IN THE CHIEF RESIDENT MAGISTRATE'S COURT

SITTING AT BLANTYRE

CRIMINAL CASE NUMBER 359 OF 2009

REPUBLIC

versus

STEVEN MONJEZA SOKO

and

TIONGE CHIMBALANGA KACHEPA

CORAM: **HIS HON. MR NYAKWAWA USIWA-USIWA, CRM**

Public Prosecutor: Supt. Mtete and Supt. Babra Mchenga

Mr Mauya Msuku of Counsel for Defence

Official Interpreter: Mrs V Saka and Khumbo Magwira

JUDGMENT

The two accused persons stand charged with three counts. **The first count** relates to the first accused person **Steven Monjeza Soko.** He is charged with buggery or having carnal knowledge of the second accused person **Tiwonge Chimbalanga Kachepa** against the order of nature. This is contrary to **Section 153(a)** of the Penal Code. Under the **second count Tiwonge Chimbalanga Kachepa** is also charged with buggery or a

charge of permitting the first accused person to have carnal knowledge of him against the order of nature. This is contrary to **Section 153(c)** of the Penal Code. **In the alternative**, both accused persons are charged with the offence of indecent practices between males contrary to **Section 156** of the Penal Code.

They both pleaded not guilty to the charges on 30th December 2009. After the closure of the prosecution's case they exercised their right to remain silent.

FACTS

The simple facts of this case that are not in dispute are that both Tiwonge, also known as Aunt Tiwo, and Steven are men. They are of sound mind. At one point they associated themselves with a certain Christian Church called **Abraham Church** where Tionge performed womanly chores. Finally on 26th December 2009 they were successful to conduct an engagement ceremony or *Chinkhoswe* at Mankhoma Lodge in Blantyre. This is a place where Tiwonge was staying and working.

ISSUES

1. Whether the fact of a ***chinkoswe*** ceremony and other attendant issues by the two men leads to the conclusion that the two had carnal knowledge against the order of nature; or
2. Whether, in the altenative, there were indecent practices between these men.

BURDEN OF PROOF

Under Section 187(1) of the Criminal Procedure and Evidence Code and from countless decided cases, including tha landmark case of ***Woolmington vs D.P.P. [1835] A.C. 462, [Namondwe vs Republic, 16(2) MLR, 657]*** as well as from learned texts on ***Criminal Procedure and Evidence Code***, it is clearly cardinal that in general the legal burden to prove the guilt of the accused rests with and never leaves the prosecution

throughout a case like this one,.... Further, under our Constitution **Section 42 (2)(f)(iii)** every person accused of crime **is presumed innocent** and does not bear any duty in the least to prove such innocence...[A]n accused need do no more than raise, if he opts to fight the allegations against him, some **reasonable doubt** about his guilt. It is in fact not even obligatory for him to give any evidence in defence. Like it happened in this case. Thus, even doubts solely arising from prosecution evidence itself are sufficient to free him from the yoke of the charges, even without him uttering a word. [a paraphrase from ***Fallid Mogra vs Rep Crim. App. No. 55 of 2005,*** per Chipeta J.]

EVIDENCE

Seized with the above explained duty or burden of proof the State paraded **nine** witnesses in this case, as follows:

PW1. EBETI MONJEZA

She is the extended grandmother to Steven. She said in October 2009 Steven brought Tiwonge to her, to introduce him as Steven's wife and that the two were staying together. Upon seeing Steven's "wife" for the first time, she remembered asking her grandson whether his wife was male or female. This, according to her she did because the "wife" did not have feminine features, for example breasts. After some time, Steven told her of the impending engagement ceremony which later took place at Mankhoma Lodge and she was present at the ceremony. She insisted that Tionge's features are not feminine.

