



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

CRIMINAL CASE NUMBER 1 OF 2022

BETWEEN:

THE REPUBLIC

-VS-

FAIZAR GAFFAR LATIF AND OTHERS

ACCUSED PERSONS

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. MODECCAI MSISKA, SC, OF COUNSEL FOR THE STATE

MR. ANTHONY CHUNGU, OF COUNSEL FOR THE STATE

MR. GIFT MWAKHWAWA, COUNSEL FOR THE ACCUSED PERSONS

MR. FELIX KAMCHIPUTU, LAW CLERK

ORDER

INTRODUCTION

1. The accused persons stand charged of various charges. The matter was commenced in the lower court before it was transferred to the Revenue Division of the High Court. When the matter was set down for trial, the accused persons through counsel raised preliminary objections, which the State objected. The Court had to set down the matter for hearing of the preliminary objections raised by the accused persons. The hearing took place on the

14th day of March 2023 as per the court record. The Court now delivers the present Order on the preliminary objections as raised by the accused persons.

ACCUSED PERSONS' OBJECTIONS

2. The accused persons raised two preliminary issues. The first preliminary issue is on certification of the matter as constitutional. The second preliminary objection is on the charge sheet. It is therefore incumbent upon this Court to first deal with the issue of certification of the matter as constitutional before proceeding to deal with the second preliminary objection on the charge sheet.

THE FIRST PRELIMINARY ISSUE

3. As already alluded to, the accused persons have raised a preliminary issue on the matter itself. Their contention is that the present matter raises constitutional issues that, in their considered view, are the preserve of the Constitutional Court. In their view, the matter needs to be referred to the Chief Justice for certification. The accused persons argue that the disclosures in this matter contain evidence extracted from computers. To them, they have serious issues with the way the evidence was extracted thereby raising admissibility and fair trial issues. They argue that, among others, there is no details of the computers and hard discs involved, no details of tools used to authenticate the evidence, no names of people who witnessed the extraction of the evidence and that there is no testimony of the disclosures of the extracts at the time of the print out. The accused persons therefore argue that the evidence in this matter was extracted using methods not reliable and questionable.
4. Hence, to them, admissibility of such evidence raises constitutional issues. The accused persons therefore requested this Court to refer the matter to the Chief Justice for certification pursuant to section 9(2) as read with section 9(3) of the Courts Act and Order 19 of the Courts (High Court) (Civil Procedure) Rules, 2017, herein to be referred to as Civil Procedure Rules. The accused persons submitted that this Court has the requisite jurisdiction to refer the matter to the Chief Justice and not the lower Court as decided in **JOSHUA CHISA MBELE-V-REPUBLIC, Miscellaneous Criminal Case No. 04 of 2022.**

5. The accused persons reiterated their contention that the prosecution case rests on illegally obtained evidence as the search warrant itself was not complied with. They argue that the extraction of the evidence was even conducted in their absence. To them, this is a matter where the issues involved are the ambit of the Constitutional Court.
6. In response to this preliminary issue on certification of the matter as constitutional, counsel Msiska, SC for the State, reminded the Court that for referral to occur, there has to be interpretation of the Constitution. He submitted that almost all proceedings raise issues pertaining to the Constitution. However, counsel submitted that what matters most is the substance. He opined that where a matter substantially raises issues pertaining to the interpretation of the Constitution, the matter may be referred for certification. Counsel argues that the sworn statement in support of the certification does not raise any constitutional issues. He submitted that the issues raised hinge on evidence and not the Constitution and that these issues are the ambit of the trial itself. Counsel submitted that the objections raised will be dealt with during trial.
7. Msiska, SC also submitted that the question of certification was also raised before the Chief Resident Magistrate, who after hearing the accused persons, declined the application. Counsel therefore argues that the fresh application before this Court is therefore an abuse of the court process as the issues are *res judicata*. In their notice of preliminary objection to the application for certification, the State argues that the accused persons did not lodge an appeal against the decision of the Chief Resident Magistrate declining the application to refer the matter for certification. The State also avers that there was no application for criminal review of the lower court's Order. The State further argues that the accused persons are challenging the execution of the search warrant before a wrong forum as the same was supposed to come before the Court that granted the search warrant. Counsel submitted that the application for certification was made by the accused persons who opined that the Chief Resident Magistrate had the jurisdiction to refer the matter for certification. Counsel submitted that the application therefore lacks merit and it deserves to be treated as such and be dismissed.

