pointed out, the Section in issue is Section 25 of the CPA. This Section, counsel argued contains a reverse onus provision under Section 25 (B)(3). The plaintiffs challenge this provision. They say that it infringes the right to be presumed innocent until proven guilty as provided for in Section 42 (2)(f) (iii) of the constitution. This reverse onus provision does not qualify as a limitation under section 44 of the Constitution.
Counsel for the Plaintiffs referred to section 25 (B) (I) of the CPA which provides as follows:

(1) Any public officer who uses, misuses or abuses his office,
or his position, status or authority as a public officer, for his
personal advantage or the advantage of another person or obtain, directly or indirectly, for himself or for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(2) Any person who uses his influence on, or induces or
persuades, a public officer to use, misuse or abuse his public office, or his position,

status or authority as a public , for such persons' advantage or for the advantage ofperson or to obtain, directly or in directly, for suchor for another person any advantage, wealth, property, profit or business interest shall be guilty of an offence.

(3) Where in any proceedings for an offence under this section the prosecution proves that he accused did or directed to be done, or was in any way party to the doing of, any arbitrary act which resulted in the loss or damage of any property of the Government or of a public body, or the diversion of such property to or for purposes for which it was not intended, the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence charged.

(4) For purposes of this section " arbitrary" in relation to actions of a public officer concerning the duties of his office, includes the doing, or directing the doing, of anything contrary to –

(a) procedures prescribed by or under any written law, or

(b) established practice or any agreed rules or arrangement which is known or ought to be known to him or is, in relation to the matter under consideration, brought to his attention in writing or other sufficient means.

Under Section 34 of the CPA, a person found guilty of an offence under section 25 (b) (1) shall be liable to imprisonment for twelve years. Counsel for the plaintiffs proceeded by saying that Section 25 (B) (1) of the CPA would therefore read:

(a) Any public officer,

(b) Who uses, misuses or abuses his public office, his position, status or authority

(c) (i) for his personal advantage

(ii) or for the advantage of another person,

(iii) or to obtain, directly or indirectly for himself or for another person

(d) any advantage, wealth, property, profit or business interest.

(e) shall be guilty of an offence.

In order for the prosecution to prove the offence, the prosecution would have to establish the following against the accused:

(a) that he was a public officer.

(b) that he used, misused or abused his public office, or his position, status or authority.

(c) that the use, abuse or misuse of office by the accused was for his personal advantage or for the advantage of another person or to obtain directly or indirectly for himself or for another person any advantage, wealth, property, profit or business interest.

Counsel submitted that the wording of paragraph © implies that the prosecution must of necessity prove that either the accused or another person got an advantage, wealth, property, profit or business interest as a result of the use, misuse or abuse of office and this advantage, wealth property, profit or business interest would have to be identified or proved in court.

Coming to subsection 3 of Section 25 (B) of the CPA, it was submitted that as comminuted, the subsection provides that:

(i) where in any proceedings for an offence under this section the prosecution proves that

(ii) the accused did or directed to be done, or was in any way party to the doing of

(iii) any arbitrary act

(iv) which resulted in the loss of or damage of any property of the government or of a public body or the diversion of such property to or for purposes for which it was intended,

(v) the accused shall

(vi) unless he gives proof to the contrary

(vii) Be presumed to have committed the offence charged.

Having dissected section 25 (B) (1)-(4), the plaintiffs' counsel said that according to section 25(B) (3) of he CPA , once the prosecution proves that the accused did an arbitrary act (i.e an act that was against laid down practices or procedures or rules or arrangement) which resulted into the loss, damage or diversion of government property the accused shall, unless he gives proof to the contrary, be presumed to have committed the offence under section 25 (B) (1) of the CPA.

To put it in a different way, once the prosecution proves that a public officer did an act without following procedures, practices or rules or arrangements which resulted in the loss, damage or diversion of government property, he will be presumed unless he gives proof to the contrary to have used, misused or abused his office for his personal advantage or for the advantage of another person or to have obtained directly or indirectly, for himself, or for another person, any advantage, wealth, property, profit or business interest and he shall thus be guilty of an offence.

The plaintiffs' counsel highlightened one important thing to note about the wording of section 25 (B) (1) and section 25 (B) (3) of the CPA in that while in section 25 (B) (1) the prosecution must prove that the accused had some personal advantage accruing to him or accruing to another person or any advantage wealth, property, profit or business interest accruing to him or to another person, under section 25 (B) (3) of the CPA, the prosecution merely have to prove an arbitrary act and loss or damage to government property or the diversion of such property for use of which it was not intended. There is no requirement for the prosecution under section 25 (B) (3) to show that the accused or any other person benefited or had any personal advantage or acquired any wealth, property, profit or business interest (as required in section 25 (B) (1) from the loss, damage or diversion of the government property. Counsel submitted that they had to highlight this difference between the two subsections of section 25 (B) because not in every situation where loss or damage or diversion of government property (for unintended purposes) occurs, does an individual (the accused or any other person) acquire a personal benefit, advantage, property, wealth or business interest.