PW2. RAPHAEL KOLOVENI

A church elder at Abraham Church where Tionge goes. He said he knew both accused persons. He told the court the two are a couple and this

he was told by the first accused in December 2009. The first accused further expressed the intention to formalize the union by having an engagement and asked him to his advocate or marriage counselor (nkhoswe). He described the house where the two used to stay as a bedsitter. PW2 also told the court that the second accused person was admitted into the church as a woman, ''Aunt Tiwonge''. He also stated that he does not know whether the two accused persons stay together.

PW3 FLONY FRANK

A businesswoman who told the court she knew both accused persons. The second accused is her friend. She had always known the accused as a woman. At some point Tionge told her she was getting engaged to Steven. She told the court that she had even lent Tionge her wrappers (zitenje) for his engagement. After the engagement, someone brought her a newspaper telling her she had been chatting with a male because the paper had reported that Tionge was a male. She was annoyed. She together with a Mrs. Piringu went to Tionge's house to hear the truth from the horse's mouth. They then went to Jean Kamphale's house where the first accused was also called and he confirmed that Tionge was indeed the wife and he slept with him. She stated that Tionge then voluntarily took off her clothes and everybody there present including this witness saw that Tionge had the private parts of a male. PW3 then told the court that she discovered that the second accused person has male genitals though they did no look normal to her. She said Mrs Piringu undressed herself,to lead by example. During cross-examination, PW3 said that she with the other women made Tionge to undress.

PW4 MRS JEAN KAMPHALE

She is the owner of Mankhoma Lodge; where the engagement took place and where Tiwonge was employed as a woman though he has male features such as hairy body, beards and lack of breasts. Further She told the court that when Tiwonge reported for work, he came with Steven whom he said was his husband. Later, on 26th December, 2009, the two got engaged. She said she knew Steven as husband to Tiwonge. She went on to tell the court she was present when Tionge undressed and it is true that he has the private parts of a male. She personally asked Tionge how her husband "did it" [carnal knowledge]. In her words the second accused told the witness that the husband was doing it anywhere he wanted, including the anus. The husband, Steven also admitted to this witness that the two were having sex. PW4 however told the court that on the following day, two women came to Tiwonge's house making noise that the second accused person was a man. PW4 then confronted Tionge

and took him into a room where he was told to undress after some reluctance. PW4 then stated that she learnt that Tionge is a man. She then asked him as to how he was having sex with Steven. He stated that they were using the anus. During cross-examination, PW4 was made to say that the meaning of engagement was that the two "intended" to get married. This meant that prior to the engagement, the two were staying together as unmarried people.

PW5 MRS NYARADZAYI PIRINGU

A member of Abraham Church she told the court she knew the two accused person from her Church going. She heard about the engagement and she was among the women who were present when Tionge undressed and she also saw that he had male private parts. She was also present when Tionge admitted that he was having anal intercourse with the first accused.

After the engagement, she said another friend asked her about Tionge being a man. They then went to Tionges's house to confront him. There Tionge is said to have undressed, remaining only with underwear for the two ladies to verify that she was a woman. Which they did. When they were about to leave and the second accused person was escorting them, one Mrs. Jean Kamphale who was the second accused person's employer called them back to find out what was happening. When they explained, Mrs. Kamphale indicated that she had always suspected the second accused person to be a man. She then compelled her to go into a room where she was compelled to undress tough reluctantly. They then discovered that the second accused person was a man. Mrs. Kamphale then, is said to have asked Tionge as to how they have sexual intercourse with Steven. There Tionge is said to have indicated that they use the anus and sometimes by her squeezing the first accused person's penis between her thighs. In cross examination, she insisted that they never forced Tionge to undress, he undressed voluntarily.

PW6 PETER MAXWELL

A photographer and is the one who photographed the two accused person's engagement ceremony. He identified and tendered in evidence five photographs. He told the court that Tiwonge had also asked him to be his marriage advocate which he did because Tionge told him that they had already purchased items for the engagement. He also told the court that Tionge's relations were far. PW6 also told the court that Tionge

started crying when people did not give him enough money (kufupa) at the engagement. In cross examination, he was made to say that he thought this was a mock wedding just for the reason that the advocates were not relations. In re examination however, he said this was a real engagement, Tionge never mentioned to him that this was mock.

