REPUBLIC OF MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO. 26 OF 2013

THE REPUBLIC

V

ANGELLA KATENGEZA

CORAM : MWALE, J.

: Matemba DDG, Counsel for the State
: Khonyongwa, Counsel for Defendant
: Kaferaanthu, Court Interpreter
: Jere, Court Reporter

Mwale, J

JUDGMENT

Background and Brief Summary of Facts

1. The accused person, Angella Katengeza, is answering to an indictment with one count. She is charged with the offence of money laundering contrary to Section 35(1)(c) of Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (hereinafter the "Money Laundering Act"). The particulars of that offence in summary are that,

> Angella Katengeza in August, 2013, in the city of Lilongwe, had in her possession K105,983,548, knowing or having reason to believe that the said sum of money represented proceeds of crime.

2. The accused person, who was arrested in October, 2013, was initially jointly charged with her son Mr. Gordon Hamdan and another person, a Mr. Leonard Karonga. The charges against Gordon Hamdan were withdrawn by the State at the plea stage of the proceedings. Mr. Karonga was also subsequently withdrawn by the State from this case as he had pleaded guilty, in a separate trial on consolidated charges relating to this offence and others under the Penal Code, and Money Laundering contrary to section 35 (1) (c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act, and was convicted on 26th August 2015 in Criminal Case No. 68 of 2014 and is awaiting sentencing.

3. The accused person pleaded not guilty to the charge. Having been found with a case to answer on 9th February 2014, the accused person opted to give evidence in her defence. The State, to prove its case against her, called 4 witnesses. It was only after all four state witnesses and the accused person herself had given evidence that the in this matter that Mr. Karonga, originally the first co-accused, then pleaded guilty of criminal offences relating to acquisition and money laundering of the subject matter of the present proceedings along with other offences of a similar nature that he had committed in the period in question.

4. Mr. Karonga having pleaded guilty to the predicate offences of the money laundering charge herein, the need to scrutinize the evidence tendered by the prosecution for this purposes was taken away. However, as one of the pillars of the defence case has been that the manner in which the predicate offence was committed obscured its commission in such a way as to render the accused person incapable of knowing or reasonably suspecting that any offence had been committed, all the prosecution evidence shall be analyzed nonetheless. The ultimate aim of such analysis is to ensure the State has discharged its burden to prove not only the *actus reus* of the offence of Money Laundering under section 35(1)(c) of the Money Laundering Act (which is that the suspect acquires, possesses or uses the property in question), but also the *mens rea* of the offence (which requires knowledge that the property in question in whole or in part, represents any person's proceeds of crime).

The Evidence

5. The first Prosecution Witness, PW1, was ***Kenson M'bwana***, the Director of Finance and Administration in the Ministry of Tourism, Wildlife and Culture. He testified that his responsibilities included, running the administration of the Ministry to ensure that it fulfils its mandate. More specifically, as Director of Finance, his duties entailed ensuring that money appropriated to the Ministry by Parliament on an annual basis is used accordingly. Administratively, he assisted

the Principal Secretary in the day to day running of the Ministry. PW1 further testified that the Ministry's budget for fiscal year 2013 – 2014 was 3.7 billion Kwacha for ORT and development. Because he assists the PS with administrative duties, he was a member of the Internal Procurement Committee (IPC) in the Ministry which he chaired until recently when Government changed policy. Between August and September 2013 when these offences took place, he chaired the Committee. Procedures for procurement in his Ministry were as follows: when the need arose for procurement, after lining up the activities of the Ministry, submission was made to the IPC which checks documentation before approving. The IPC could only authorize payments of up to K5 million; any amount above that had to be approved by the Office of the Director of Public Procurement and if it involved building, the Department of Building had to be involved. PW1, could not remember how many contracts were awarded construction contracts he could only recall Kapita Construction, Donald's Construction, Afro Oriental and another whose name he had forgotten. He identified two cheques marked ID1 and ID 2. ID 1 was the photocopy of a Government cheques dated 20th August 2013 made out to Faith Construction, for MK36, 530,900. The vote number on the cheques was 360, meaning it belonged to the Ministry of Tourism and Culture. There was a stamp on the cheque dated 20th August 2013 for FDH Bank, City Centre Branch. The cheque number was 016135. He could not recall if the IPC approved any payment to Faith Construction although he subsequently said it did not. ID2 was another Government cheque made payable to Faith Construction for the amount MK59,452,568.32. It had the same vote number as the previous cheque. It was also stamped by FDH Bank, Capital City Branch on 21 August 2013. According to his testimony, the cheques were supposed to have originated from the Ministry of Tourism and Culture, but whether it followed the correct procedures, he did not know.

6. In cross-examination, PW1 was very elusive. He didn't seem to be able to recall much. He did not remember swearing a witness statement and was not aware of any issues outside the Ministry's budget allocation. All he could say was that this case was on issues outside the budgetary allocation. His knowledge was only in relation to the MK3.7 billion which was the Ministry's allocation, for anything outside that, he had nothing to say.

7. The second Prosecution Witness, PW2, was ***Peter George Makanga***, the Chief Professional Development Officer in the Office of the Director of Public Procurement (ODDP) whose duties, among others, include being desk officer for the Ministry of Local Government and the Ministry of Tourism, Wildlife and

Culture. This meant he was responsible for screening every procurement by that Ministry that went above a certain threshold. According to his personal deduction, Faith Construction Company should have rendered certain services to the Ministry and due to the amounts involved in this case, if it had rendered any services then his office ought to have been consulted. When the police investigations for this matter started, he was questioned as to whether Faith Construction performed any services to the Ministry. His search in the relevant file during the period in question (April to October 2013) which he extended the search backwards to mid-2011 revealed that no permission in the form of a letter of no objection in relation to faith Construction was found. Such permission would have been the only legitimate way in which Faith Construction could have rendered any services to the Ministry. During cross examination by Counsel for the accused person he revealed that he did not know under what circumstances the cheques were deposited into the account of Faith Construction. This information went beyond his job description and further, he did not know who handed over the cheques to Faith Construction.