The two plaintiffs have also filled in their affidavits in support of this application. These affidavits are in identical terms. In their affidavits, the two plaintiffs have exhibited copies of the indictment and a copy of section 25 (B) of the CPA. They depose that they are aware that under section 42 (2) (f) (iii) of the constitution they have a right to a fair trial which includes the right to be presumed innocent, to remain silent during plea proceedings or trial and not to testify during trial. They further state that they are aware that section 25 (B) (3) of the CPA reverses the onus of proof in that where the state proves that they may have done anything without following procedure (an arbitrary act) which results in the loss of government funds or in the diversion of government property for purposes for which it was not intended, they will be presumed, unless

they give proof to the contrary, to be guilty of the offence under section 25 (B) (1) of the CPA. They depose that by referring that mere proof of an arbitrary act by the prosecution must lead to a finding that they committed the offence unless they give proof to the contrary, section 25 (B) (3) of the CPA violates their rights under section 42 (2) (f) (iii) of the constitution. Further, they state that section 25 (B) (3) presumed the commission by them of the whole of the offence and not a mere ingredient or an essential element of the offence. Hence by requiring that they be convicted of the offence unless they give proof to the contrary, the section requires them to disprove, not the existence of one element of the offence, or the essential element of the offence, but the whole offence. The plaintiffs further depose that they do not see any rational connection between the basic fact i.e the doing of an arbitrary act and the presumed fact ie the liability for the offence of misuse of office for the advantage of another person or themselves. Further, they depose that it cannot be demonstrated that the presumed fact is more likely than not to follow from the proved or basic fact on which it is made to depend. Hence, in their view, the presumed fact defies rationality, reasonableness and fairness and may result in innocent people being convicted. Finally, they indicate their belief that it is possible to have, less obtrusive ways of criminalizing arbitrary acts than subjecting an accused person to a presumption that they are liable for he offence under Section 25 (B) of the CPA.

The applicants are therefore seeking declarations that:-

(a) section 25 (B) (3) of the CPA violates the rights of an accused person in section 42 (2) (f) (iii) of the constitution .

(b) the limitation to the rights in section 42 (2) (f) (iii) of the constitution that is contained in section 25 (B) (3) of the CPA is not reasonable, is not recognized by international human rights standard, is not necessary in an open and democratic society and negates the essential content of the rights in section 42 (2) (f) (iii) of the constitution.

In his oral submissions, Counsel Kaphale referred to the importance of the presumption of innocence. The leading case of **Woolmington –vs.-D.P.P** (1935) A.C. 462 shows that the presumption of innocence has enjoyed a long standing recognition at common law. Viscount Sankey wrote at pages 481-482:

“ Throughout the web of the English Criminal law one golden

thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner as to whetherthe prisoner killed the deceased with a **malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

There are several other cases from other jurisdictions which counsel cited in order to underline the fact that the presumption of innocence has received a lot of emphasis. These other cases are the Canadian case of **Regina – vs – Oakes** (1986) 19 CRR 308, the English case of **Regina – vs – Lambert**(2001
ULCLTH, the South African case of **State-vs-Mbatha**(1996) 2. L. R. C. 208 where Langa J said this at page 218 about the importance of the presumption of innocence.

"**The presumption of innocence is clearly of vital importance in the establishment and maintenance of an open and democratic society based on freedom and equality. If, in particular cases, what is effectively a presumption of guilt is to be substituted for the presumption of innocence, the justification for doing so must be established clearly and accordingly."**

The plaintiffs' Counsel submits that whilst the presumption of innocence is limitable under section 44 (2) (3) of the constitution, section 25 (B) (3) reverses the burden of proof in the sense that it provides that where the accused does an arbitrary act unless he proves to the contrary, he is presumed to have committed an offence. Counsel says that Section 25 (B) (3) creates a legal burden and not an evidential burden . Counsel has cited several case authorities in order to buttless the fact that section 25 (b) (3) creates a legal burden. The cases in point are **Scaggel – vs – Attorney General** (1997)4L.R.C. 98 at page 107, **State – vs – Chogugudza** (1996) 3 LRC 683, **Rep – vs – Oakes** (Supra), **Rep – vs- Whyte(**1988) 35 C.R.R. Land **State – vs – Mbatha** (supra). Counsel further demonstrated through case law from various jurisdictions of the

common wealth and America how section 25 (B) (3) does not meet the limitation criteria in section 44(2) (3)of the constitution. There are so many cases authorities cited by Counsel and I shall be referring to some of them at a later stage.