PW7 DR BONUS MAKANANI

An obstetrician and gynecologist from the College of medicine and Chantinkha Maternity wing. He said he conducted a medical examination On 5th January, 2010 on Tiwonge on request by the police. He told the court he was asked to make findings on whether Tionge is male or female and whether he was involved in sexual intercourse. He did the gender examination but could not find out whether Tionge was involved in anal sex because it was not within his expertise and there is nobody in Malawi who can do that. On the first issue, PW7 having identified the medical report, indicated that his conclusion was that the person presented to him was a man. PW7 also tendered the report.

PW 8 Mc EVANS PHIRI

A Principal Psychiatric Clinical Officer at Zomba Mental Hospital. He told the court that he was on 6th January, 2010 presented with the two accused persons. He assessed both accused persons and his findings were that they are both fit to stand trial as they had no psychiatric symptoms and were stable. He tendered reports for each of the accused persons evidence. PW8 however, stated that in his assessment, the second accused person had gender disorientation as he considered himself a woman.

PW9 DETECTIVE INSPECTOR JUSTIN MAGRETA

Materially, PW9 told the court that police got information that two males had an engagement ceremony. He led a team of investigators to make a follow up on the same. They confirmed this and they also got information that the two had been staying together as husband and wife for about 5 months prior to the engagement.

When they traced Tionge, he told them he is a female. They arrested both accused persons. He recorded caution statements from the accused persons. Both voluntarily admitted staying together as husband (Steven) and wife (Tionge), having had the engagement ceremony and

having anal intercourse. He tendered the caution statement and evidence of arrest for each of the two accused persons in evidence.

This witness also tendered the clothes worn by the two accused persons at the engagement ceremony. A skirt and blouse (national wear) for Tionge and a shirt made from a similar cloth for Steven. Some engagement photos found on the accused persons were also tendered by this witness.

STANDARD OF PROOF

Having seen the State carry the burden of proving, in the above body of evidence; here is now the standard of proof. It is a high standard of proving every material element of the offence beyond any reasonable doubt. Proof beyond reasonable doubt; that's the standard.

In **Republic vs. Chimbelenga (1996) MLR, 342**, Chimasula Phiri, J (as he was then) stated at 345 that in

> *" proving the guilt of the accused beyond reasonable doubt ... [the] court must subject the entire evidence to such scrutiny as to be satisfied, beyond reasonable doubt, that all the important elements placed on the prosecution by the substantive law are proved. If it is not so satisfied, the accused person must be acquitted."*

<u>But what is proof beyond reasonable doubt?</u>

" *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. <u>The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice</u>. If the evidence is so strong against a man as to leave only a remote possibility in his favour ... the case is proved beyond reasonable doubt....*" per Denning J in **Miller v Minister of Pensions [1947] 2 ALLER 372.**

THE LAW, ANALYSIS AND FINDINGS

At this point it now becomes the duty of the court to look at the elements of the offences under the Penal Code; and what the state brought in evidence. Regard shall also be had on the objections, cross-examination and submissions by the defence. Because the two exercised their right to silence. Which at any rate must not be viewed as as an admission of the

offence. This is a warning observed by the court, and directed to itself. We start with the section that creates the offence.

Elements under s. 153 (a) and (c)

Section 153 provides as follows:

"Any person who-

(a) Has carnal knowledge of any person against the order of nature; or
(b)
(c) Permits a male person to have carnal knowledge of him or her against the order of nature shall be guilty of a felony ...