8. The third Prosecution Witness, PW3, was ***David Bill Kandoje***, the former Accountant General and in office during the period these offences were committed. His testimony was to the effect that the Government of Malawi uses the Integrated Financial Management System **(IFMS).** No person has power to access the central data base to initiate payment in this system unless that person has rights (password) given to them by Government. PW3 testified that in order for the Accountant General's department to make payment, the process has to start from some particular ministry or department. He added that all the necessary procedures should be completed by that ministry or department before payment is made to any of its suppliers (by his office). It was his testimony that the ministry or department must first generate an automated payment voucher in its accounts office. The voucher should have two approvals (by way of signature) first by an officer between P7 and P5 grade and second by Deputy Principal Secretary or above. After a number of vouchers are generated a voucher list is produced with covering letter signed by two officers at senior level.

9. Further, it was his evidence that the documents are then taken to the cheque printing office where all documents are thoroughly checked before the cheques are printed. Then the cheques are signed by authorized signatories and recorded in the dispatch book. He said he would know who would collect the cheques at his department because each ministry has a list of employees mandated to collect cheques from his office. He also identified cheques IDI and ID2 as drawn on vote 360 and went on to say that the system was designed to automatically decline to produce a cheque when the budget amount has exhausted. He also testified that

when the fraud (popularly known as cash-gate) was discovered in Government, experts were engaged to investigate how the irregular payments were made and the back-up system was retrieved showing persons who were involved in the scheme. In cross-examination PW3 revealed that he knew two people at the Ministry of Tourism and the Principal Secretary who had user rights but he did know the names of those two people. He recognized that one signature on ID1 was his and could not tell names of the other signatories on ID1. His evidence was that at the time he was signing the cheque, it must have had all supporting documents or he would not have signed but he could not remember the type of supporting documents he saw. He said that although money amounting more than 3.7 billion Malawi Kwacha was stolen through vote 360, the Ministry of Tourism had not been approved more than amount by Parliament. He admitted having given a statement to the police where he mentioned the names of people who had rights to enter the IFMS data base. He emphasized that he could not detect fraud because all documents were in order.

10. Prosecution Witness number 4, PW4, was ***Gerald Chiwanda,*** Senior Superintendent in the Malawi Police Service based at National Police Headquarters. He told the Court that in 2013, he gathered information that Angella Katengeza who owns Faith Construction had received two Government cheques in the amount of MK105.9 million and that she did not render any services to Government. Following that information, he obtained a warrant to investigate her account at FDH Bank. The bank cooperated and he collected a number of documents including bank statements, cheque images, bank opening documents all of which indicated that the money had actually entered her account. He therefore recorded a caution statement from her which was tendered as exhibit PW4A. He also tendered her Evidence of Arrest which he tendered as exhibit PW4B. He also subsequently tendered the cheques previously identified as ID1 and ID 2, marked exhibits PW4E and PW4F. He also tendered a bank statement for the account in the name of Faith Construction, account number, 5700000006526, marked exhibit PW4 G. He then tendered an application for Business Registration which he got from the bank to indicate that the account belonged to Angella Katengeza, marked PW4H. The last document he tendered was a certificate of registration, certifying that Angella Katengeza was carrying on business as Faith Construction. It was marked exhibit PW4I.

11. The accused person elected to give evidence in her own defence as the only defence witness. In her defence, she testified that she has been in construction business for five years. The name of her company is Faith Construction through which she did both civil engineering and construction. Her previous contracts

included renovations of roads, construction of schools and hospitals and renovations of houses. Apart from this business, she is also a pastor and a student, and therefore a busy person. With respect to the case at hand, she testified that she was drawn into it by Mr. Karonga, who was initially charged with her as the 1st accused person. Mr. Karonga was an old friend whom she regarded as a brother. They had met around 1999 when they were neighbours in Area 15 in the City of Lilongwe.

12. She testified that around July, 2013, she met the said Mr. Karonga and he told her that at the Ministry of Tourism where he was employed, there were several urgent projects that needed to be done before 2014. Mr. Karonga is said to have told her that as an employee of the Ministry of Tourism, he could not take them up and so asked her to lend him the business registration certificate of her company so that he could bid for them using her business identity. The accused was no longer active in construction at the time because she was busy with a course in theology. She testified that she had two certificates, one for the registration of her business with the Registrar General and another from the National Construction Industry Council (NCIC). It was her evidence that neither of her certificates had been renewed because of her inactivity and he offered to assist her in getting them renewed.

13. The accused person further testified that Mr. Karonga then turned up a week later to pick up the certificates and he even asked her to propose names of others who could carry out the works and she suggested her brother Sympathy Chisale since she was worried that if she mentioned strangers, they may end up not remitting the money to Mr. Karonga. According to her, she did not find this request strange because it is a common practice among contractors to lend one another business certificates for purposes of bidding and carrying out contracts and the NCIC was silent on the issue at the time. She proceeded to explain that in the construction industry, when you lend your certificate out, payment for the works done is remitted into your account. The person who does the work gives the cheques to you, you deposit the cheques into your account, withdraw the money and then give the money to that person. The accused had done this before in the past and there had been no problems.