The Attorney General Mr. Ralph Kasambara filled in an affidavit in opposition. He also filled in skeleton arguments and during the hearing, the Attorney General made an oral submission in response to the submission made by the plaintiff's counsel. In the affidavit in opposition, the Attorney General deposes that presumptions of law and fact operate in every legal system and that here in Malawi, Section 44 (1) of the constitution does permit them as they are not viewed as a violation of the rights contained in section 42 of the constitution as long as they are reasonable, recognizable under international human rights standards and are necessary in an open and democratic society and do not negate the essential content of the right to fair trial. He deposes that a balance has to be struck between the interests of the state and the individual charged with a corruption offence. It is clearly reasonable and sensible that a deviation be allowed from the strict application of the principle that the state must prove the accused guilty beyond reasonable doubt,' and that the law recognizes that the state should not be required to shoulder the virtually impossible task of proving matters that are only within the peculiar knowledge of the accused. He goes on to say that the objective of the State to curb corruption is of sufficient importance to warrant the limitation of a constitutionally guaranteed right as the objective relates to concerns which are pressing and substantial in a free and democratic society consequently characterized as being sufficiently important. Hence the means chosen to achieve the objective of reducing the appalling levels of corruption in Malawi by having a presumption under Section 25 (B) (3) of the CPA is rationally connected to the objective and not arbitrary nor based on irrational considerations, and impairs the rights in question as little as possible. Hence the limitation is proportional to the objective. Mr. Kasambara deposes that the state under the CPA Section 25 (B) (3) retains the responsibility to proving the elements of the offence and the accused has the benefit of the doubt. He goes on to say that the presumption as provided under section 25 (B) (3) places an evidential burden upon the accused referring him to do no more than raise a reasonable doubt on the matter and hence does not violate section 42 (2) (f) (iii) of the constitution. He states that there is a rational connection under section 25 (B) (3) between the facts which are the element of the offence and the presumed fact, which is misuse of public office. He wraps up by

saying that the mere fact of other conceivable ways of achieving the same objective with a smaller infringement on the rights would lead to invalidity, thus in almost any situation legislation can be struck down. Accordingly some leeway of choice must be given to Parliament.

Before the Attorney General made his oral submission, he raised a preliminary issue. The issue was with regard to the withdrawal of the application by the second plaintiff on section 45 (2) of the CPA. The Attorney General said that the case before the lower court was pending due to this application. The concern by the Attorney General was that if the Court ruled in favour of the Attorney General on Section 25 (B) (3), the second plaintiff might come back to the court to pursue section 45 (2) of the CPA. That would be a delay and abuse of the court process. He therefore said that if the discontinuance of section 45 (2) was under order 21 rules of supreme court , this court should impose terms and conditions under order 21 (4) RSC. The condition he was praying for was that the plaintiff should not use the constitutional challenge to stay proceedings. He also prayed to the court to order for costs incurred by the defendant up to the time of the discontinuance. The Court reserved the ruling on this application which ruling shall be incorporated in this judgment.

Going back to the oral submissions by the Attorney General he told the court that section 25 (B) (3) of the CPA is not a free standing section that creates an offence on its own. This is a proviso to section 25 (b) (1) (2). Had the draftsman wanted to be extravagant with words, he would have added a semi colon after Section 25 (b) (2) and add the word provided and add the word prosecution in the second line. He went on to say that the presumption in Section 25 (B) (3) is a presumption of an evidential burden and not a legal burden. The Attorney General said that it seems to be an agreed fact between the two sides that the presumption of innocence and to remain silent is not an absolute right. The duty to prove the guilty of the accused always rests on the prosecution in few cases, the law will allow the prosecution to adduce the legal burden and leave the evidential burden on the shoulders of the accused. In such an instance, where the law casts the evidential burden on the shoulders of the accused, all that the accused has to do, is to discharge that burden on a balance of probability. This the Attorney General said, is what is called the “reverse onus burden” which is found in section 25 (B) (3), of the CPA. At this juncture, the Attorney General quoted cross on evidence pages 121-123 where he gives examples of two kinds of presumptions which are:-

(1) **presumption without basic facts**

(2) **Presumption with basic facts**

The Attorney General said that before the presumption in Section 25 (B) (3) goes to play, the prosecution has the burden to prove three things, and these are the basic facts. Thus Section 25 (B) (3) creates a rebuttable presumption which requires the accused to give evidence to the contrary. He went on to submit that where the law uses the words " where he gives proof to the contrary", common law courts have construed that to mean that the accused person has the evidential burden of adducing enough evidence questioning the truth of the presumed fact. The Attorney General cited the cases of **State –vs – Chogugudza**1996 (1) ZLR 28, **Hong Kong–vs – Lee Kwong KUT** LRC (Crim) 100 and Attorney General Reference ofno. 1 of 2004. The Attorney General went at length to examine Section 25 (B) (1) of the CPA.

He submitted that the prosecution has to prove:-

(i) that the accused was a public officer

(ii) that he used or misused or abused his office to achieve

any of the following things :-

(a) personal advantage

(b) for the advantage of another person

(c) obtained advantage, wealthy property, profit or interest.