DISPOSAL OF THE CERTIFICATION ISSUE

8. The starting point, correctly pointed out by the accused persons, is section 9(2) of the Courts Act, that provides as follows:

“Every proceeding in the High Court and all business arising thereout, if it expressly and substantively relates to, or concerns the interpretation or application of the provisions of the Constitution, shall be heard and disposed of by or before not less than three judges.”

9. Section 9(2) of the Courts Act is therefore clear that where in the High Court, proceedings relate substantively to the interpretation or application of constitutional provisions, such proceedings shall be heard by the Constitutional Court (a panel of three judges). Section 9(2) is on proceedings that substantially relate to or concern interpretation or application of the constitutional provisions, and not otherwise. As correctly pointed out by the State, all proceedings, looking at the totality of all issues, involve constitutional provisions. Parties who wish to benefit under section 9(2) of the Courts Act, may at all cost, attempt to connect any proceedings to the constitutional provisions. A court faced with an application for certification therefore needs to be satisfied that the threshold in section 9(2) of the Courts Act is complied with before referring the proceeding(s) for certification.
10. Reverting to the present case, the accused persons submitted essentially that the ground for their application for referral is that the evidence herein was illegally obtained thereby affecting the admissibility of such evidence. With due respect, I do not think that the present proceedings pertain expressly and substantively relate to the interpretation of constitutional provisions. It is my observation that the accused persons attempted to overstretch the issues herein so that they are the subject of section 9(2) of the Courts Act as read with Order 19 of the Civil Procedure Rules. The issues raised by the accused persons, as pointed out by the State, are evidential issues, that will form part of the trial itself. I do not think that these proceedings are constitutional in nature. I am, if I may,

entitled to state that the accused persons have no any meritorious issue/objection herein. I therefore decline the application by the accused persons to refer the matter to the Chief Justice for certification.

11. At this juncture, let me register my agreement with the decision in **JOSHUA CHISA MBELE-V-REPUBLIC, Miscellaneous Criminal Case No. 04 of 2022**, where the Court pronounced that the Courts Act does not confer power on a magistrate court/ lower court to refer a matter for certification to the Chief Justice. That power of referral, pursuant to Civil Procedure Rules, is vested in the High Court. I therefore totally agree with the accused persons that the correct forum for the application for certification is the High Court. Be that as it may, this resolution does not affect my finding that the application for certification lacks merit and for avoidance of doubt, is accordingly dismissed.

THE PRELIMINARY OBJECTION ON THE CHARGE SHEET

12. The accused persons have raised objections to specific counts. On Count 1, the accused persons allege that the same lacks sufficient particulars as it refers to 'dates unknown'. To the accused persons, this lack of particulars is not sufficient to enable them prepare a defence including that of *alibi*. The accused persons citing the case of **THE STATE V KAMBALAME [2002-2003] MLR 395 (HC)**, submitted through counsel that there is need for inclusion of place and dates when the offence was committed.
13. Further, the accused persons argue that the charge is statute barred since the offences were committed between 2018 and 2021. To them, this is contrary to section 261A of the Criminal Procedure and Evidence Code (CP&EC), which provides that proceedings be commenced within 12 months of the date of the complaint.
14. The accused persons also challenge the inclusion of a conspiracy charge in Count 1 together with a substantive charge in Count 3. To them, a charge of conspiracy cannot stand together with a substantive charge. To them, Count 1 and Count 3 are caught by this rule. The accused persons therefore propose that the conspiracy charge be struck out to pave way for the substantive charge.

