

REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL CASE NUMBER 871 OF 1998
BETWEEN
THE REPUBLIC

VS

- (1) **RODRICK IBO CHIZINGA**
- (2) **LIGHTON ENOS MAGANIZO PHANGIRE**
- (3) **GDC HOLDINGS LIMITED**

SUBMISSIONS

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SUBMISSIONS

1. BRIEF FACTS

Institution of investigations

On the 17th of March, 1998 the Anti-Corruption Bureau received a complaint of alleged corrupt practices by GDC Holdings Limited (hereinafter called "GDC").

The allegation was that GDC was bribing officers from, among others, Customs and Excise, Department of Road Traffic Commission and Immigration at Mwanza border. GDC was bribing so that its foreign registered trucks enter Malawi without paying the necessary duties (hereinafter called "toll fees"). After investigations were authorized the following procedure was established.

2. CHARGES, FACTS AND LAW

2.1 RODRICK CHIZINGA (hereinafter called the first accused)

The first accused was charged with three counts of corrupt practices by public officers contrary to Section 24 (2) of the Corrupt Practices Act; attempting to commit an offence of corrupt practices with public officers contrary to Section 35 of the Corrupt Practices Act and misleading officers of the Anti-Corruption Bureau contrary to section 14 (b) of the Corruption Practices Act.

On the first count, the first accused was alleged to have corruptly given gratification in the form of cash to Christopher Alex Msinja a Police Officer-in-Charge at Mwanza border for the said Msinja to

forbear from conducting a detailed check of foreign currency and unknown suspected foreign individuals on GDC foreign registered trucks at Mwanza border.

In the second count, the first accused was alleged to have attempted to give gratification in the form of cash to Christopher Alex Msinja; one Lekani, Sergeant Kulumbazi, Constable Mwakikunga and Detective Constable Nkuka, all Police Officers at Mwanza border as an inducement or reward for the said Police Officers to forbear from conducting a detailed check of the foreign currency and unknown suspected foreign individuals on GDC foreign registered trucks at Mwanza border.

The above two activities were allegedly committed on or about the 1st day of September 1997 at the said Mwanza border.

The first accused was further alleged to have mislead officers of the Anti-Corruption Bureau by making false statements namely that GDC was paying Toll Fees for all its foreign registered trucks and that the contents of the memoranda (Make Plan documents) were false in material particular when in fact GDC was not paying the Toll Fees of all its foreign registered trucks and that the contents of the memoranda above referred were in fact true.

As stated above, the first accused was a GDC officer based at Mwanza border. He was detailed to oversee entering of GDC's foreign registered trucks at Mwanza border, preparing the TFCF's documents (Exhibits P15, P16, P17, P18 and P19a among others).

It is the evidence of PW5; Msinja that sometime in September, 1997 the first accused brought an envelope to him. The envelope contained a total sum of K1, 050.00 in amounts apportioned to each of the above named Police Officers. The money was given to PW5. PW5 tendered exhibit P53 acknowledging return of such money. PW11 Masugzo Matan Mwakikunga a Policeman at the border at the material time confirmed this testimony.

PW5 also confirmed that the duties of the Policemen at the border were to check suspected individual faces from abroad and also check potential importation of foreign currency.

Section 24 (2) pursuant to which the first accused has been charged provides as follows:-

“Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as an inducement to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall guilty of an offence”.

Under the said section 24 (2), the prosecution is expected to prove the following elements for an offence of corrupt practices with a public officer to be established.

- (a) Did the accused person give gratification to a public officer?
- (b) Was such gratification given corruptly?
- (c) Was the gratification for the benefit of such public officer or any other person?
- (d) Was the gratification given as an inducement for the public officer to do or forbear to do something?
- (e) Was the thing forborne to be done in relation to a transaction a concern of a public body?

It is clear from the foregoing and especially from the evidence of PW5 and PW11 that indeed the first accused gave gratification to the above named officers for the benefit of such officers. Such payment could not have been made for any other purpose apart from being an inducement for the Police Officers concerned to forbear from

discharging their functions as stated by PW5. The checking of foreign currency and suspected foreign individuals and trucks was a concern of the Malawi Police as indicated by PW5.