As can be seen from the above element, the Attorney General submits that it is not easy for an outsider to show that the accused abused his office. The fundamental element is on the abuser. In an attempt to assist the prosecution deal with the mental element, parliament decided to mitigate the means of proof by bringing in the presumption. Thus in proving the same offence, the state is supposed to prove the following:

I. **that the accused was a public officer**

II. **that the accused did or directed something to be done or was in a way a party to doing something**

III. **something that he did had a result of loss or damage of property or diversion for something that was not intended and also that what he did must be an arbitrary act as defined in subsection (4)**

IV. **the prosecution must also prove that there was** personal **advantage or advantage of another person**.

What section 25 (B) (3) has done is only to presume the misuse of office. That is to cater for the mental element. The Attorney General says that a look at the charge sheet (Fg1) will show that the reading is S25 (B) (1) – (3) as S 25 (B) (3) is just a proviso . One therefore sees that in both framing the charge and proving the case, the state still is required to prove what is in section 25 (b) (1). The Attorney General submitted that the issue of arbitrary act is rationally connected to abuse or misuse. For example, if a person is a public officer and he decides to do an arbitrary act (section 23 (B) (4), then obviously he is misusing the office or abusing it. That doing must be intentional and the prosecution must prove the mens rea, the Attorney General submitted. The fact that the office has been abused or misused, is a thing that is wholly in the knowledge of the accused. It will therefore be up to the accused to explain. The accused has therefore to raise evidence that would question the truth of the presumption. The Attorney General further submitted that the reverse onus burden is also important due to the magnitude of cases of corruption and also the evil of corruption. He again referred to the case of **State vs Chogugudza**and **Hong Kong –vs – Lee Kwong Kut.** The reverse onus is also important taking into account the difficulty proving misuse or abuse.

Finally , the Attorney General submitted that this reverse onus burden has to be tested against section 44 of the constitution. He therefore submits that:

(1) the CPA is a law and that it has prescribed the limitation .

(2) the limitation is reasonable. The presumption here is only of evidential one. The state retains the legal burden to prove the case beyond reasonable doubt. If the accused remains silent he will not be

automatically convicted unless the state proves the case beyond reasonable doubt.

(3) The limitation is necessary in an open and democratic society. There is abundant case authority from both transitional and developed democracies.

(4) The limitation is recognized by international human rights standards, even the European Human Rights courts have confirmed some of the decisions, see case of **Sulabiaka – vs – France**(1988) 13 EHRR 379. under theHuman Rights jurisprudence, such reverse onus is acceptable.

Counsel Kaphale made a brief response to the Attorney Generals' reply. Much of what he said was already captured in his submission I shall therefore not delve into his response. Suffice to say that he did comment that he had filed skeleton arguments in March 2005 where he had informed the Attorney General that he would not be pursuing Section 45 of the CPA. He also personally spoke to the Attorney General about this development. He therefore says that there was a timely notice on the partial withdrawal of section 45 of the CPA. He therefore suggested that may be up to the day he gave notice, they could suffer costs. He also submitted that since there has been no discussion of section 45 of the CPA, there is no justification to bar the party from further pursuing it in the courts.

Before I further delve into this matter, let me thank both counsel for the industry shown in this case. They have both cited quite a rich regime of case law. They indeed went deep with their research in trying to illuminate pertinent areas in particular those case authorities from other jurisdictions . These cases have assisted this court in trying to see how our colleagues in the commonwealth with similar constitutional provisions have approached the matter. I have gone through all these cases although I may not be able to refer to each one of them. But I am greatly indebted to both counsel.

This Court has got original jurisdiction to review any law, and any action or decision of the Government for conformity with the Republic constitution. Section 108 (2) of the Constitution is very clear on that point. By virtue of section 5 of the constitution this Court can declare any law that is inconsistent with the provisions of the constitution to be invalid to the extent of the

inconsistency. It is also provided for in Section 11 (3) of the constitution that where a court of law declares any act of the executive or any law to be invalid, that court may apply such interpretation of that act or law as is consistent with the constitution. I am therefore proceeding with the analysis of this case with a very clear conscience that the constitution does empower this court to do so.

It is therefore imperative now to look at the principles that are applicable when interpreting the constitution. The starting point here is section 10 (1) of the constitution which provides:-

" **In the interpretation of all laws and in the resolution of political disputes the provisions of this constitution shall be regarded as the supreme arbiter and ultimate source of authority."**

Section 10 (2) provides:

" **In the application and formulation of any Act of parliament and in the application and development of he common law and customary law, the relevant organs of the State shall have due regard to the principles and provisions of this constitution."**

Section 11 then states the appropriate principles of interpretation of this constitution.

It provides:-

"(1) Appropriate principles of interpretation of this constitution shall be developed and employed by the Courts to reflect the unique character and supreme status of this constitution.