15. On Count 2, the objection is that there are no sufficient particulars and that the period is more than 3 years.
16. On Count 3, the objection is that there are no sufficient particulars as the charge refers to 'divers' occasions and is statute barred as the offence is alleged to have taken place between 2010 and 2021.
17. On Count 4, the objection is the same as in Counts 2 and 3. It is the contention of the accused persons that there are no sufficient particulars as there is no disclosure of the person(s) to whom the documents were allegedly uttered to. The accused persons also argue that the charge does not show which specific invoice, bill of lading or packing list was allegedly false. They argue that they import a lot of raw materials, thereby making a general averment not sufficient. The accused persons also argue that the charge is bad for duplicity. They argue that the charge aver that the accused persons falsified documents namely invoices, bills of lading and packing lists, which are separate documents. To them, putting them in one count and allege that they were uttered makes the charge bad for duplicity.
18. Further, on Count 4, the accused persons argue that there is no need to charge the accused persons with an offence of uttering a false document under section 360 of the Penal Code when under section 135 of the Customs and Excise Act provides for the same specific offence.
19. There is no objection on Count 5. However, the accused persons have raised an objection on Count 6 on fraudulent evasion of VAT payment contrary to section 49 (1) of the Value Added Tax. The accused persons allege that the particulars are not sufficient as they did not show which months and in which years the accused persons underdeclared VAT or did not pay VAT.

20. On Count 7, the accused persons are charged with uttering a false document contrary to section 360 as read with section 356 of the Penal Code. The accused persons allege that the charge lacks sufficient particulars as it does not disclose to whom the documents were uttered to. They also argue that the charge is bad for duplicity as it refers to VAT returns showing several false forms. Further, the accused persons contend that the charge is bad for it is based on a general Act (Penal Code) and not a specific Act (Customs and Excise Act).

21. On Count 8, the accused persons allege that the charge is objectionable as the statement of the offence and the charging section and the particulars of the charge are at variance. The accused persons submit that section 112(4)(d)(ii) of the Taxation Act deals with making false claims on repayment of tax whilst the statement of the offence is talking about omitting from a return income which should have been included.

22. As for Count 9, the accused persons adopt the objections under Count 7.

23. As for Count 10, the accused persons submit that the charge is objectionable as the statement of the offence, the charging section and the particulars of the charge are at variance.

24. As for Count 11, the objections are the same as in Count 7.

25. On Count 12, the accused persons allege that the charge is objectionable as the statement of the offence, the charging section and the particulars are at variance.

26. On Count 13, the accused persons are charged with money laundering contrary to section 42(1) (c) of the Financial Crimes Act. The accused persons allege that the particulars of the charge show that the offences took place between 2010 and 2021. The accused persons argue that the Financial Crimes Act came into force on 17th February 2017. The accused

persons therefore argue that the Financial Crimes Act cannot apply to offences committed before 17th February 2017.

27. As for Count 14, the objections under Count 7 apply.

28. As for Count 15, the objections under Count 13 apply.

PROSECUTION RESPONSE

29. The State, as already alluded to, is opposing the preliminary objection. The State filed skeleton arguments in opposition to the preliminary objections. During oral submissions, the State referring to **R-V-MAHMED SHAFEE AHMED CHUNARA, NORMAN PAULOSI CHISALE, PETER MUKHITO, ROZA MADALO MBILIZI AND AHMED MOHAMMED CHUNARA, Criminal Case No. 02 of 2022**, submitted that a charge should always contain particulars that the accused person understands and that will assist the accused person to prepare a defence. The State submitted that the accused persons pleaded to the charges without raising any objections. The State further argued that the charges contain sufficient particulars contrary to the assertion by the accused persons.

30. On the law governing conspiracy charges, the State agrees with the submission of the accused persons that conspiracy charge and substantive charge cannot be charged together in a charge sheet. However, the State argues that there is no substantive charge in these proceedings and that if the same is identified, the State is ready to drop the conspiracy charge.

31. On duplicity of charges, the State submitted that a charge that alleges various ways of committing an offence without indicating a particular mode is defective. However, the State submitted that for revenue matters, by intention, covers all methods of commission of offences that may be charged. On variance between the offence and statement of offence, the State submitted that there is no such variance and that the objection has no merit. On other offences being statute barred, referring to section 155 of the Customs and Excise Act,

the State submitted that there is an exception where fraud is an element. The State argues that fraud is an element to be covered during trial. On Financial Crimes Act, the State submitted that the offence and particulars of offence do not affect the application of the Act in these proceedings. On framing of charges, the State submitted that the purpose of framing charges is to inform the accused person of the offences in a manner that the accused person understands. The State submitted that the objections raised by the accused persons lack merit and prayed to this Court to sustain the charges.