The question that however arises is whether the gratification was given corruptly. In terms of Section 3 of the Corrupt Practices Act the accused will be deemed to have accepted corruptly if the gratification is accepted by way of a bribe or other personal temptation, enticement or inducement.

In the cases of R vs. Smith (1960) 2 QB 423 and R vs. Calland (1967) Criminal Law Reports 236 it was held that the word “corruptly” does not mean “dishonestly” but purposely doing an act which the law forbids (see also the case of Harvey (1999) Crim. L.R. 70.

The payment by the first accused was clearly calculated to operate as an inducement. The Corrupt Practices Act prohibits the giving of gratification to public officers. Such giving was therefore done corruptly.

The first accused is also charged with attempting to give the above named Police officers gratification as an inducement for the said Police Officers to forbear from carrying out their duty of checking foreign currency and suspected foreign individuals on GDC trucks. The attempt comes in because the money Rodrick Chizinga brought to PW5 did not reach the intended beneficiaries as it was obstructed by PW5 before reaching its desired targets. The first accused therefore attempted to corrupt those officers to whom the money did not reach.

It is evidence of the first accused that Benson Chithowa who at the material time was the Operations Manager for GDC sent to him an envelope. He said that he only realized that there was money in the envelope when he was called by the officer in charge, PW 5 to collect the envelope.

The first accused's version does not seem to be credible. Firstly, one wonders how he could carry an envelope the contents of which he did not know. Secondly, it is the evidence of the PW5 and PW 11 that when he was called by the Officer in charge and confronted on the money, he apologized. We wonder why he did not say at that time that the envelope came from Chinthowa. We wonder why he did not say that he did not know the contents of the envelop at such confrontation.

Under Section 14 (b) of the Corrupt Practices Act, an offence of misleading officers of the Anti Corruption Bureau will be committed when the accused person has given any false information to the said officers of the Anti Corruption Bureau. The giving of such false information must be done knowingly. Section 14(b) provides as follows-

“Any person who knowingly -

- (a) makes or causes to be made to the Bureau a false report of the commission of an offence under this Act; or**
- b) misleads the Director, the Deputy, Director or other officer of the Bureau by giving any false information, or by making any false statements or accusations.**

Shall be guilty of an offensive and liable to a fine of K100,000 and to imprisonment for ten years.”

For an offence under the above section to be established it must be established by the prosecution that the accused gave false information or made a false statement to the Anti- Corruption Bureau. It must also be established that the false information or the false statement were made by the accused knowingly. Further it must be

established that the false information or the false statement misled the Director, the Deputy, Director or other officer of the Bureau.

In his Caution Statement, (Exb 48) Rodrick Chizinga stated on page two (2) that GDC had in fact paid all the Toll Fees and that he had received general receipt for those payments. He indicated that he could produce the general receipt, which he never did. In fact an examination of Exhibits P15a, P18a, and P19a together with Exhibit P45 shows that the trucks contained in the named exhibits had not had their Toll Fees deducted from Exhibit P45. The trucks had indeed entered Malawi as can be noted from the relevant NBS's (Exh P46 b).

It is clear from the foregoing therefore that the first accused gave false information or made a false statement to the Anti-Corruption Bureau. The statement or information misled the Deputy Director and the Assistant Director of the Anti Corruption Bureau who at the material they were investigating the matter.

False statements are misleading in themselves. The issue therefore is whether it has to be shown in what actions the Deputy Director and the Assistant Director of the Anti Corruption Bureau took to show that they were misled.

Section 14(2) is clear in its intent and purport. No evidence is required to prove the actions of the Assistant Director and Deputy Director to demonstrate that they were misled. The mere giving of a false statement is a form of misleading. The accused in fact misleads by giving false information. In terms of the above section there are three forms of misleading.

One can mislead by:

- (a) Giving false information.
- (b) Making a false statement.
- (c) Making a false accusation.

The fact that a false statement was made invariably shows that there was misleading.

To misleading was defined in the Oxford Advanced Learner's Dictionary Fifth Edition Page 745 as follows-

“ To cause somebody to have a wrong idea or impression about somebody or something”

It will be noted from the above that misleading means to give a false impression. By merely giving false information to the Assistant Director and Deputy Director the first accused gave a false impression that toll fees were paid when in fact they were not. It is not necessary to prove the actions that the Assistant and Deputy Director took as a result of the false information.

