IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

FINANCIAL CRIMES DIVISION

CONFIRMATION CASE NO. 03 OF 2024

(Being Criminal Case No. 423 of 2023 in the First Grade Magistrate's Court sitting at Dowa)

BETWEEN:

THE REPUBLIC

-AND-

ROBERT MANDEVU

CORAM: HONOURABLE JUSTICE KAPINDU

Dzikanyanga, Court Clerk/Official Interpreter

ORDER IN CONFIRMATION

KAPINDU, J

1. The accused person herein was charged with the offence of obtaining money by false pretences, contrary to section 319

of the Penal Code (Cap 7:01 of the Laws of Malawi) in the First Grade Magistrate's Court at Dowa. He was convicted and duly sentenced by that Court. The matter is before this Court for confirmation pursuant to the provisions of section 15(1) of the Criminal Procedure and Evidence Code (Cap. 8:01 of the Laws of Malawi)(CP & EC).

2. Before proceeding further, the Court wishes to take a moment and commend the First Grade Magistrate Court at Dowa for referring the present matter to this Division of the High Court for confirmation, subsequent to the abovesaid conviction and sentence. The Court deliberately states this here because it has noted, with concern, that, with the exception of a few, most magistrate courts in this country seem, thus far, to be unaware of the full scope of financial crime matters as conceived and delineated under the Courts Act, and are thus not sending appropriate financial crime matters to this Division for purposes of review and confirmation.

3. Notably, in terms of section 2 of the Courts Act (Cap. 3:02 of the Laws of Malawi), financial crimes are addressed in several Acts of Parliament, including the Penal Code. In terms of the Penal Code, section 2 of the Courts Act provides that all offences under Chapters X, XXXI, XXXII, XXXIII and XLI of the Penal Code are financial crimes. Chapter XXXI of the Penal Code, under which section 319 being the charging provision herein falls, is specifically headed *"False Pretences"*.

4. In addition, complementing the generality of section 6A(1)(f) of the Courts Act as read with section 2 of the same, Paragraphs 1 and 2 of the Chief Justice's Practice Direction No.1 of 2023 provide clearly that:

> *"(1) All new financial crimes matters handled by the High Court and filed after the coming into force of the Courts (Amendment) Act No. 36 of 2022, namely on the 18th of November, 2022, shall be heard, tried, determined and disposed of by the Financial Crimes Division of the High Court.*
>
> *(2) For the purposes of Paragraph 1 of this Practice Direction, "new financial crimes matter" includes matter brought before the High Court for-*
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> *(a) appeal and review whether civil or criminal in nature and directly related or connected to a financial crimes matter; or*
>
> *(b) confirmation pursuant to the procedure under the Criminal Procedure and Evidence Code."*

5. The Practice Direction speaks with the clarity of a crystal. Yet, such clarity notwithstanding, the Court is aware, as stated earlier, that many magistrates in the country are not remitting to this Division many financial crime matters as broadly defined under section 2 of the Courts Act for this Court's confirmation and/or review in the like manner that the Dowa FGM Court and a few others have done. In this

regard, the Court encourages other magistrates to take a cue from the approach adopted by the Dowa FGM Court herein. Let the courts give life to the intention of the Legislature as expressed through the Courts (Amendment) Act No. 36 of 2022 by implementing the changes it brought in this regard.

6. Further, the Court also encourages Assistant Registrars in various Divisions of the High Court, and particularly those in the Criminal Division and Revenue Division in as far as confirmation matters are concerned, to do a proper jurisdictional classification in terms of which matters ought to be handled by the Criminal Division or the Revenue Division, and which ones should go to the Financial Crimes Division. As a corollary, the same encouragement and clarion call goes to the Assistant Registrar(s) in the Financial Crimes Division.

7. Some of the risks attendant to a lack of judicial due diligence in respect of the jurisdictional classification of matters between various High Court Divisions were recently eloquently expressed by my sister Judge, Chipao J, in the case of ***Financial Intelligence Authority vs Zahra Ali & Another***, Civil Cause No. 2 of 2024 (HC, FCD). In respect of the duty of the Registrar's office in ensuring that matters are placed in appropriate jurisdictional forums, the learned Judge stated that:

"The starting point in addressing the confusion noted above would start with the Registrar at the time the matter is being commenced. Section 6A (2) of the Courts Act gives power to the Registrar to transfer proceedings to an appropriate Division where the proceedings have been commenced in the wrong Division."

8. The learned Judge pointed out that the exercise of these powers by the Registrar under section 6A(2) of the Courts Act *"is not merely an administrative function of the Registrar. It is a judicial function to which the Registrar must apply his [or her] mind."*

9. Thus, when it comes to the confirmation process, the responsible Registrar (where the term Registrar includes Deputy and Assistant Registrars) should likewise judicially apply his or her mind, regard being had to section 6A(1)(f) of the Courts Act as read with section 2 of the same, in terms of which Division between the Criminal Division, Revenue Division or Financial Crimes Division is the appropriate forum for review and confirmation of the matter.

10. As a logical conclusion to this issue, the Court has to state what it really needs not elaborate on knowing that their Ladyships and Lordships – the Judges – are all too aware, namely that ultimately the responsibility rests with them to put right any omissions or oversights on the part of the

Registrar's office, and to give necessary directions to the Registrar regarding the handling of financial crime matters in order to ensure compliance with the provisions of the Courts Act and Practice Direction No. 1 of 2023.

11. With that said, the Court now proceeds to address the relevant substantive issues relating to the proceedings in the Court below.