DISPOSAL OF THE OBJECTION

32. The Republican Constitution guarantees to every accused person fair trial. Section 42(2)(f)(ii) provides as follows:

“Every person arrested for, or accused of, the alleged commission of an offence shall in addition to the rights which he or she has, have the right, as an accused person, to a fair trial which shall include the right to be informed with sufficient particularity of the charge.”

33. It is therefore a constitutional requirement that every accused person be provided with sufficient particulars of every charge levelled against him or her. The rationale for this constitutional requirement, as has been stated in a litany of cases, is to make sure that the accused person understands the charge and subsequently prepares a defence that answers that particular charge.

34. Section 126 of the CP & EC provides as follows on the need for sufficient particulars of charges:

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

35. Section 126 of the CP&EC must be read with sections 128 (d) and 128(f) of the CP&EC. Section 128 (d) provides as follows on particulars to be provided in a charge:

“the description or designation in a charge of the accused, or of any other person to whom reference is made therein, shall be such as is

reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation, shall be given as is reasonably practicable in the circumstance, or such person may be described as “a person unknown”.

36. Section 128(d) enjoins the prosecution to provide in the particulars reasonable description or designation of accused person or any other person referred in the charge without correctly mentioning his or her name. Section 128(d) further provides that where it is not possible to provide such a description or designation, it is allowed to refer to such a person as “a person unknown”.

37. Section 128(f) reads as follows:

“Subject to any other provisions to this section, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge in ordinary language in such a manner as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to...”.

38. What is clear in section 126, 128(d) and 128(f) of the CP&EC is that particulars are to be sufficiently provided in all charges to enable the accused person prepare his or her defence. The scheme under the CP&EC is to avoid ambush on the accused person by the prosecution. It is imperative that the accused person be provided with sufficient particulars of the charges he or she is answering so that he or she is not misled as to the defence to advance. Sections 126, 128(d) and 128(f) of the CP&EC guarantee the constitutional right to fair trial as enunciated in section 42(2)(f)(ii) of the Constitution as correctly observed in **REP V HONOURABLE DR. CASSIM CHILUMPHA AND YUSUF MATUMULA [2007] MLR 261.**

39. On Count 1, the defence raises several objections. The first objection is that the Count lacks sufficient particulars. The accused persons have issues with 'dates unknown' as not sufficient enough to enable the accused persons prepare their defence. The accused persons submitted that there is need for place and dates to be included. In **REP V HONOURABLE DR. CASSIM CHILUMPHA AND YUSUF MATUMULA, (supra)** the Court stated as follows on inclusion of dates and places in a Count:

“As regards the materiality of averment as to dates and place of the alleged offence it has been established from time immemorial that these have really not been a material matter unless they were an essential part of the offence. See *R v Wallwork* 42 Cr. App. R. 153 and *R v Dossi* 13 Cr. App. R. 158. In a case of treason where the overt acts are continuous, it is more than common practice to use expressions like “on divers days” and “places unknown”. It will be sufficient in such cases if it can be shown that the alleged overt acts were committed within the time estimated in the indictment. Our own Criminal Procedure and Evidence Code supports this practice in sections 128(d) and (f).”

40. The accused persons are charged with conspiracy to commit customs offences, contrary to section 132(j) as read with section 142 of the Customs and Excise Act. The particulars of the offence states that the offence was committed on a day and place “unknown”. I am of the considered view that the objection by the accused persons lacks merit as the CP & EC supports this scheme. The particulars of the offence have been sufficiently provided and the prosecution has correctly captured the period when these offences were allegedly committed, to be between 2010 and 2021. See **REP V HONOURABLE DR. CASSIM CHILUMPHA AND YUSUF MATUMULA (supra)**. With due respect, I am of the view that section 126 of the CP&EC has been complied as reasonable particulars have been provided. I do not see any reason that will make the accused persons fail to prepare their defence. In my view, the accused persons are not being prejudiced in any way. All in all, I dismiss this objection.