(2) In interpreting the provisions of this constitution a court of law shall ;

(a) promote the values which underlie an open and democratic society;

(b) take full account of the provisions of chapter III and Iv; and

(c) where applicable, have regard to current norms of public international law and comparable foreign case law."

Since the coming into force of the 1994 Republic Constitution, there have been several decisions of the High Court of Malawi and the Malawi Supreme Court of Appeal which have expounded

the principles to be followed when interpreting the constitution. These principles have been reflected by the Malawi Supreme Court of Appeal in **The State and Malawi Electoral Commission – ex - parte Rigtone Mzima** MSCA civil Appeal No. 17 of 2004 and in the case of **The Attorney General – vs – Fred Nseula and Malawi Congress Party** MSCA Civil appeal no. 32 of 1997, the MSCA made the following observations in that regard-

> "**Section 11 of the constitution expressly empowers this court to develop principles of interpretation to be applied in interpreting the constitution. The principles that we develop must promote the valves which underlie an open and democratic society, we must take full account of the** provisions of the fundamental constitutional principles and the provisions on human rights. We are also expressly enjoined by the **constitution that where applicable we must have regard to current norms of public international law and comparable foreign case law. We are aware that the principles of interpretation that we develop must be appropriate to the unique and supreme character of the constitution. The Malawi Constitution is the Supreme law of the country. We believe that the principles of interpretation that we develop must reinforce this fundamental character of the constitution…. There is no doubt that the general purpose of the constitution was to create a democratic frame work where people would freely participate in the election of their government . It creates an open and democratic society …. Constitutions are drafted in broad and general terms which lay down broad principles and they call, therefore, for a generous interpretation avoiding strict legalistic interpretation. The language of a constitution must be construed not in a narrow legalistic and pedantic way, but broadly and purposively."**

The position taken by the MSCA is on all forms with that taken by the Privy council in the case of **Minister of Home Affairs and Another v Fisher and Anothe**r (1979) 3 ALL E.R. 21, 25 – 26 and also the decision of he Supreme Court of Ghana in the case of **Taffour – vs – Attorney General** (1980) G.L.R. 637, 647 – 648, where the Court said:-

> "**A written constitution …… is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account**

therefore, needs to be taken of it as a landmark in a peoples' search for a better and fuller life. The constitution has its letter of the law. Equally the constitution has its spirit ……. The language …… must be considered as if it were a living organism capable of growth and development …… A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and being that consideration to bear, in bringing it into conformity with the needs of the time."

Taking into account the foregoing principles on Constitutional interpretation, I now move to the pertinent issues before this court. The presumption of innocence is one of the rights provided for in our Republic constitution in Section 42 (2) (f) (iii). Relevant case authorities have already been referred to in the narration or chronology of events. Thus I shall not repeat the citation of these cases. This presumption of innocence entails at least that the state bears the burden in criminal proceedings of proving the guilty of the accused beyond a reasonable doubt. In Constitutional Law of South Africa Chaskalson et al it is stated in paragraph 26 – 3 that any rule which burdens the accused with the ones of proof or which lowers the standard of proof required of the state offends the presumption of innocence and has to be justified in terms of the general limitations provisions to survive. This applies not only to the elements of he offence but also to every issue relating to the innocence or guilt of the accused. It applies equally to a defence, excuse, justification or exception. The real concern is not whether the accused must disapprove the element of the offence or prove a defence, excuse, justification or exception, but that the accused may be convicted despite a reasonable doubt about his guilt. It is against that risk that the presumption of innocence protects. The wording of section 25 (B) (3) of the CPA clearly shows that it creates a "reverse onus." It is therefore a reverse onus provision. These reverse onus provisions are allowed under law. This is common in almost every jurisdiction. In most cases, there are statutory provisions that provide an exception or limitation to the prosecutions burden to prove an accused guilty beyond reason able doubt. Thus it can safely be said here that the presumption of innocence is not an absolute one. It isan unlimitable right. Actually section 44 (1)of the constitution does not include the presumption of innocence as one of the rights that can not be limited. However, for these to be a valid limitation to the presumption of innocence, the Law or legal instrument orprovision limiting it must comply with Section 44 (2) and44 (3) of

the constitution. Section 44 (2) (3) provides :

"(2) without prejudice to subsection(1), no

restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.

(3) Laws prescribing restrictions or limitations shall

not negate the essential content of the right or freedom in question, shall be of general application."

Before I further go into the analysis as to whether the provision in Section 25 (B) (3) passes the limitation test in section 44 (2) (3), let me first make a finding as to whether the reverse onus provision herein creates a legal or evidential burden. Counsel for the plaintiffs cited a number of cases illuminating the fact that what is before the court here is a legal burden and not an evidential burden. On the other hand, the Attorney General also submitted at length that this reverse onus provision only creates an

evidential burden.