Like in typical sexual offences, the offence of buggery is complete upon proof of canal knowledge - penetration even if emission is expressly negative. ***R v Reekspear (1832) 1 Mood 342 ; R v Cozins (1834) 6 C & P 351.***

Circumstantial evidence

But under the first count nobody testified on the two people having carnal knowledge. Hence the State has argued for circumstantial evidence of carnal knowledge. The State must prove that Steven had carnal knowledge of Tiwonge. The State must also prove that Tiwonge allowed Steven carnal knowledge. In any case if this is proved, the method used should be deemed to have been against the order of nature because the two are men.

That would be the basic elements of the offence.

What is circumstantial evidence?

Circumstantial evidence is evidence of relevant facts. These facts are from which the existence or non existence of facts in issue may be **inferred.** It does not necessarily follow that the weight to be attached to this kind of evidence will be less than that to be attached to evidence of a direct nature. A tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, than to direct

evidence to the contrary, coming from the witnesses lacking credibility – ***Blackstone's Criminal Practice, 1777***

Circumstantial evidence works **cumulatively in Geometrical Progression eliminating other possibilities.** It is like a rope comprising several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. ***DPP vs Kilbourne [1973] AC 729.***

In circumstantial evidence there may be a ***combination of circumstances none of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt that human affair can require or admit of*** – **Exall (1866) 4F & F, 922 at 929.**

That would be basically the law and the State shares that view.

But it was the argument of the Defence that if the court is to find a case against an accused person based on circumstantial evidence, then the evidence should be such that it is not in any way compatible with the innocence of an accused person. In other words, the evidence presented must be capable of one and only one conclusion and that is the accused person's guilt. See: ***Moyo vs. Rep, 4 ALR (Mal), 470***, Bolt, J stated at 474:

> *"...in any a case depending on circumstantial evidence only ... a Court of Law can only convict an accused person* ***if one inference, and one inference only, is possible.*** *Where several inferences are open, some consistent with innocence and others consistent with guilt, it is not open to a Magistrate, in the absence of any other evidence, to choose the inferences consistent with guilt and to reject the inferences consistent with innocence. I repeat: for a conviction, only one inference must be possible, and in the present case on the evidence adduced numerous inferences were open."*

The mere fact that there is strong suspicion against an accused person will not suffice, as Banda, Ag J (as he was then) stated in ***Mtama vs. Rep, 10 MLR, 15,*** suspicion cannot form a basis of conviction. Verbatim, he stated at p. 17.

Each link in a chain of evidence must be unassailable and its cumulative effect must be inconsistent with any **rational conclusion** rather than guilt. See the case of ***Jailosi v R 4 ALR (Mal), 494.***

Admissions/Confessions

On admissions the Defence argued that It is the position of the law that where there is a plea of "not guilty" every element of the offence becomes in issue and anything in form of admission by the accused at the police or at any point cannot be used as evidence against him. In ***Chisenga v. Rep, 16(1) MLR, 52,*** the Supreme Court of Appeal, stated at 56:

> *"The prosecution ... cannot rely on a confession, denied confession, whether or not it is corroborated, bearing in mind that a plea of not guilt puts every material fact in issue and anything in the nature of an admission by an accused person before the trial, ought, in such circumstances, to be disregarded by the court. ...*

Under the new constitutional dispensation, it has been held that any admissions obtained under duress is unusable: ***Republic vs. Chizumila & others (1994) MLR, 288,*** Mwaungulu, Ag J (as he was then).

In fact, **section 176** of the ***Criminal Procedure and Evidence Code***, has to the extent that it makes forced admissions admissible, expressly, been declared invalid. In ***Republic vs. Chinthiti and Others (1)(1997) 1 MLR, 59*** Nyirenda J (as he was then) stated at 69:

> *"What is certain is that section176 of our Criminal Procedure and Evidence Code cannot stand the test of time. To the extent that the provision allows for involuntary confessions, it is consistent with section 42(2)(c) of the Constitution and, therefore, pursuant to section 5 and section 200 of the Constitution, in so far and to the extent of the inconsistency, the section is invalid."*

The defence further argued that all the State witnesses who alleged that the accused persons confirmed the doing of the alleged acts, stated that the same was confirmed by the second accused person. As per the law, these admissions do not bind the first accused person as he has not adopted them. Even if such statements were to be admissible as far as

facts are concerned therefore, the same would be used against the first accused person.