41. Another objection on this Count is that the Charge is statute barred. The accused persons argue that the particulars of the offence show that the offences were committed between 2010 and 2021, a period of 11 years. Pursuant to section 261A of the CP&EC, the accused persons argue that the State cannot prosecute all offences committed more than a year ago. The accused persons therefore prayed to this Court to order the State to amend the charge. Let me observe that the accused persons are citing a wrong provision on this point. Section 261A of the CP&EC is on Rules relating to procedure in subordinate courts where the law is giving power to the Chief Justice to make rules relating to trials before subordinate courts. The correct provision is section 261 of the CP&EC which provides as follows:

“1. Subject to subsections (2) and (3), the trial of any person accused of an offence triable by a subordinate court, other than any other offence punishable by imprisonment of more than three (3) years, shall-

- (a) Be commenced within twelve months from the date the complaint arose; and
- (b) Be completed within twelve months from the date the trial commenced

(2) Where the person who committed the offence is at large, the period prescribed by subsection (1) within which to commence the trial shall run from the date the person is arrested for the offence.

(3) Where the cause of the failure or delay to complete the trial scribed by subsection (1) is not attributable to any conduct on the part of the prosecution, the court shall order such extension of time as it consider necessary to enable the completion of the trial.

(4) A person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence of his trial is not committed or has not been completed within the period prescribed by subsection (1), and in such case the accused shall stand discharged of the offence at the expiry of such period”.

42. Section 261 of the CP&EC provides that trials caught by that provision are to be commenced within twelve months from the date the complaint arose. In this particular Court, the accused persons argue that the complaints(offences) arose between 2010 and 2021, thereby rendering them statute barred. The question that I have to resolve, in my considered view, is when do complaints/offences arise. Should we say that section 261 should apply even in situations where those complaints are not discovered by the prosecution? For instance, in the present matter, the accused persons argue that since the particulars of the offence indicate that they arose between 2010 and 2021, they are statute barred. What is certain is that the prosecution was not aware of these offences in 2010. Let me state that I differ with the accused persons on how they have interpreted section 261. In my view, to attribute delays to commence trial on the prosecution before discovery of such complaints is unfair and unjust to the prosecution. I am of the view that section 261 only applies when the investigations are completed and complaints registered in a court of law. In the present matter, despite the fact that the offences occurred between 2010 and 2021, the court should look at the date when the same were registered in a court of law. As per the court record, the accused persons were taken to Court around May 2021. I am of the view that this is the starting point in computing the limitation period under section 261 of the CP & EC.

43. Section 261(1)(b) of the CP & EC provides that trial has to be completed within 12 months from the date the trial commenced. Reverting to the present case, taking May 2021 as the period when trial commenced, definitely, 12 months have elapsed. However, the Court should have recourse to section 261 (3) of the CP & EC to deduce who is responsible for these delays. The case commenced in the lower court with several applications at the instance of the accused persons, until the matter was referred to the High Court for prosecution. In this Court, there have been instances where the case did not proceed due to various reasons attributed to the accused persons. When this Court thought, the matter would proceed to trial, the accused persons filed these preliminary objections. In all fairness, I do not think that the prosecution is responsible

for these delays. In fact, the accused persons have not shown to this Court any role prayed by the prosecution in any delays to complete the matter within 12 months. In the absence of such evidence, I hold that the prosecution is not responsible for the delays. Pursuant to section 261(3) of the CP&EC, I extend time to next 12 months within which the present matter is to be concluded subject to review. In essence, the objection raised by the accused persons is accordingly dismissed.

44. The third tier of the objection to Count 1 relates to inclusion of substantive and conspiracy charges. The accused persons argue that Count 1 contains a charge of conspiracy and that Count 3 contains a substantive charge to the alleged conspiracy. The accused persons prayed to this Court to strike out the conspiracy charge. I totally agree with the accused persons that these two charges cannot be charged together. The general rule is that where there is substantive charge, the conspiracy charge cannot stand. See **R v Griffiths [1966] 1 QB 589** and **NGUWO AND ANOTHER v R 14 MLR 384**. The State argued that there is no such a scenario in this matter and that the State is ready to do the needful if the accused persons prove that Count 1 contains conspiracy charge and Count 3 contains substantive charge.