Having caused a survey of several decided cases such as **Scaggel – vs Attorney General**(1997) 4 L.R.C. 89, **State- vs - Chogugudza** (1996)3 LRC 683, **R-vs- Whyte**(1986) 19. C.R.R, 308, and **R vs Oakes**(1988) 35 C.R.R. 1, I find that section 25 (B) (3) of the CPA creates a legal burden on the accused. This Section therefore does offend the right of an accused person to be presumed innocent in terms of section 42 (2) (f) (iii) of the constitution. The provision can accordingly only be permissible if it is saved by the provisions of section 44 (2) (3) of the constitution.

It is imperative at this moment to remind ourselves that the presumption of innocence under section 42 (2) (f) (iii) is not an absolute right. It is one of those rights which can be limited. Actually world wide, it is also accepted that the presumption of innocence can be limitable. There are abundant case authorities and examples on this. Closer to home here, in South Africa, the courts there also recognize that the presumption of innocence is not an absolute right. The cases in point are those of **State – vs – Mbatha**(1996) 2 LRC, 208, **State – vs – Zuma** (1995) ILRC, 145 and **State -vs – Bhulwana**ILRC 194. From neighbouring Zimbabwe, the case of **State – vs – Chogugudza**(Supra) has clearly articulated the point. In the United States of America, the case of **Country Court** of **Ulster County –vs – Allen** US 140 (1979) has also

entrenched this doctrine of Limitation .

From the European perspective, the European Court of Human Rights in the leading case of **Salabiaku vs France** (1988) ECHR 19 stated as follows at page 28.

" **Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, how ever, require the contracting states to remain within certain limits in this respect within criminal law.**

If, as the commission would appear to consider, art 6 (2) merely laid **down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirement would in practice overlap with the duty of impartiality imposed in art 6 (1). Above all, the National legislature would be free to strip the trial court of any genuine power of assessment if the words "according to Law" were construed exclusively with reference to domestic law. Such a situation could not be reconciled with the object and purpose of art 6, which by protecting the right to be presumed innocent, is intended to enshrine the fundamental mental principle of the rule of law. Art 6 (2) does nottherefore regard the presumptions of fact and law provided for in the criminal law with in difference. It requires states to confine them with reasonable limits which take into account the importance of what is at stake and maintain he rights of the defence."**

In the Hong Kong case of **Attorney General of Hong Kong vs Lee Kwong Kut**(1993) 3 All ER 939, the privy council also recognised that article 11 (1) of the Hong Kong Bill of Rights (presumption of innocence) is subject to implied limitations.

Finally, in Canada, in the case of **Regina –vs-Oakes**(Supra), Dickson CJC also stated at page 335 that

" The rights and freedoms guaranteed by the charter are not however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical the realization of collective goals of fundamental importance. For this reason, section 1 (of the Canadian charter) provides criteria for justification of limits on the rights and freedoms guaranteed by the charter. These criteria impose a stringent standard for justification".

Before I commence analyzing the limitation section, let me openly acknowledge that the Malawi Constitution which now contains a human rights chapter is a recent development on our legal landscape. Thus the sections 44 (2) and (3) of the Constitution which directly with the clauses

on this pertinent issue have not received interpretation in Malawi jurisprudence.

It is because of this background that courts in Malawi have heavily relied on precedents from other commonwealth jurisdictions in order to seek guidance. Fortunately for us, section 11 (d) (c) of our constitution allows that . Be that as it may, this court has to be vigilant when dealing with such foreign case law. Some caution is in any event called for in considering different enactments decided under different constitutional arrangements. Having carried an indepth survey of all the case authorities cited by both counsel, I am satisfied that the Malawi situation is close to the Canadian and South African situation. I can not say that the two situations are exactly the same, but it is more convenient to refer to the Canadian and South African case law as they offer better guidance. Most of these cases are persuasive . There are of course some differences here and there in the way the limitation clauses have been drafted . For example, section 1 of the Canadian charter of Rights and Freedoms provides:

> "**The Canadian charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."**

Our section 44 (2) of the constitution does not use the phrase "demonstrably justified."
The South African Constitution in section 36 (1) dealing with limitation of rights provides:
"(1) The rights in the Bill of rights may be limited only interms of law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

(a)the nature of the right,
(b)the importance of the purpose of the limitation
(c)the nature and extent of the limitation and its purposes;and
(d)less restrictive reasons to achieve the purpose"

It is therefore clear that the South African Constitution is even more detailed than the Canadian one on he limitation clause. But both clauses talk of justification for the limitation although the Canadian charter says "demonstrably justified."
Inspite of these differences in language, I however advocate that courts in Malawi should follow the approach taken by our commonwealth brothers and sisters in Canada and South Africa.

Where not applicable, courts in Malawi should highlight those fine differences. It is because of this stand which I have taken that I shall make

Particular reference to the Canadian and South African case law.