The Defence also argued that the two accused persons were compelled by the State to make the admissions just as was the case with their being taken to the hospital. It is also clear that the second accused person was compelled by her employer to undress and say what she said. In the present case, the defence expressly challenged the confessions and retracted them. The State however, did not even attempt to prove that the confessions were freely made. In those circumstances, the State cannot use such admissions and confessions as evidence. Neither can section 176 of the Criminal Procedure and Evidence Code come to the aid of the State as the same has in such circumstances already been declared invalid.

Even if all the evidence presented by the State was to be admissible, says the Defence, there is still a lot of doubt as regards the accused person's guilt. All the evidence presented by the State only tells one story. The accused persons were staying together. On 26th December 2009, they got engaged. On 28th December 2009 they got arrested and charged.

The State witnesses said that the fact that the two accused persons got engaged on 26th December 2009, meant that prior to that, they were never married. There is therefore, no basis for imputing sexual intercourse prior to that. Even in heterosexual relationship people stay together and never have sex until after marriage. Sexual activities cannot therefore be imputed by the mere fact of staying together.

The Defence then concluded with **Section 176(2) of the Criminal Procedure and Evidence Code**

> *"No confession made by any person shall be admissible as evidence against any other person except to such an extent as that other person may adopt it as his own."* [and **Thomson Fulaye Bokhobokho et al vs. Republic, MSCA Criminal Appeal No. 10 of 2000.**

Quoting Section 42 (2)(c) of the Constitution of the Republic of Malawi **the State agrees** that the provision gives a right to the accused person not to be compelled to make a confession or admission which could be used in evidence against him or her. However, in the case of ***R v Chinthiti (1997)(1) MLR, 59*** the court upholds voluntary confessions as being admissible. See also the case of **R v Chizumila. (1994) MLR, 288** and Section 176 of the Cp &EC also gives guidelines on confession evidence.

Much as there may be no direct evidence to prove that the two were having sex against the order of nature, the State argued that there is direct evidence proving both accused persons' gender, the first accused is male. PW 7, Dr. Makanani told the court that he be examined the second accused and that his findings were that the second accused is also a male. PW1, PW2, PW3 and PW4 expressly told the court they know the two accused persons and stayed together as husband and wife. PW 4 went further to state that she gave the second accused a room to be staying with the first suspect as her husband and all the time that they lived in her compound she took the two accused persons as a husband and wife.

Much as neither Dr. Makanani nor any doctor in Malawi could not examine the second accused to find out if he had need having sex through the anus, there by giving the court direct evidence of anal sex taking place between the two, the circumstantial evidence is strong enough to impute that the two were really having sex against the order of nature.

The two accused persons were staying together in the same house, they were telling people were staying together in the same house, they were telling people they are husband and wife with the second accused person telling people and behaving like a woman.

The argument by the defence that there is no way the two may have had sex because they were yet to formalize their relations does not hold water at all. That is according to the State. There are so many people in heterosexual relationships staying together without formalizing their relationships and yet they have sex and bear children. **Sex through the anus (against the order of nature) is the only reasonable and rational conclusion that can be derived from the conduct and everything that took place between the first and the second accused.** See the case of **Nyamizinga v R, Moyo v R** and **Jailosi v R** cited above.

On the defence alluding to the fact that there is no person who has direct or personal knowledge of the two having sex against the order of nature the State argued that Sex takes place in private, there is no way a single soul would have been present to witness the two having sex through the anus.

PW3 and 4, after seeing the story about the two accused persons in the newspaper, inquired from the second accused how they were having sex

as a family when both of them were men, and the second accused is said to have told them that they were having it through the anus.