Count 1 is indeed a conspiracy charge. In Count 3 the accused persons are charged with the offence of smuggling contrary to section 134 (a) as read with sections 2 and 142 of the Customs and Excise Act. For avoidance of doubt, in Count 1 the accused persons are charged with conspiracy to commit customs offences contrary to 132(j) as read with section 142 of the Customs and Excise Act. With due respect to the accused persons, I do not see any substantive charge to Count 1 herein. Even the charging provisions are different. I therefore dismiss the objection.

45. As for Count 2, the accused persons are charged with interfering with goods under Customs Control contrary to section 134(d) as read with section 143 of the Customs and Excise Act. The accused persons argue that the charge is not sufficiently particularized as the customs laws were not cited or mentioned. I do not see any merits in this objection. The charge is clear that the accused persons are charged under section

134(d) as read with section 143 of the Customs and Excise Act. I do not understand what the accused persons are looking for on this Count. In other words, the objection lacks merit and I hereby dismiss the same.

46. The other objection on Count 2 is that the period indicated in the Count is more than 5 years and as such, the accused persons allege that it offends section 155 of the Customs and Excise Act. My observation is that the particulars of the offence indicate the period of 19th April 2021 and 20th April 2021 when the offence took place. For sure, this is not more than 5 years ago, unless if counsel is reading a different Count. That as it may, the objection is that the period indicated is more than 5 years ago and as such offends section 155 of the Customs and Excise Act that demands commencement of proceedings within two years of the date of the offence unless where fraud is a material element, the period in such circumstances is extended to 5 years. I am of the view that at this juncture, this court is not dealing with evidential issues. I am of the view that details may come out during trial. To demand the prosecution to produce evidence now is unprocedural. Assuming that the prosecution fails to show any element of fraud in Count 2, definitely, the accused persons are at liberty to raise that issue at trial. I therefore dismiss the objection.

47. On Count 3, the accused persons are charged with the offence of smuggling contrary to section 134(a) as read with sections 2 and 142 of the Customs and Excise Act. The objection is that the charge lacks sufficient particulars as it mentions of 'divers' occasions'. I adopt my findings under Count 1 and I accordingly dismiss this objection.

The other objection is that the charge is statute barred as the offence is alleged to have taken place between 2010 and 2021, a period of 11 years. I also adopt my findings under Count 1 and I accordingly dismiss this objection.

48. On Count 4, the accused persons are charged with uttering a false document contrary to section 360 as read with section 356 of the Penal code. The first objection is that the charge lacks sufficient particulars as it does not disclose as to who the documents were

allegedly uttered to. The accused persons submitted that a charge of uttering a false document must contain a clear allegation as to who the document was uttered to. Unfortunately, the accused persons through counsel have not cited any law to substantiate their position. As already mentioned, it is a legal requirement under section 126 of the CP&EC that every charge must contain sufficient particulars to enable the accused person prepare a defence. I do not think that a charge should contain evidential details. Some of these details are unearthed during trial. I do not think that the charge is defective simply because it does not mention the name of the person to whom it was uttered. The question should be whether the charge provides sufficient particulars for the accused persons to understand and prepare their defence. In **SIGILANI v R (2004) 2 KLR 48**, The Court stated as follows:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

49. I am of the view that there is no any prejudice caused by Count 4. I therefore dismiss this objection.

50. The other objection on Count 4 is that it is bad for duplicity. The accused persons argue that the charge states that the accused persons uttered falsified documents namely invoices, bills of lading and packing lists. To them, all these mentioned documents are separate and need not be contained in one Count. The accused persons argue that their inclusion makes the charge bad for duplicity. In **BWANAMAKA AND MASHA v R [2018] eKLR**, the court stated as follows on duplicity:

“On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be ‘duplex’ or ‘duplicitous. The rule stems from two important principles: firstly, as a matter of fairness,

a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction”.

51. The accused persons argue that Count 4 is bad for duplicity simply because of its inclusion of falsified documents namely invoices, bills of lading and packing lists. With greatest respect to counsel for the accused persons, I do not think that Count 4 contains more than one offence as to be caught by the rule against duplicity. In my considered view, mentioning those documents in one Count does not make the charge bad for duplicity. I am also mindful that in framing charges, it is not prudent to coin several charges arising from same facts as this also may be an affront to fair trial. To demand that all those falsified documents be in separate charges, in my mind, is not correct. I therefore dismiss this objection.