14. The accused person further testified that after a week, Mr. Karonga called her and gave her a cheque of MK36,530,980.00 with an accompanying voucher, which she tendered as exhibit DW1, and that she deposited the cheque in her bank account at the FDH Bank at City Centre. She informed the court that she, on numerous occasions, went to the Bank to withdraw the money and gave it to Mr. Karonga, as per his instructions. Mr. Karonga indicated that he needed the money urgently as he had to buy materials for the works he was undertaking. She withdrew around

MK18 million or MK19 million at a time. Whenever she withdrew the money she would go with her nephew because the money was, in her words, "too huge" for her to carry alone. When asked if she thought there was anything amiss with this arrangement she said she did not. As a contractor she knew that cheques were only issued if work was carried out. She informed the court that she gave the said Mr. Karonga various sums on numerous occasions at different places, including at her (accused person's) house, at the car park of the Ministry of Tourism, as well as at his (Karonga's) house in Area 18B. The accused person went on to say that after sometime, she was again given another cheque worth MK69,452,568.32, again accompanied by a Malawi Government payment voucher. She deposited the cheque in her bank account at the FDH Bank. She narrated how Mr. Karonga had told her that he needed the money urgently to complete road works so that the former president could use a good road during the campaigns. Her exact words in Chichewa were that Mr. Karonga had told her that, "*ndalama ndi za Amai adutse poyela pa campaign*." When the accused person did not have transport to deliver the money, her neighbor would give her a lift to FDH Bank to withdraw the money.

15. She further told the Court that Mr. Karonga told her to retain the sum of MK3,000,000.00 to service her account cater for fuel, her time as well as paying for the renewal of her licence/registration with the NCIC and as a "commission" for using my account since his works were going well. She only got MK3 million but after the completion of the works she would receive a 10% commission. She further testified that at no point did she suspect that the two cheques in question were fraudulently obtained by Mr. Karonga or that she knowingly participated in the criminal enterprise since Government takes long to pay for works but as he mentioned the former President, she believed it was for genuine works which Government was paying for fast in view of their urgency in connection to the former President. Further, as far as she was concerned, to get a cheques out of Government, the authorizing officer must first check the site to see if the works were indeed done. It is only after certification of works done that a payment voucher is issued. Withdrawing the money in phases did not cause her any alarm.

16. As she testified, despite being a busy person, she withdrew the money in phases other than withdrawing the whole amount and surrendering the same to Mr. Karonga, because that was what he instructed her to do. She also stated that in construction, most of the money is meant for the purchase of items for the project site and therefore one cannot just withdraw all the money at once. Furthermore, there was a limit put by the FDH Bank beyond which she could not withdraw certain amounts of money besides, the monies were bulky and therefore could not

be withdrawn at once. Other factors that led her to believe that it was a bona fide venture were that Mr. Karonga was very senior officer at the Ministry of Tourism; they were like a brother and sister to each other. In addition, the cheques were being cleared at the bank and were accompanied by payment vouchers. These factors led her believe that the cheques were genuine.

17. The accused person further stated when she was arrested on 13th October 2013 and taken to the police station, Mr. Karonga denied all knowledge of her it was then that she realized she had been tricked. In order to prove that Mr. Karonga knew her, the accused person went as far as to implicate a legal practitioner in the web of deceit that characterizes the dealings in this entire matter. According to her testimony, what was surprising to her was that Mr. Karonga sent her his lawyer whom she identified as one Mr. Chris Tukula to represent her. According to the accused person, Mr. Karonga would not have done this if he didn't know her. When the accused person's family asked the lawyer why he was there, the lawyer is said to have answered that he was Mr. Karonga's lawyer and had been sent by him to bail her out. The lawyer, Mr. Chris Tukula, is said to have unscrupulously asked her to change her statement so she should tell the police that she got the cheques from the post office. The accused person stated that she refused the services of this lawyer and she refused to lie about where she got the cheques from. According to her, having been in the construction industry for many years, there is no way a person can just get cheques from the post office and thus, she could not accept what the said Mr. Chris Tukula told her, even though he was a legal practitioner.

Courts Reasoned Determination

i. The Applicable Law

18. The prosecution is obliged to prove each and every element of the offence with which the accused person is charged to the requisite standard, beyond a reasonable doubt. In the case before me, whether the burden is discharged by the prosecution will depend on whether there is direct evidence in the case, in the absence of which, whether there is circumstantial evidence that cumulatively gives rise to the conclusion, beyond reasonable doubt, that the accused person committed the offence. With regard to the burden of proof, the relevant provision is section 187(1) of the Criminal Procedure and Evidence Code which reads:

> 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 is guilty of an offence lies upon the prosecution

In ***Namonde v. Rep*.** [1993] 16(2) MLR 657 in which the Honourable Chatsika, J. as he was then, affirmed Lord Sankey views in ***Woolmington v. Director of Public Prosecution*** [1935] AC 462, the burden of proof was clarified as follows:

It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case.

In ***Chauya and Another v The Republic,*** Criminal Appeal No. 9 of 2007, the Honourable Chipeta J as he was then stressed that in,

Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul.

19. In the case before me, the State thus has to prove beyond reasonable doubt that the accused person committed the offence of money laundering contrary to Section 35 (1) (c) of the Money Laundering Act which provides:

(1) A person commits the offence of money laundering if the person knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly presents any person's proceeds of crime-

(c)Acquires, possesses or uses that property, knowing or having reasons to believe that it is derived, directly or indirectly, from proceeds of crime,

20. As counsel for the accused person correctly noted in his closing submissions, there are three essential elements of the offence which must be proved in order to secure a conviction and these are:

1. *that the accused acquired, used or had the property in question in her possession;*
2. *that the property is proceeds of a crime; and*
3. *that the accused knew or had reason to believe that the property was derived from proceeds of crime.*

21. From the evidence of PW4 and indeed from the accused person's own evidence, the monies that form the basis of the charge were in the accused person's business bank account namely, account number 5700000006526, in the name of Faith Construction Company at FDH Bank, Capital City Branch. She withdrew the monies for dispatch to Mr. Karonga and kept MK3,000,000 for herself. There is therefore no doubt that *the accused person acquired, used or had the property in question in her possession.* From the record of Criminal Case No. 58 of 2014 over which I also presided, in which Mr. Karonga pleaded guilty to various offences one

which forms the provenance of the funds which the accused person is charged with laundering. Consequently, the record of Criminal Case No.58 of 2014 makes it abundantly clear that the money which forms the subject matter of the charge herein was indeed derived from the proceeds of crime. The offences which were committed by Mr. Karonga were part of an elaborate scheme to defraud Government, popularly known as cash-gate that involved a number of participants within the Government machinery to by-pass expenditure controls that genuine cheques were issued even though the ministries from which these cheques were supposed to come from were neither able to detect nor register the losses. Such was the level of sophistication of the scheme.