It is therefore not necessary to prove the actions the Deputy Director and the Assistant Director took to show that they were misled. It is sufficient to prove that the false information or false statement was made to them by the accused and that the accused knew that the statement or information was false.

Rodrick Chizinga indicated on page three (3) of the Caution Statement “at the time I was writing the reports I knew that they were not correct but I kept on writing them because I was promised some money”. Investigations revealed that these trucks that were contained in the reports (Make Plan documents) had indeed entered Malawi as is evidenced by the respective NBS's.

An examination of exhibits 45, 46a, 46b and 47 also discloses that the contents of the “Make Plans documents” were in fact true contrary to the assertion of the first accused in his Caution Statement.

The first accused therefore gave the above information to the Anti-Corruption Bureau officers fully knowing that it was false in material particular at the time he was giving it. He had therefore contravened the provisions of Section 14 (b) of the Corrupt Practices Act.

2.2 LIGHTON ENOS MAGANIZO PHANGIRE (hereinafter called the second accused)

He was charged with two counts of corrupt practices by public officers. In the first count he is alleged to have accepted the sum of

K234, 160 between the period 1st April 1996 and 31st July, 1998 from GDC. He is also alleged to have accepted entertainment. The above was accepted as an inducement for forbearing to carry out detailed weighing of GDC foreign registered trucks. The checking and weighing of the trucks being a concern of the Road Traffic Commission.

In the second count, he is alleged to have accepted and to have solicited similar amounts from GDC Holdings Limited at Blantyre as an inducement for him to forbear the above weighing and checking of GDC trucks.

The evidence that has come in Court is that among the monthly payments by GDC to public officers, some payment was going to Balaka Weighbridge where Mr. Phangire was stationed. There is uncontroverted evidence that the second accused's duties was to weigh the trucks and check Toll Fees on GDC foreign registered trucks.

By way of example, Exhibit 4b shows that the sum of K1, 600.00 was earmarked for Balaka Weighbridge every month.

The evidence of Mbendera (PW3) Lindeire (PW4) show that GDC was making monthly payments to public offices and that included Balaka personnel. Both PW3 and PW4 also confirmed that GDC personnel including the second accused used to frequent GDC premises.

It was the further evidence of PW3 that sometime in October, 1996 the second accused came to GDC Holdings premises to collect the sum of K1, 600.00 and a petty cash voucher Exhibit P31 (a) was prepared. Exhibit 31(a), 31(b) and 31(c) bears testimony to this fact. Exhibit P30b shows that in the month of September, a similar amount was also paid to Balaka Weighbridge.

For an offence of corrupt practices by public officers to be established against the second accused, the prosecution should prove that the

second accused corruptly accepted gratification to forbear from carrying out the detailed weighing and the checking of Toll Fees on GDC trucks. It must also be shown that such weighing and checking was a concern of the Road Traffic Commission. It cannot be disputed that the weighing and checking are a concern of the Road Traffic Commission. The issues are whether the second accused accepted gratification and whether he forbore to do so weigh the trucks and check toll fees.

The evidence of both PW3 and PW4 confirm that the second accused accepted gratification. However, in terms of Section 33 (1) and 47 of the Corrupt Practices Act it would not be a defence on the part of the second accused to say that he did not forbear to check toll fees and weigh the said trucks as long as it is proved that he accepted or solicited gratification from GDC. Sections 33(1) and 47 provide as follows-

Section 33 (1)

“If, in any proceedings for an offence under any section of this Part, it is proved that the accused accepted any gratification, believing or suspecting or having reasonable grounds to believe or suspect that the gratification was given as an inducement or reward for or otherwise on account of his doing or forbearing to do, or having forborne to do, any act referred to in that section, it shall be on defence that:-

- (a) he did not actually have the power, right or opportunity so to do or forbear;**
- (b) he accepted the gratification without intending so to do or forbear; or**
- (c) he did not in fact so do or forbear**

Section 47

“Where any public officer has corruptly solicited,

accepted, obtained, or agreed to accept or attempted to receive or obtain any gratification, it shall not be a defence in any trial in respect of an offence under Part IV:-

- (a) that the appointment, nomination or election of such person or any other person as a public officer was invalid or void; or**
- (b) that such public officer or any other public servant did not have the power, authority or opportunity of doing or of forbearing from doing the act, favour or disfavour to which the gratification related; or**
- (c) that the public officer did not actually do any act, favour or disfavour to induce the gratification, or never had the intention of doing so”.**

The absence of actual forbearance therefore will not be fatal to the prosecution evidence. In any event the accused does not deny that he had been frequenting GDC premises. All he said was that he was frequenting GDC to visit his friend and mechanic. One however would not fail to question the reasonableness of having to get a mechanic in Blantyre for a person who is based in Balaka. Are there no mechanics in Balaka?