52. The last objection on Count 4 is that the charge is bad as it is based on a general Act other than a specific Act. The main argument by the accused persons is that there is no need for the prosecution to charge them under the Penal Code when the Customs and Excise Act has a similar provision. The accused persons under this Count are charged under section 360 as read with section 356 of the Penal Code. Their argument is that Customs and Excise Act, under section 135(1)(d) provides for a similar offence. To them, the prosecution could have charged them under section 135(1)(d) of the Customs and Excise Act. As the Court stated in **R-V-MAHMED SHAFEE AHMED CHUNARA, NORMAN PAULOSI CHISALE, PETER MUKHITO, ROZA MADALO MBILIZI AND AHMED MOHAMMED CHUNARA** (*supra*), the prosecution has the discretion as to which law is appropriate to charge an accused person. This is in line with section 53 of the General Interpretation Act, which provides as follows:

“Where an act or omission constitutes an offence under two or more written laws, the offender shall unless a contrary intention appears, be liable to be prosecuted and punished under any of such laws, but shall not be liable to be punished twice for the same offence”.

53. The accused persons herein correctly cited section 53 of the General Interpretation Act. Section 53 allows the prosecution to exercise discretion as to which law is to be used in prosecuting the accused person, provided that there is no contrary intention. In other words, the prosecution has to make a choice. In this matter, the prosecution decided to charge the accused persons under the Penal Code and not under the Customs and Excise Act. There is no reason to fault such exercise of discretion by the prosecution. Even in situations where the written laws provide for different sentences, the prosecution is at liberty to go for the law providing stiffer penalties.

54. On Count 5, as already alluded to, there is no objection.

55. On Count six, the objection is that there are no sufficient particulars as no months and years are mentioned when the alleged under declaration of VAT took place. The accused persons are charged with fraudulent evasion of VAT payment contrary to section 49(1) of the Value Added Tax Act. With greatest respect to counsel for the accused persons, the particulars of the offence state that the offence was committed at Makata Industrial Area and that this offence was committed on diverse months ranging from 2015 to 2021. I adopt my reasoning and findings on Count 1. In essence, the prosecution has provided sufficient particulars to enable the accused persons understand the charge and prepare their defence. The objection lacks merit and is accordingly dismissed.

56. On Count 7, the accused persons are charged with uttering a false document contrary to section 360 as read with section 356 of the Penal Code. The accused person argues that the charge is objectionable as it does not show to whom the documents were uttered and does not show which specific VAT return was uttered. I adopt my reasoning and

findings under Count 4 above. I accordingly dismiss the objection. On Count 7, the accused persons also argue that the charge is bad for duplicity as uttered falsified documents are all included under this Count. The accused persons submitted that the Count shows that many VAT forms were uttered and that including them in one count is unprocedural. I differ with the reasoning of the accused persons. I do not think that inclusion of several VAT Forms in one Count renders the charge bad for duplicity. I do not think that where, for instance, uttered documents are in hundreds, then the prosecution should formulate hundred charges. This will also be unfair to the accused persons. I therefore adopt my reasoning and findings in Count 4 and I accordingly dismiss the objection.

57. The other tier of the objection on Count 7 is that the charge is bad as it is based on a general Act other than a specific Act. In essence, the accused persons argue that the appropriate Act is the Customs and Excise Act and not the Penal code. This is the same objection advanced by the accused person under Count 4. I therefore adopt my reasoning and findings in Count 4 and I accordingly dismiss the objection.

58. On Count 8, the accused persons are charged with omitting from a return of income in respect of a year of assessment amounts which should have been included contrary to sections 84 and 105 as read with section 112(3) and (4)(d)(ii) of the Taxation Act. The accused persons argue that the statement of the offence, the charging section and the particulars of the charge are at variance. They submit that section 112(4)(d)(ii) of the Taxation Act deals with false claims on repayment of tax whilst the statement of the offence is talking about omitting from a return income which should have been included.