22. It must however also be stressed that in addition to the offences with which Mr. Karonga was charged and convicted, there were other criminal offences that were committed in the sourcing of these funds. Mr. Karonga would not have been able to channel the funds outside Government without having falsely represented that it was Faith Construction that was due to be paid for purported services. This scheme which was originated in Government would not have been possible without willing participants outside Government who provided their business registration licences and bank accounts in breach of their licencing requirements, as outlets for these funds. Money laundering offences do not require a conviction for the predicate offences as a condition for conviction. As long as proof of some criminal activity such as enabling a person to misrepresent that he or she is providing services by fraudulently using certificates that do not belong to him or her, the predicate offence for money laundering is sufficiently established.

Proving Knowledge or Reasonable Belief

23. The offence of money laundering, being a recent addition to our criminal law, is not backed by an abundance of local jurisprudence and as such, recourse has to be had to foreign case law that is at a more advanced stage than our own. I am grateful to counsel on both sides, especially counsel for the accused person for their industriousness in providing guidance to the Court.

ii. The Defence Case

24. Counsel for the accused person has argued, with reference to the recent case of ***R. v Maxwell Namata and Luke Kasamba*** Criminal CauseNo.14 of 2013(unreported), that the mental element required for the offence of money laundering is the same as that required for the offence of receiving property unlawfully under S. 328 of the Penal Code. He further referred to the case of ***Nkuna v Rep,*** Criminal Appeal No. 51 of 1994 (unreported), citing ***Sirdar v Rep,***[1968-1970] 5 ALR (Mal) 212 at 221,

where Smith J,the question of the knowledge required for cases of receiving stolen property, stated as follows:

> *It is a trite observation that there is no specific means of analysing the state of a person's mind at a particular moment in time. There is no specific instrument which enables you to do that, nothing comparable to a pressure gauge on a steam boiler, or a speedometer on a motor vehicle which enables you to ascertain what is going on inside. So you look at the man's actions, at all the surrounding circumstances, at the conduct which precedes and the conduct which follows: you look at the way the act was done.*
>
> *... knowledge is not confined to a mental state of awareness produced by actual participation in the theft, but includes a conviction or a belief created by the attendant circumstances. If the accused wilfully refrains from making enquiries because he fears that the result of making enquiries would be knowledge he does not want, he cannot complain if this helps to return the scales against him".*

25. Proof beyond reasonable doubt that the accused person had a guilty mind to accompany her possession of the funds is therefore imperative. Counsel for the accused person consequently pointed out the crucial distinction between dishonesty as a state of mind and dishonesty as a course of conduct. Thus, according to ***Sirdar v Rep,*** cited above, dishonesty in section 1 of the Theft Act 1968 (much like S 35 of the Money Laundering Act here) refers to a state of mind. The question is therefore, not whether the accused person has in fact acted dishonestly but whether she was aware that she was acting dishonestly. To determine what amounts to "dishonestly", I was referred to ***R v Ghosh***, [1996] MLR 188 where it was stated as follows;

> *In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realized that what he was doing by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider being dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did*. (Emphasis supplied.)

26. Counsel for the accused person therefore concluded that test for dishonesty, therefore, is two limbed, requiring both an objective and subjective assessment. First (objective), whether the conduct of the accused was dishonest according to the ordinary standards of reasonable and honest people. Secondly, (subjective) whether the accused was aware that what he or she was doing was dishonest by those standards. In this vein, recourse was had to a Hong Kong Case, ***Pang Hung Fai v Hksar,*** Final Appeal No. 8 of 2013 (Criminal) Court of Final Appeal of The

Hong Kong Special Administrative Region[1], in evaluating the content of the reasonable man's belief, the court inquired into whether any reasonable person looking at those grounds *"would* believe*"* that the property dealt with represents the proceeds of an indictable offence rather than a test of *"could* believe" that the property dealt with represents the proceeds of an indictable offence.

27. Counsel for the accused person summarized the facts of the ***Pang Hung Fai*** case (cited above) for the Court as they have a direct bearing to the defence case. Thus, in that case, the appellant in had been close friends with a Mr. Kwok, who was the chairman and major shareholder of a Hong Kong listed company, for 30 years. Their families were close and they often socialized with each other. The appellant had always found Mr. Kwok to be scrupulous, and the two had trusted each other with unsecured, interest-free loans which were repaid. In 2008, Mr. Kwok had asked the appellant to allow a sum of HK$ 14 million to be deposited into the appellant's bank account, and to hold the same for Mr. Kwok. The appellant agreed without asking any questions, because he trusted Mr. Kwok and did not believe Mr. Kwok would do anything dishonest. Shortly afterwards, the appellant transferred the money to Mr. Kwok's bank account in Cambodia, again on Mr. Kwok's instructions and without raising any questions. It transpired that the money had been obtained from the listed company under a fraudulent scheme perpetuated by Mr. Kwok and his accomplices. The appellant was charged and convicted of money laundering on the basis that he 'had reasonable grounds to believe' the money represented proceeds of an indictable offence. On appeal, the Court of Final Appeal held that money laundering is a serious offence which leads to a maximum of 14 years' imprisonment. The maximum penalty applies regardless of whether the accused had actual knowledge or "*reasonable grounds to believe*". Whether "*a common sense, right-thinking member of the community* ***would*** *consider (the grounds)* ***sufficient*** *to lead a person to believe*", in fact amounted to a test of ***"could*** believe" and that is an inappropriately low standard. That court further held that only when a test of "*would* believe" is adopted can there be a strong sense of moral blame that commensurate with seriousness of the offence.