The accused's own testimony renders credence to the evidence of PW3 that the second accused came to collect from GDC the sum of K1,600 in October and he is the one who cashed the cheque in respect of such payment.

The testimony by the prosecution on the third accused is also an indication that the monthly payments of K1,600 ear marked for Balaka were also being received by the third accused. An offence of corruption is a secretive offence. To expect the prosecution to demonstrate that the money was actually signed for by the accused would be to expect the impossible from the prosecution. The court needs only to look at the circumstances pointing to the fact that the accused received the gratification. It was held in the case of the *Republic vs. Nyamizinga* ALR Mal 258, that an inference of guilt can be drawn from circumstantial evidence when the prosecution has established beyond reasonable doubt that the facts are incompatible

with the innocence of the accused and incapable of no other reasonable explanation.

2.3 GDC HOLDINGS LIMITED (hereinafter called the third accused)

The third accused is charged with three counts of the offence of corrupt practices with public officers contrary to Section 24 (2) of the Corrupt Practices Act and in the alternative an offence of official corruption contrary to Section 90 (b) of the Penal Code.

It is alleged that the third accused corruptly gave gratification amounting to K234, 160.00 to Raibon Enos Mwenitete, the second accused, Tonnex Mphepo and Selwin Simfukwe all officials of the Department of Customs and Excise, The Road Traffic Commission and the Immigration department respectively and other unknown public officers. The third accused is also alleged to have invited the above persons and other unknown public officers to parties. The said sums of money and the parties were given as an inducement for the above persons and other unknown public officers to forbear from collecting Toll Fees in excess of K8.6 million in the case of Raibon Enos Mwenitete and the second accused and to expedite the checking of travel documents for GDC drivers and unknown suspected passengers on GDC Holdings trucks in the case of Selwin Simfukwe.

It is the prosecution's evidence that the third accused is incorporated in Malawi. Exhibits P1 to P3 gives a history of the incorporation of the Company.

It is also in evidence that the first accused was preparing NBS's and TFCS's, which were sent to management. The TFCS's were in the majority of cases irregular in that they did not tally with the NBS's. It is further in evidence that the first accused was preparing "Make Plan documents" which were being approved for payment by the management of the third accused Company. Exhibits P15, P16 to P19(a) evidences this fact. Management of the third accused

Company was also approving the payment of goodwill requisitions.

It is the evidence of Lindeire (PW4) that he cautioned management of this practice but the General Manager (PW2) told him that the practice was a long time practice in the third accused Company and that he himself as General Manager had found it. PW4 was told simply to effect payments.

PW2 who was the former General Manager confirmed the existence of the above facts. Resulting from the above, the sum of K8.6 million as evidenced from the Toll Fees Analysis, Exhibit 51(a) and 51(b) was evaded by the third accused Company.

Exhibit P53 also demonstrated that between the year 1996 and 1998 goodwill amounting to K234, 160.00 was paid to a number of officers who were detailed to handle the third accused Company's trucks.

For an offence of corrupt practices with public officers to be proved, the prosecution must show that the accused gave gratification to public officers.

It is abundantly clear that GDC Holdings Limited organized parties for public officers detailed to handle its truck and also paid goodwill to such officers. Indeed there is uncontroverted evidence of forbearance to collect K8.6 million by public officers.

For an offence of official corruption under Section 90 (b) to be established the prosecution must prove that the accused person gave property or benefit to persons employed in the public service. The prosecution must also prove that such giving was on account of an act or omission by the said persons employed in the public service.

There is uncontroverted circumstantial evidence that the third accused Company gave K234,160 to persons employed in public service and that it organized parties for such persons. The parties and money were a benefit and property respectively.