12. The offence of obtaining money by false pretences, contrary to section 319 of the Penal Code, with which the accused person herein was charged, provides that:

> *"(1) Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen or any services or induces any other person to deliver to any person anything capable of being stolen shall be guilty of a misdemeanour, and shall be liable to imprisonment for five years.*
> *(2) It is an obtaining of service where there is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for with money or money's worth."*

13. The term *"false pretence"* is defined under section 318 of the Penal Code which provides that:

"Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence."

14. The particulars of the offence were that:

"Robert Mandevu, between the months of April to June, 2023 at Zolire in the District of Dowa, with intent to defraud, obtained money amounting to K1, 400,000 from Isaac Mafuleka by falsely representing that [sic] you will be a servant of Airtel agents dealer of Isaac Mafuleka"

15. In the case of ***Mputahelo v Republic*** (Criminal Appeal 28 of 1999) [1999] MWHC 7, Mwaungulu, J (as he then was), stated that:

*"Obtaining property by false pretenses is proved if the defendant makes a false pretense, intends to defraud and obtains from another something capable of being stolen. The offence bases on a false pretense. The offence is committed when the false pretense operates on another to release property (**R. v. Laverty**, 54 Cr. App. R. 495; **Metropolitan Police Commissioner v. Charles***

[1977] A.C. 177). The defendant must make a false pretense as defined. The defendant must say words, write or present a writing or do some action whose effect is a representation of some fact. The provision codifies the Common Law where the representation is to a fact, not law."

16. The accused person appeared before the First Grade Magistrate Court sitting at Dowa on the 12th of December, 2023 to answer to the above-mentioned charge.

17. When the charge was read out to him, he pleaded guilty. In his plea, he admitted that he obtained the sum of MK 1, 400,000 from the complainant after he had falsely represented to the complainant that he was going to work for him (the complainant) as his servant. He further admitted that in making such false representations, he intended to defraud the complainant. The accused person further informed the Court that he had understood the consequences of taking a guilty plea.

18. The prosecutor proceeded to read out the facts to the Court and to the accused person, and the accused person agreed that he had understood the narration of the facts and that they were correct. Resultantly, the Court convicted him of the offence on his own plea of guilty.

19. The Court is mindful that the proviso to section 251 of the CP & EC provides that:

> *"before a plea of guilty is recorded, the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit without qualification the truth of the charge against him."*

20. Evaluating the accused person's guilty herein plea in the context of the elements of the offence of obtaining money by false pretences, as ably articulated in the case of ***Mputahelo v Republic*** above, this Court is satisfied that *the accused understood the nature and consequences of his plea and intended to admit without qualification the truth of the charge against him*. The Court therefore finds that the Court below properly convicted the accused person on his own guilty plea.

21. The Court, after listening to the narration from both the prosecution and the accused person in respect of mitigating and aggravating circumstances, proceeded to impose a maximum sentence of 60 months IHL on the accused person.

22. Courts have times out of number emphasised that the imposition of the maximum penalty is reserved for the worst type of offenders. In the case of ***Ayami v Rep*** [1990] 13 MLR 19 (SCA), the Supreme Court of Appeal stated, at pages 28-

29, per Tambala, JA reading the judgment of the full Court, that:

> *"We wish to comment, in passing, on the sentence which the trial magistrate imposed against the appellant and the rest of the accused persons following their conviction… He imposed a sentence of five years imprisonment with hard labour which is the maximum sentence prescribed for that offence. A maximum sentence is reserved for the worst offence of its kind:* ***R v White*** *(1923–60) 1 ALR (Mal) 401. In the present a case property worth K60-00 was damaged. We believe that his was not the worst kind of the offence of malicious damage. It was therefore, wrong in principle to pass the maximum penalty in the present case. When upholding the sentence the learned judge in the High Court said that a sentence of five years imprisonment with hard labour could not be said to be manifestly excessive having regard to the circumstances in which the offences were committed. The question was, surely, not whether the sentence was manifestly excessive. It was whether the trial magistrate was legally entitled to pass a maximum sentence. It would seem to us that the learned judge misdirected himself when he upheld the sentence on the ground that it was not manifestly excessive. We are of the view that this*

misdirection constituted an error on a matter of law which is also appealable to this court."

23. Similarly in the present case, there was no suggestion at all, and even if such a suggestion were made, it would scarcely be said, that the circumstances of the present case, as stated in the above particulars of the offence, came even close to the worst kind of the offence of obtaining money by false pretences. The sentence of 60 months IHL herein, being a maximum sentence, is therefore hereby set aside on account that it was wrong in principle.

24. In ***Nyanda vs Republic***, Criminal Appeal No. 80 of 2007 (HC, LL), 2008 MWHC 74 (19 March 2008), the Appellant was found guilty, after a full trial, of the offence of obtaining by false pretences contrary to section 319 of the Penal Code after he had defrauded the complainant by presenting a fraudulent cheque and obtaining from the complainant building materials of different descriptions amounting to MK350,000. It must be said that this was a significant amount in 2007, whose value would easily exceed the amount of MK 1,400,000 which is in issue in the instant case. There was however partial recovery of the property which had been obtained by false pretences in that case. The accused person (the Appellant) was sentenced to 18 months IHL by the Magistrate Court and the sentence was confirmed on appeal by Singini, J (as he then was).

25. Given the totality of the facts, and noting among other considerations in mitigation and aggravation, that the accused person herein is a first offender on the one hand, but also on the other hand the aggravating factor that the money herein was never recovered, the Court is of the view that a sentence of 30 months imprisonment with hard labour is appropriate.

26. The Court therefore replaces that set aside sentence of 60 months imprisonment with hand labour, with a reduced sentence of 30 months imprisonment with hard labour.

27. It is so ordered.

Delivered in Chambers at Lilongwe, this 12th Day of April, 2024.

R.E. Kapindu
JUDGE