28. Nonetheless, counsel for the appellant did concede that a person could not escape a finding of dishonesty because he set his own standards of honesty and did not regard as dishonest what he knew would offend the normally-accepted standards of honest conduct. It would, however, be less than just for the law to permit a finding that a defendant had been dishonest where he had not been aware that what he was doing would be regarded by honest men as being dishonest. Reference was also

[1] Available at http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=95657

made to the case of ***R v Landy*** [1981] 1 All ER 1172 at 1181**,** where Lawton LJ, stated thus:

> *"An assertion by a defendant that throughout a transaction he acted honestly does not have to be accepted but has to be weighed like any other piece of evidence. If that was the defendant's state of mind, or may have been, he is entitled to be acquitted. But if the jury, applying their own emotions of what is honest and what is not, conclude that he could not have believed he was acting honestly, then the element of dishonestly will have been established. What a jury must not do is to say to themselves: "if we have been in his place we would have known we were acting dishonestly, so he must have known he was".*

29. Finally, counsel for the accused person stressed that negligence or recklessness does not amount to knowledge and thus is not sufficient as a ground for the conviction of a serious crime (see ***Atwal v Massey,***[1971 3All ER 881, ***R v Havard***(1914) 11Cr App Rep 2, 78 JP Jo 400 CCA, ***Abou-rahmah & Anor v Al-Haji Abdul Kadir & Ors*** [2006]EWCA Civ 1492**,** ***Twinsectra Ltd v Yardley*** [2002] 2 All ER 377***).*** Consequently, it is dishonest for a man deliberately to shut his eyes to facts which he would prefer not to know. If he does so, he is taken to have actual knowledge of the facts to which he shuts his eyes. But a person's failure through negligence to make enquiry is insufficient to enable knowledge to be attributed to him (see ***Agip (Africa) Ltd v Jackson,*** [1992] 4 All ER 385 at 405**).**

30. The arguments by counsel for the accused person may briefly be summarized as that the accused person had no knowledge that the money going into her bank account was the proceeds of crime because:
    1. the accused person lent Mr. Karonga her business certificate and it was common practice among contractors to lend each other certificates;
    2. the cheques were accompanied by vouchers from the Government of Malawi and coupled with the fact that not even the prosecution witnesses could point to any defect in the accompanying cheques, she had no suspicion of any criminal origin;
    3. a person who lends out their certificate only acts on instructions and releases the money on instruction;
    4. the frequency of the withdrawal and the amounts withdrawn could not have put her on notice because the works to which the monies were tied were political and as such there was a plausible explanation for these circumstances.

    Counsel for the accused person therefore concludes by arguing that using the subjective standard, the accused person should be taken with all her prejudices and beliefs, which based on her relationship with Mr. Karonga, led her to believe that the money was not the proceeds of crime.

iii. The State's case

31. The State has however contested all these grounds and has firmly argued in their closing arguments that the accused person either knew or had reasonable ground to believe that the money that was deposited and subsequently withdrawn from her bank account was in fact the proceeds of crime. The State's argument is centred on Mr. Karonga's caution statement which was brought to the attention of the accused person during cross-examination and both she and her counsel had an opportunity to read through. Mr. Karonga had confessed that each of the contractors he had dealt with had been aware of the exact nature of their dealings. In her view, some of its contents were true, whilst others were not. It was therefore the State's contention that the accused person knew that the money was derived from the proceeds of crime.

32. The State's second argument is that the actions surrounding the conduct of the accused person were highly indicative that she had reason to believe that the money was derived from the proceeds of crime. It is the State's argument that right from the outset, the accused person should have seen the red flags arising from her dealings with Mr. Karonga.

33. The first red flag is that, from the very onset of her interaction with Mr. Karonga, the accused person should have been on alert that he was up to no good. According to her own testimony, the accused person told the Court that Mr. Karonga told her that at the Ministry of Tourism where he was working, there were several urgent projects that needed to be executed, but that since he was an employee of the Ministry of Tourism, he could not execute the projects and so he wanted her to lend him the business registration certificate of her company.

iv. Findings

34. This Court finds that indeed, as a self-proclaimed "experienced contractor" which the accused herself testified to be, she should have known that the dealings which Mr. Karonga was proposing to enter were not legitimate. Mr. Karonga expressly told her that he was not allowed to tender for works in his own ministry and she knowing that this was not allowed, allowed him to falsely represent to his ministry that she was the one doing the works when in fact she wasn't. Further, this Court takes judicial notice of the prohibition in section 20 of the National Construction Industry Act[2] which provides as follows:

> (1) No person shall carry on business in the construction industry in Malawi unless he is registered under this Act.

[2] Cap 53:05 of the Laws of Malawi

> (2) No person being registered under this Act shall carry on business of a category in respect of which he is not registered.
> (3) An employee of any person registered under this Act shall not be deemed to carry on business within the meaning of subsection (1) or (2) by reason only of his performance of his functions as an employee.

The penalty for engaging in conduct prohibited in section 20 is provided under section 28 of the said Act as follows:

> Any person who contravenes the provisions of this Act shall be guilty of an offence and be liable to a fine of K20,000 and to imprisonment for a term of two years, and in the case of a continuing offence to a further fine of K2,000 for each day during which the offence continues.

35. As an "experienced contractor", the accused person was undoubtedly aware of the conditions upon which she obtained her licence and the National Construction Industry Act is very clear that for the accused person to lend someone else her certificate, that person would be carrying out works in respect of which he was not licenced, and hence both the accused and that person would be committing a crime under that Act. Although the accused person testified that the National Construction Industry Council was silent about the conduct of people lending each other certificates and that it was therefore commonplace for contractors to do this, I must doubt her veracity on this issue. The accused person cannot call herself an experienced contractor if she was not aware of the terms upon which her construction licence was granted.