It is also abundantly clear that the cash and parties were given by the third accused Company on account of the persons employed in the public service refraining from collecting Toll Fees, checking Toll Fees on the third accused Company's trucks and expediting the checking of travel documents of persons on GDC trucks respectively.

The payments were targeted to only those persons handling the third accused's Company's trucks and no other. The evidence of PW2 Kangulu confirms this fact.

There are facts that are not disputed that are central to this case. Firstly the fact that GDC through Chizinga was making "make Plan" documents evidencing that certain foreign registered trucks were crossing the boarder without paying toll fees thereby making savings. The " Make Plan Documents were being addressed to the Management of GDC and the General Manager was approving payment.

The second fact is that GDC through Chinthowa was making a list of goodwill payments to specified Public Officers, all of whom were concerned with the handling of GDC trucks. The Cheques were being cashed by PW3 who testified that the money was being sent to the Chizinga at the Boarder to effect payment to Public Officers. Payment vouchers in respect of such goodwill payments were being authorized and signed by the General Manager, the Managing Director in some cases and the Financial Controller PW4.

The fourth fact is that an envelope containing money was given to the Police and was returned. Further, Mr. Maganizo Phangire, who was working for the Road Traffic Department came to collect the sum of K1, 600.00 which was cashed by PW3 and paid under petty cash voucher P31A.

In terms of section 24 of the Penal Code once a corporation is found to have committed a criminal offence every person charged with or

concerned with the control or management of the affairs of the company shall be guilty of such offence. Section 24 of the Penal Code provides as follows:

“Where an offence is committed by any company or other body corporate or by any society, association or body of persons, every person charged with or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and shall be liable to be punished accordingly, unless it is proven by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.”

The above section further shows that the person charged with the responsibility of running the company will be exculpated from liability if they show that they were not aware that the offence was being committed and that they took all reasonable steps to prevent its commission.

It was stated by Lord Diplock in *Arlidge and Parry on Fraud* 2nd edition as follows-

“ Where an offence is committed by a person whose position within a Company is such as to justify regarding his actions and intentions as those of the company itself, the Company will also be guilty of the offence” (see also the case of **Tesco Supermarkets Limited vs. Natrass (1972) AC 153**)

Arlidge proceeds on page 199 as follows:

“ An officer who positively encourages or assists in the commission of the

offence will in any event be guilty as an accessory. It is arguable that the same would apply to a director, at least who simply acquiesces in the fraud, on the ground that a person who has authority to prevent an offence being committed may be implicated by the mere failure to exercise that authority.”(see also the case of Tuck vs. Robson (1970)1 W.L.R 741

It is the evidence of Robert Bruce Holmes, who was the Managing Director of the third accused company that he never was aware that such offence was being committed. He however, signed exhibits P21A, P21B, P34A, P35B, P39A and P31B. In cross-examination he advised the court that he thought the payments appearing in the payment of vouchers were toll fees. When asked further whether the payment in Malawi Kwacha would be payment for Toll fees when Toll fees was being paid US Dollar, he advised that the Toll fees is a generic term encompassing a wide spectrum of payments. When quizzed further on exhibit P38B that only referred to ‘goodwill’, he stated that he did not know what ‘goodwill’ meant. He however signed exhibit P39A.

It is quite strange how a Managing Director who was charged with the overall responsibility to run the affairs of the third accused company could sign a voucher for eleven thousand three hundred fifty Kwacha (K11, 300) without knowing what the payment was for. We are to the view that he knew that the ‘goodwill’ was meant for cash payments to Public Officers at the border. Further Mr. Robert Holmes as Managing Director of the third accused company failed to take all reasonable steps to prevent the commission of this offence. The presentation to him of exhibit P39A was enough to put him on enquiry that could have led him to discover and put a stop to the commission of the offence herein by his Company. He should therefore be adjudged guilty of the offences herein as he acquiesced to the commission of the offences herein by the third defendant and its management team.

3 CONCLUSION

A review of the facts of this case shows that the prosecution has proved beyond reasonable doubt that the accused persons have committed the offences they have been charged with. The prosecution has satisfied the standard of proof required to prove criminal offences against accused persons.

DATED THIS 16th DAY OF JUNE 2005

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