The question whether the limit is "prescribed by law" is not contentious in the present case since section 25 (B) (3) of the Corrupt Practices Act is a duly enacted legislative provision. It is, however, necessary to determine if the limit on the plaintiffs' right, as guaranteed by Section 42 (2) (f) (iii) of the Constitution is "reasonable," "recognized by international human rights standards" and "necessary in an open and democratic society" and thereby saved from inconsistency with the constitution. From the foregoing it is clear that the onus of proving or establishing that the limit on a right or freedom as guaranteed by the constitution is reasonable, recognized by international human rights standards and necessary in an open and democratic society rests on the state. The burden of proof is the one on a balance of probability. This has also been enchoed in the case of R–**vs – Oakes** (Supra). It was however said in the **Oakes** that this preponderance of probability test must be applied vigorously. This is much so with the Canadian case because section 1 of the Charter uses the words "demonstrably justified" which is not in our section 44 (3) of the Constitution. Since I have said that the Canadian approach provides a useful guidance, I shall hereby refer in extension to a passage from **R –vs - Oakes**(Supra) as to the rigorous approach that has been advocated. This is found on pages 336 – 337 where the Court said.

> "**To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". R vs Big M Drug Mart Ltd supra, at page 352. The standard must be light in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain S. 1 protection. It is necessary, at a**minimum, that an objective relate to **concerns which are pressing and substantial in a free anddemocratic society before it can be characterized as sufficiently important. Second, once a sufficiently significant objective is**

recognized, then the party invoking S.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" : R –VS – M Drug Mart Ltd at P. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfairor based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in **this first sense, should impair "as little as possible" the right or freedom in question: R – vs – Big M Drug Mart Ltd at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of "sufficient importance."**

With respect to the third component, it is clear that the general effect of any measured impugned under S.1 will be the infringement of a right or freedom guaranteed by the charter, this is the reason why resort to S.1 is necessary.

The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the charter; and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the charter will be more serious than others interms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisified, it is still possible that, because of the severety of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of the measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

The South African Courts in the cases of **State – vs – Coetzee and Others**(1997) 2 LRC, **State – vs – Mbatha**Supra, **R – vs – Zuma**supra, have followed the persuasive reasoning and approach a in the case of **R – vs – Oakes** . It is understandable as the South African Constitution in Section 26 is analogous to S.1 of the Canadian Charter. The same would be said of S44(2) of the constitution of Malawi although with some deviations, like demonstrably justified. Having canvassed the case law, I should now start to apply the principles in **R –vs – Oakes** , to the case a hand. Is the reverse onus provision in S25 (B)(3) a reasonable limit on the right to be presumed innocent until proved guilty beyond reasonable doubt, recognized by international human rights standards and necessary in an open and democratic society ? The starting point for formulating a response to this question is as stated above, the nature of Parliament's interest or objective which accounts for the passage of S.25 (B)(3) of the Corrupt Practices Act. According to the Attorney General, the magnitude of the evil of official corruption does necessitate the enactment of such legislation. He also went on to state that there is that difficulty of proving misuse or abuse. One can only go through inferences and thus collusion usually comes into play as it takes two people to tangle who are the corruptee and corruptor. The Attorney General also said that Section 25(B)(3) of the CPA is aimed at curbing corruption by facilitating the conviction of public officers engaged in corrupt practices through abuse of office. In my opinion, Parliaments' concern with decreasing corrupt practices by public officers can be characterized as substantial and pressing. The corrupt practices Act came into force in 1996 following the enactment of the 1994 constitution. One of the Fundamental Constitutional Principle deals with Public Trust and Good Governance. Section `13 (O) provides:

"13. The state shall actively promote the
welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:-

(O) To introduce measures which will
guarantee accountability,transparency, personal integrity and financial probity and which by virtue of their
effectiveness and transparency will
strengthen confidence in public
institutions."

Pursuant to Section 14 of the Constitution Courts are entitled to refer to these fundamental

principles when interpreting the Constitution or of any law. After almost ten years since the enactment of the CPA, Parliament decided to amend the CPA by incorporating provisions such as S25 (B)(3). All this was done in order to address the epidemic problem of corruption. That corruption is an epidemic in our society should not be a borne of contention. Thus at national level, Malawi has done all it could in order to curb corruption.

At the international level, Corruption has also been identified as a cancer. In the report of the Secretary General to the United Nations compiled by the Commission on Crime and Prevention and Criminal Justice, 10th Session, Vienna , May 8 – 17, 2001 (United Nations, E/CN. 15/2001/3) it is acknowledged that:

> "**Corruption is multifaceted and affects every Society regardless of its level of development and the sophistication of its organization. The effects of corruption vary, as do its manifestations. While underlying causes may range from the societal to the institutional, one clear conclusion is that corruption exacerbates other problems and derails development efforts while it wrecks havoc on efforts to build, and consolidate or further develop democratic institutions. Another key element of the phenomenon is its progressively increasing complexity, as the stakes get higher.**

Nancy Zucker Boswell, Managing Director of Transparency International USA has described the situation of corruption in Africa as follows:

> "**The level of corruption has become intolerable for business, development, and political stability. The cost to business is greater than lost contacts and lost jobs; although these are certainly an important indicator and a certain outcome. Businesses are increasingly reluctant to invest in countries that cannot provide political and economic stability and transparent legal, judicial, and** regulatory environment. **Corruption undermines these preconditions, adding to the risk and cost from unpredictable outcomes, wasted time spent navigating corrupt or non transparent bureaucratic systems, and the risk to repudiate from involvement in cozy deals…….. We are currently witnessing another consequence of corruption, the loss of public trust in government engendered by the misuse of public power for**

private gain. The path from corruption and miss management to economic hardship, to economic turmoilis unmistakable. **This particularly disturbing in those countries where democracy has not yet taken root."**

The Southern African Development Protocol Against Corruption (SADC Protocol) to which Malawi is a member has also entrenched principles on issues of corruption.

The objective of protecting the Malawi Society from the grave ills associated with corruption, is in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of Corruption makes its acknowledgement as a sufficiently important objective for the purposes of Section 44 (2), to a large extent, self – evident. Thus the first criterion of a section 44 (2) inquiry, therefore, has been satisfied by the Attorney General.

The next stage of the inquiry is a consideration of the means chosen by parliament to achieve its objective. The means must be reasonable. Unlike in the Canadian charter, there the means must be reasonably and demonstrably justified. Here, the proportionality test is called into play. This test should begin with a consideration of the rationality of the provision. Is the reverse onus clause in section 25 (B) (3) rationally related to the objective of curbing corruption ? This therefore requires that there must be a rational connection between the basic fact of misuse of public office and the presumed fact of arbitrary act. Going back to section 25 of the CPA, it is clear that section 25 (B)(3) is not a free standing section. It has to be read with either section 25 (B)(I) or 25 (B)(2). Thus if a person is a public officer and he/she decides to do an arbitrary act as defined in section 25 (B)(4), then obviously that person is misusing or abusing his/her office. There is thus a rational connection between the basic fact which is the misuse of public office and the presumed fact which is the arbitrary act. The prosecution however saddles the prosecution with the burden to prove beyond reasonable doubt the essential elements of the offence before the accused is called upon to prove the contrary. If the accused opts to remain silent, it does not mean that the court shall automatically convict the accused.

The court has to be satisfied beyond reasonable doubt that the prosecution has proved all the ingredients of the offence beyond reasonable doubt. In my view therefore, I find that the

proportionality test is satisfied. The next step of our inquiry is whether the limitation herein is recognized by international Human rights standards. As I have already pointed out before, it is not possible to find constitutions or laws which are drafted in exactly the same words. Thus one can not find the same limitation in other jurisdictions, let alone international instruments. This is so because every country has got its peculiar social economic and cultural circumstances. That is why international law recognizes deviations. What is however important here is the minimum standard that is required for a country to attain. Internationally, limitations are allowed so long as they pass the proportionality test. For example, the European Human Rights Courts have done that. A case in point here is that of **Salabiaku – vs – France**(supra). Also judging from international Human Rights jurisprudence that I have referred to in this judgment, it is clear that such reverse onus burdens are recognized by international human rights standards. I therefore find that section 25 (B) (3) passes this test. The next inquiry is whether section 25 (B)(3) is necessary in an open and democratic society? The term necessary presupposes that there is the existence of a pressing social need. It is therefore the duty of each state to determine and prescribe whether there is a pressing social need warranting limitation of the right. As regards the term open democratic society, the test to be applied is an objective one. There is certainly no mathematical exactitude. What is however important is that the society should meet minimum standards. It is clear from section 13 of the Constitution that Malawi has entrenched principles of accountability and transparency. Therefore what the Corrupt Practices Act is doing is merely to require persons to give an account of their deeds. This is very necessary in an open and democratic society. I also find that section 25 (B) (3) does not negate the right in issue. It is of general application.

I therefore find that Section 25 (B)(3) of the CPA is not inconsistent with the constitution as it passes the limitation test. The application therefore fails with costs awarded to the Attorney General.

With regard to the issue as to the condition to be attached on the withdrawal of the application under section 45 (2) of the CPA by the second Plaintiff, I am very reluctant to attach any conditions. The second Plaintiff did not argue his case under section 45(2) of the CPA. It would therefore be unfair for this court to attach any condition related to his right to access to justice.

The Plaintiff has the liberty to pursue his application in the higher Courts. Coming to the issue of costs related to the withdrawal of the application under section 45(2) of the CPA, all I can say is that the Attorney General was given timely notice by Counsel for the second plaintiff. Although the legal formalities were not followed by the plaintiff"s Counsel but I am mindful of the fact that the Attorney General was aware of the intention of the second plaintiff to withdraw this application at a very opportune moment. I therefore do not award any costs.

Pronounced in open Court this 21st day of October 2005 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE

J. Katsala

JUDGE

M.C.C. Mkandawire

JUDGE