36. The test as to knowledge or belief required for the offence of money laundering having been elaborately argued by the defence and set out above, requires two limbs. The first limb is an objective one. The objective test depends on an assessment of what ordinary people consider as honest. It could very well be that corruption is so entrenched in society that ordinary people regard as honest that which is not. The question then becomes, is the accused person to be judged on a corrupt objective standard or an honest one, even though such standard is not ordinarily held. As the law stands, the answer is simple; an objective test is always based on the standard of the "*reasonable man*", traditionally, the man on the "*Clapham omnibus*". Regardless of how common the corrupt view is in society, the reasonable man will always stand for what is right, even if he is the sole voice of reason. It wouldn't have made a difference if the accused person was able to call evidence from members of the construction industry who would have testified that they were reasonable persons and in their trade, lending out business certificates was neither corrupt nor dishonest. The fact is, such conduct in breach of the law, can never the conduct of a reasonable man. It therefore follows from the case of *Healthcare* ***at Home Limited v. The Common Services Agency*** *[2014] UKSC 49 (Supreme Court of the United Kingdom,. 30 July 2014),* that the nature of the "*reasonable man*", as a means of describing a standard applied by the court is described as follows,

> *it would be misconceived for a party to seek to lead evidence from actual passengers [i.e. "the right-thinking member of society," "the officious bystander," "the reasonable parent," "the reasonable landlord," "the fair-minded and informed observer,"...] on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable men, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, in those circumstances, of applying that impersonal standard (emphasis supplied).*

37. There is therefore no doubt whatsoever, that the National Construction Industry Act having clearly stipulated the terms on which construction works are to be undertaken, no reasonable man would consider it honest to lend his certificate to another, especially having been expressly told that the reason the other was borrowing the certificate was that he was not allowed to do such works due to a conflict of interest.

38. The second limb of the test is the subjective one. Once the objective threshold has been passed, i.e. the Court is satisfied that the conduct was dishonest according to the standard of the reasonable man, the subjective limb requires that the accused be aware that what he or she was doing was dishonest by those standards; given his or her actual subjective knowledge and the accused must have fallen below ordinary objective standards of honesty having been aware that he or she was doing so. In order to display that the accused person did indeed have subjective knowledge that her conduct fell below reasonable standards of honesty, the State pointed to a second red flag. Namely that the initial conduct displayed by Mr. Karonga in giving her the cheques and vouchers should have raised her suspicions. The voucher which the accused person tendered as exhibits DW1 was approved by Mr. Karonga himself and she admitted seeing his name as approving officer on the vouchers during cross examination. When further asked why this did not lead her to suspect foul play, she informed the Court that she didn't pay any attention to the details on the vouchers (i.e. that she had no interest with the vouchers), but only the cheques, and that she just threw the vouchers away. The State then questions that if indeed the accused person had no interest with the vouchers and just threw them why did she keep them all this time (from the year 2013) and then tender them in Court? This is a legitimate question for which I have found no reasonable explanation from the accused person.

39. The accused person contended that she drew on her knowledge and trust of Mr. Karonga as the main determinants of her subjective belief that there was untoward going on. The accused person cannot however separate her prejudices and beliefs and only use those that favour her decision to trust Mr. Karonga and discard those that should have rang alarm bells. The accused person is an experienced contractor and knows the construction industry well. Her brother, also a contractor, to whom she tried to introduce Mr. Karonga declined to take part in this scheme. The reason she gave for his refusal was that at the time she called him, he was at a funeral. I am sure he must have left the funeral at some point and the offer could have been repeated to him. Nothing further is said about her brother's refusal which leads me to conclude that he being an experienced contractor knew better than to be involved in a scheme with such an obvious conflict of interest and one which flouts the terms on which they were licenced under the National Construction Industry Act.

40. An experienced contractor with the accused person's number of Government Contracts on her CV or list of achievements should also have been put on the alert by the sheer speed with which the transactions proceeded. As the State have argued, barely two weeks from the date Mr. Karonga "borrowed" the accused person's registration certificate, the first cheque of K36,530,980.00 was issued and given to the accused person to deposit in her FDH Bank account. The accused person told the court that Mr. Karonga instructed her to *"quickly deposit the cheque because he urgently needed the money to buy equipment from China for the construction works".* She then withdrew the money and gave it to Mr. Karonga. The accused person further stated that after a week or so, Mr. Karonga phoned her and informed her that another cheque, this time K69,452,568.32, was issued and he needed to give her to deposit in her bank account as well. The accused person's explanation to the speed was that since this was a road contract which was linked to the former President, Her Excellency Joyce Banda's campaign, it was given priority and the money was released very quickly. The accused person also testified that from her experience with Government Contracts, some money was paid upfront for the contractor to commence the works but further payments were paid upon certification of completion. Whilst it is plausible for the accused person to genuinely hold the belief that the payments were coming at a rapid rate because the former President was involved, it is hardly plausible for an experienced contractor to believe that in such a short space of time, within a space of one week, that Government could issue two cheques to a person who had not even started the construction works. As the State pointed out, he had only just collected her certificates when the money was released.

41. Again, I must share the State's disbelief as to how Government could issue two cheques to a person who by any reasonable reckoning could not be expected to have

mobilized or assembled, let alone transported the construction equipment to the construction site. It is in evidence that the equipment was to be procured from China, shipped to Malawi. How then in that space of time could Mr. Karonga have cleared with customs, and transported to the construction site in Mangochi (i.e. Mpale Yao Cultural Village, according to the payment vouchers)? Even by the wildest stretch of the imagination, political pressures prevailing or not, this was an impossible feat.