59. To begin with, section 84 of the Taxation Act covers return of income and provides the procedure for such return of income to the Commissioner General. Section 105 of the Taxation Act deals with payment of tax on assessment. Section 112 (3) of the Taxation Act provides as follows:

“Any person who-

- (a) Omits from his return of income in respect of any year of assessment, any amount which should have been included therein;
- (b) In his return of income in respect of any year of assessment, deducts or sets off any amount the deduction or setting off of which is not allowed under the Act;
- (c) Claims any allowance in respect of any year of assessment, which he is not entitled to claim under this Act; or
- (d) Fails to deduct the tax due, or to remit tax deducted, under section 76A,

Shall be liable to pay the Commissioner General-

- (i) An additional sum of twenty per centum of the amount of tax which he has failed to pay in the first month or part thereof; and
 - (ii) A further interest charged on the outstanding amount of tax at the prevailing bank lending rate plus five percent per annum for each month or part thereof during which the tax remains unpaid;
- and such additional sums together with the amount of the tax shall be summarily recovered by Commissioner General in his own name:
- Provided that the Commissioner General may reduce or waive the amount of such additional sums if a satisfactory explanation for the delay is given”.

60. Section 112(3) provides for omission of any amount from taxpayer’s return of income in respect of any year of assessment.

61. . Section 112(4) provides as follows:

“Any person who with intent to defraud-

- (a) Commits any of the acts or omissions referred in subsections (2) and (3);

Commits an offence and shall be liable-
(d)(ii) upon conviction, to imprisonment for one year.

62. Section 112(4)(a) refers to subsections (2) and (3). What this means is that anyone who omits from a return of income in respect of a year of assessment as provided for under section 112(3)(a), with intent to defraud commits an offence. I do not therefore agree with the accused persons that the offence, statement of offence and particulars of offence are at variance. I therefore dismiss the objection in its entirety.
63. On Count 9, the accused persons submitted that the arguments under Count 7 apply with equal force. I therefore adopt as well my reasoning and findings under Count 7. I accordingly dismiss the objection.
64. On Count 10, the objection is the same as that in Count 8. I therefore adopt my reasoning and findings in Count 8 and I accordingly dismiss the objection.
65. On Count 11, the accused persons submitted that the arguments in Count 7 apply with equal force. I therefore adopt as well my reasoning and findings under Count 7. I accordingly dismiss the objection.
66. As for Count 12, the accused persons are charged with failure to deduct and remit Non-Resident Tax (NRT) on income paid to a person not being a resident of Malawi contrary to section 76A as read with sections 105 as read with section 112(3) and (4)(d)(ii) of the Taxation Act. The objection raised by the accused persons is the same as the objection in Counts 8 and 10. I therefore adopt my reasoning and findings in Counts 8 and 10. I therefore dismiss the objection in its entirety.
67. As for Count 13, the accused persons are charged with money laundering contrary to section 42 (1) (c) of the Financial Crimes Act Number 14 of 2017. The argument of the accused person is that the Financial Crimes Act came into force on 17th February 2017.

The alleged offences took place between 2012 and 2021. It is therefore the argument of the accused persons that the Act is not applicable to the period before 17th February 2017. The accused persons submitted that the prosecution cannot therefore charge them under the Financial Crimes Act in respect of acts that were committed before the Act came into force. The charge, according to the accused persons, should therefore include only acts and omissions after 17th February 2017.

68. There is no dispute that the charges the accused persons are answering were filed in 2021. In 2021, the applicable law is the Financial Crimes Act, that as correctly pointed out by the accused persons, came into in 2017. I am of the considered view therefore that the prosecution is legally correct to charge the accused persons with money laundering offence as contained in section 42 of the Financial Crimes Act.

69. On Count 14, the argument is the same as in Count 7. I therefore adopt my reasoning and findings in Count 7 and I accordingly dismiss the objection. There is also an objection pertaining to the variance of the offence and particulars of the offence as in Count 8. I therefore adopt my reasoning and findings in Count 8 and I accordingly dismiss the objection.

70. On Count 15, the objection is the same as in Count 13 on money laundering. I therefore adopt my reasoning and findings in Count 13 and I accordingly dismiss the objection.

**MADE IN OPEN COURT THIS 27TH DAY OF JULY 2023 AT PRINCIPAL REGISTRY,
REVENUE DIVISION, BLANTYRE.**


JOSEPH CHIGONA

JUDGE