Further to that, both accused persons voluntarily admitted in their caution statements that they were staying together and they used to have sex through the anus. The investigator who recorded statements which were properly signed by the two indicated to the court that there was **Counsel** present and **representing the two** through the recording of the caution statements. The presence of Counsel during the recording of statements from the two accused persons rules out all possibilities of the police forcing or compelling the two to confess and later sign for the confessions.

The confessions were thus voluntary and admissible as evidence under **Section 42(2)(c) of the Constitution** and even under **Section 176 CP & EC** which is to the effect that the court may take a confession into account in reaching its decision if it is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true as it was in the present case.

It is trite law that there is no other better evidence than that of a person admitting himself that he did a certain act. Even though the two accused persons pleaded not guilty in court, yet they admitted having sexual relations through the anus both to PW 3 and PW 4 and in their caution statements.

The confessions of the two accused persons are corroborated by the fact that they were living together as a husband and wife in the same house for five months and there was a great opportunity for them to commit the offences considering that they were portraying themselves as a husband and wife.

On the Defence opting for silence the State, observed that this is his constitutional right and does not corroborate the evidence against them. However, there are circumstances where it is reasonable that a reply is expected. It was stated in the case of ***R v Phiri Confi. Case No 914, 1973 Mal. (Unreported)*** that *"Undoubtedly when persons are speaking on even terms, and a charge is made and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge that is evidence to show that he admits the charge to be true."* The State submits that this is an example of a case where silence would give an impression of an admission of the allegation against the accused persons.

Here the Court would like to distinguish outright this 1973 case as a case that was blind to the 1994 constitution and proceed to dismiss the State's

submission and regard the accused persons in the context of innocent people exercising the constitutional right to silence.

THE ALTENATIVE CHARGE OF INDECENT PRACTICES BETWEEN MALES

Coming to the alternative Charge of indecent practices between males the **Elements of the offence come under** **Section 156** of the PC which provides that:

> *"Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable ..."*

According to the Defence, and from the wording of section 156 above, the critical element that the State must prove is that there were acts of gross indecency. It is not sufficient that there was indecency.

Under section 156 therefore, the State must establish where mere indecency ends and where gross indecency begins as mere indecency is no offence under section 156. That is the observation by the Defence..

From the evidence tendered, there is no witness who has personal or direct knowledge of the commission of the offences herein; except that State witnesses, were made to say in cross-examination that people can only be deemed married after the engagement. Since the two accused persons were arrested immediately after their engagement, at what point then, did they commit the alleged activities ? That seems the question paused by the Defence and concludes that an imputation of sexual intercourse cannot be made by the mere fact that people used to stay together.

But according to the State in the case of ***R v Pearce (1951) 1 All ER 493***, it was held that if two male persons are to be convicted of gross indecency the prosecution must prove that they were acting in consent of both, and there is no reason why, where two persons are jointly indicted for such an offence and the necessary evidence is not forthcoming, one should not

be convicted and the other acquitted. See also ***R v Hall (1963) 2 All ER 1075***.

Indecency is defined by the ***Oxford Advanced Learners Dictionary (1989 4th Ed)*** as being indecent or doing indecent behavior and ' indecent' is defined as something offending against accepted standards of morality.

In ***R v Stanley [1965] 2 QB 327*** at 333 Parker CJ stated that the words "indecent and obscene" convey one idea namely offending against the recognized standards of propriety, indecent being on the lower end of the scale and obscenity being on the upper end of the scale. It was observed by Lord Woolf CJ. ***R v Smethurst [2002] Cr. App. R. 50*** at ***p.58*** that **"the society is the ultimate guardian of decency."**

Therefore, the Stae argues, ***an engagement in a Malawian setting takes place between a man and a woman***. Similarly only a man and a woman can live together as husband and wife.

The two accused persons both being male were living as a husband and wife, says the state, and later they went further to have an engagement ceremony and this is conduct which is totally against the accepted moral standards.