42. I must find from all the attendant circumstances therefore, that the whole transaction was dubious and irregular. The State, again made a yet another persuasive argument when it considered the two week's period from the date Mr. Karonga "borrowed" the accused person's registration certificate (which at the time had not been renewed with NCIC) to the time the first cheque of K36,530,980.00 was issued. A reasonable contractor in the accused person's shoes ought to have at the very least wondered how Mr. Karonga could manage to bid for a contract, get an award of the contract and have the first cheque issued in such a record period of time? Her personal beliefs and prejudices are informed by her experiences of previously bidding for and carrying out Government construction works or contracts. She should definitely have been suspicious with regard to the pace at which the events were unfolding and the short duration (of a week or so) between which the first cheque and the second cheque were issued. Further, as the State correctly pointed out, the accused person herself, during cross-examination, admitted that she knew how long Government takes to issue cheques when you are executing a Government contract. If the accused person was an experienced enough contractor to ignore the advice of a legal practitioner, Mr. Chris Tukula as being inconceivable in the industry, she cannot feign ignorance about other issues that were suspicious on the basis of what was standard practice with regard to Government payments in the industry.

43. The State also raised another valid argument that should have caused the accused person to suspect that the works were not genuine. As the State has also argued, the accused person testified that apart from doing business, she is also a pastor, a block leader and a student. Clearly, and as admitted by the accused person herself during cross-examination, she is very busy person. The question which consequently confounded the State and has again convinced this Court of the accused person's state of mind is how and where the accused person got the time and motivation to conduct or embark on several trips to the FDH Bank to make several cash withdraws, and in phases? The accused person's explanation, which this court does not find to be reasonably true, is that the practice in the construction industry is that where a person uses another's certificates, the person who uses the certificates dictates when and how much money should be drawn. Even if this was the practice, the accused person is herself a very busy person and she should have been able to

stand up to Mr. Karonga and tell him that his terms were an inconvenience to her. The accused person does not seem to have minded the inconvenience at all and she testified that Mr. Karonga compensated her with MK3,000,000 for her "expenses" and time. She also testified that she was yet to receive a commission of the contract awarded to Mr. Karonga as is customary in the industry. This element of compensation, both received and to come taints her motives. K3,000,000.00 must be beyond any reasonable expenses she may have incurred. This was generous sum that should have led her to suspect that she was being paid for a service in facilitating a criminal act.

44. The State also argued that clearly, knowing that the monies represented proceeds of crime, both the accused person and Mr. Karonga did not want to take chances with most secure and less inconveniencing options of transferring the monies. After withdrawing such large sums of money the accused person inconvenienced herself even further by putting her life at risk and taking the money to diverse locations to deliver to Mr. Karonga, namely, at the accused person's house in Area 47, at the Car park of the Ministry of Tourism, and also at Mr. Karonga's house in Area 18B. Carrying such large sums of money is risky business and knowing the crime rate in Malawi where cases involving people being waylaid and robbed of sums of money coming from the bank are rampant. It inconceivable that a person in the accused person's shoes would happily take up such a risk without raising issue with it. The only logical conclusion to be drawn from these facts is that the accused person knew exactly what type of a transaction she was dealing with, and was happy to proceed as she was assured a cut in the proceeds. This compensation was worth taking a risk for.

45. The State has also raised doubts as to the accused person's innocent state of mind by recalling that on three different occasions when the accused person was why she dedicated so much of her scarce time to running errands for Mr. Karonga, she first stated that it was because that is what he told her. She subsequently said it was because the cash would have been too bulky to carry all at once. She finished off by saying it was because the bank had limits on how much money could be withdrawn. I am inclined to agree with the State in that her vacillation is indicative of a cover up. I am alive to the fact that such vacillation is not indicative on its own of a guilty mind, but taken cumulatively with all the reasoning above and below, leads to the conclusion that the accused person knew that what she was involved in was not an honest scheme.

46. The last argument that the State made with regard to the suspicious circumstances in which the whole exercise were conducted concerns the places of delivery of the monies. The accused person informed the Court that she used to surrender the

various amounts of the money to Mr. Karonga at diverse which as alluded to above included, at the accused person's house in Area 47, at the Car park of the Ministry of Tourism, and also at Mr. Karonga's house in Area 18B. The issues raised by this set of facts are many according to the State. Since one of the reasons given by the accused person for withdrawing the monies in phases is the sheer volume making it physically difficult to carry such heavy loads; then it would have been safer, more convenient and easier for the accused person to withdraw the money and surrender it to Mr. Karonga right in the banking hall. It is the State's contention that the accused person was trying to avoid being captured by the bank's Closed Circuit Television (CCTV) whilst carrying large sums of money. The State has also questioned why the accused person did not find it strange, suspicious and out of ordinary to be giving large sums of money to Mr. Karonga at the Ministry of Tourism's car park when she could have gone to his office. The State has also argued that No doubt, a cheque could have created or left a trail leading to Mr. Karonga which was obviously to be avoided at all costs.

47. I must point out that the issue of the accused person being afraid that the transaction would be recorded on CCTV in the banking hall if she handed the money over to Mr. Karonga in the banking hall was never tested in Court. Neither was the assertion that the accused person was afraid to use a cheque because it would have led a trail back to Mr. Karonga. The State never raised these issues during cross-examination and I therefore cannot entertain them at this stage. The issue however that the money's were delivered to Mr. Karonga at various locations was in evidence and this should however have raised some suspicion to a reasonable person in the accused person's shoes. Of course, knowing that Mr. Karonga was by virtue of conflict of interest not permitted to bid for the funds made it impossible for him to receive the money at his office. This issue though does not in any way exculpate the accused person as it made it very clear that both parties were aware of the criminality of the action and could not afford to transact any exchanges in a place where they could be detected.

48. The accused person never tendered for any works at the Ministry of tourism and yet she gave her certificates to a person who falsely represented that she is the one who carried out works for Government. She has always known that the monies she received, were for works which another person allegedly carried out, and even if this was a common practice, it was a criminal practice both under the Penal Code and the National Construction Industry Act. A contractor of the accused person's standing and experience cannot then turn around and say she was not aware that something untoward was going on. The fact that the cheques looked genuine and were backed by vouchers does not avail her in the least. In fact, knowing the construction industry and how long it takes for Government to make payments, the fact that Mr.

Karonga who was not permitted to bid for contracts was authorizing payments for contracts to himself should have made her suspicious of the whole issue. Mr. Karonga should not have been able to get the payments to her so quickly when it was clear to her that he could not, and should not have done the works. All this is irrefutable evidence of her criminal intent.

49. All in all, cumulatively from the evidence led, and as I have reasoned above, the State has sufficiently discharged its burden with respect to the mental element required for the offence. The accused person had knowledge that the transaction she was entering into was criminal in nature and therefore the proceeds that she received in her account were proceeds of crime, and if she didn't have actual knowledge which is doubtful, the circumstances are overwhelmingly such that the only logical inference is that there objective and subjective indicators that lead me to conclude that she had reasonable grounds to believe the monies were proceeds of crime.

50. The Hong Kong case of ***Pang Hung Fai v Hksar*** (cited above) which counsel for the accused person placed much reliance can be distinguished on its facts from the case before me in a number of ways. The case of ***Pang Hung Fai v Hksar*** concerns the standard to be applied when evaluating the content of a "reasonable person's belief". When analyzing the accused person's subject state of mind, having been satisfied on the objective limb of the test, the Court must use the question of whether any reasonable person looking at those grounds *"would* believe*"* that the property dealt with represents the proceeds of a crime rather than a test of *"could* believe". The appeal in that case overturned the appellant's conviction because based on his particular circumstances, namely that he trusted Mr. Kwok, Chairman and shareholder of a listed company who asked him to deposit HK$14 million into his account and later transfer it to Mr. Kwok's off shore account. What the Hong Kong Court of Final Appeal looked at was whether the defendant's "perception and evaluation" of relevant facts "constituting or contributing to reasonable grounds for" the requisite belief can be taken into account.

51. The decision to overturn the conviction of money laundering in the Hong Case was based on two factual differences that led the Hong Kong Final Court of Appeal to decide that the appellant's perception and evaluation of the relevant facts (subjective), did not constitute or contribute to reasonable grounds that the monies were derived from proceeds of crime. The first factual difference was the nature of the relationship between the appellant and Mr. Kwok. The two had known each other for many years, 30 years to be exact. During that relationship, the appellant had known Mr. Kwok as a Chairman of a Hong Kong listed company and a major shareholder. The appellant therefore knew Mr. Kwok and trusted him not only as a friend but knew him to be a man of business acumen. One does not get to be a

chairperson of a Hong Kong listed company by chance. He also knew Mr. Kwok to be a very rich man for whom HK$14million was nothing.

52. In the present case, trust between the accused person and Mr. Karonga was over personal dealings. They had known each other as neighbours and their families knew each other. They never had a business relationship on which the accused person could base her trust on his honesty. There was never any evidence that she knew him as an honest businessman just as a good friend. In fact, she certainly did not know him to be a contractor. Further, Mr. Karonga didn't simply ask the accused person to keep a certain amount of money in her account, he first asked for her certificates so that he could generate the money. This difference is vital. The appellant in the Hong Kong case knew Mr. Kwok to be a man who could have HK$14 million at his disposal and therefore had no reason to believe it was derived from crime. The accused person however knew Mr. Karonga was not in the construction industry and that it would be a conflict of interest, if not a criminally liable misrepresentation for him to bid for a contract by representing himself to be the accused person. There can therefore be no doubt that the accused person in this case "would" unlike in the Hong Kong case, have reasonable grounds to believe that the money was tainted.

53. Secondly, the offence of money laundering under Hong Kong legislation requires the provenance of the monies to be an "indictable offence". Therefore, the fact that the appellant was offered no explanation, and made no enquiry, as to why Mr. Kwok could not use one of his own accounts could not form the basis of an "irresistible inference" that something untoward was going on, which required Mr. Kwok to hide the flow of funds. The reason being that it is not so apparent in the Hong Kong case that what was untoward involved proceeds of an "indictable offence". Section 35 of the Money Laundering Act simply requires the provenance of the funds to be proceeds of crime, and not specifically an indictable offence which is the sort of offence classified as a felony in our jurisdiction. Thus, even if it may not have been obvious that the cheques were obtained by defrauding the Malawi Government through the complicated scheme that has come to be popularly known as cash-gate, the fact that the mere lending of the certificate was a criminal offence albeit a misdemeanor under section 392 of the Penal Code[3], or even breached the prohibition

[3] Section 392 of the Penal Code provides as follows:
Any person who, being a person to whom any document has been issued by lawful authority whereby he is certified to be a person possessed of any qualification recognized by law for any purpose, or to be the holder of any office, or to be entitled to exercise any profession, trade, or business, or to be entitled to any right or privilege, or to enjoy any rank or status, sells, gives, or lends the document to another person with intent that that other may represent himself to be the person named therein, shall be guilty of a misdemeanour.

under section 20 of the National Construction Industry Act, taints the provenance of the monies. These two offences add to the list of offences from which these funds were derived. As alluded to earlier, I reiterate that to secure a conviction in money laundering, no person needs to be arrested or charged for the predicate offence in order for a conviction on the money laundering offence to stand, so long as there is proof of the criminal origins of the money, that is enough. These two criminal offences arising from the accused person's conduct in lending Mr. Karonga her certificate should have led the accused person to either know or to reasonably suspect that the monies were the proceeds of crime (that is if Mr. Karonga's witness statement that she knew exactly what was going on, as well as the other circumstantial evidence that corroborates this view is disbelieved).

54. This Court, on the basis of all that has been reasoned above, accordingly finds the accused person, Angela Katengeza, guilty of the offence of section 35 (1) (c) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act as charged.

55. Bail is immediately revoked and the accused person is to be remanded to custody awaiting sentencing.

56. The defence are to file their written submissions for sentencing within 14 days of the order hereof and the State are to respond within 7 days of service of the same. The matter shall then be set down for hearing of oral submissions on sentence on a date to be fixed by the Registrar as soon as is practicably possible thereafter.

57. I so order.

Pronounced in Open Court in Lilongwe in the Republic on this 14th day of March 2016.

F.A. Mwale
J U D G E