The engagement and the living together as husband and wife of the two accused persons, who are both males, transgresses the Malawian recognized standards of propriety since it does not recognize the living of a man with another as husband and wife and two men having an engagement ceremony with each other. Both these acts were acts of gross indecency.

Both the two accused persons voluntarily submitted themselves to the "marriage" and the engagement ceremony and they intended to do just that.

To conclude the submissions it is the **Defence** view that from the foregoing the State has failed not only to prove the major elements of the offences herein and that the evidence does not reach the required standard of proof beyond reasonable doubt. To the contrary, there is a lot of doubts as regards the accused persons' guilt. Further, the case turns on the evidence which is wholly inadmissible. The Defence therefore **prays** that the accused persons herein be acquitted the State having failed to prove their case to the required standard.

But the State observes otherwise: There was evidence proving that the two accused persons voluntarily lived together as husband and wife and they prepared for and organized an engagement ceremony.

The State therefore submits that there is also proof beyond reasonable doubt of the fact that the two accused persons committed acts of gross indecency.

It is the State's view that it has brought evidence before the Court to prove beyond reasonable doubt that the first accused had carnal knowledge of the second accused against the order of nature and that the second accused permitted the first accused to have carnal knowledge of him against the order of nature.

Proof has also been given of the fact that by holding a public engagement and living together as husband wife, the two accused persons acted with gross indecency.

It is the State's **prayer** before this honourable court therefore that the accused persons be found guilty as on the charged and convicted.

THE FINDINGS

To begin our findings, the court would like to explore the assertions that s. 176 CPEC is **invalid** per Justice Nyirenda in the ***Chinthiti case (1997)***. The section is based on confessions. This was advanced by the defence mainly because both Steven and Tionge in their statements at police do admit that they were having carnal knowledge among other things through the anus: Steven playing the part of ' man' and Tionge the 'woman'. The Defence also argued that Tionge was forced to undress to prove that he was a man.

So far we agree with the Defence that 'any admissions obtained under duress is unusable . This comes from the case of ***Republic vs. Chizumila & others (1994) MLR, 288*** *per* Mwaungulu, Ag J (as he was then). When I read that case I understood why the High court made that finding. It was because Lameck Chizumira and others went to the house of Krufferbergers in Chigumula for burglary and theft. Police tortured them to get a confession.

But not in this particular case. We find no use of force by the police when Tionge and Steven were taken statements, each one of them separately explaining how they had anal sex. So the confessions are allowed is in this court because they were made in the presence of Counsel. That is our finding. Further because something important about section 176, CPEC was not discussed. Confessions under that section would be admitted in court if there is corroboration. **Corroboration means *independent evidence*. Further it means that confessions may not stand alone and secure conviction**. For example, we may not end at if Steven and Tionge confessed that they have sexual intercourse the unusual way therefore

they are guilty, no. There must be pointers, or independent evidence to that effect.

Then another question could be, what do we do with the High Court decision of Judge Nyirenda, that s.176 is unconstitutional and invalid. Before we answer this question, let it be put on record that the intention of Parliament as recent as **January of this year 2010**, that was when the amendments were published, is that s. 176 CPEC is still valid. I consider the decision to be deliberate. Out of the numerous little amendments to the Act, section 176 was left intact, despite the ***Chinthiti judgment***.

So, the answer to the question arising from the Chinthiti judgment, the answer is found in two other High Court cases. First, the same ***Chizumira case***. There, Judge Mwaungulu after observing that evidence or confession obtained by duress should be excluded completely because its inclusion would be part of perpetration of an abridgement of a fundamental right in s. 42(2)(c) of the Constitution, ***he did not attempt to declare s.176 unconstitutional*** like his brother Judge Nyirenda.

Secondly, to answer the question 'is s.176 invalid?' there are several decisions of the same High Court, but we shall regard this other decision by the same Judge Mwaungulu in ***Jasi v Rep (1997) Cr. Cas. No. 64***. In this case Judge Mwaungulu among other things lamented why the *Chinthiti case* did not mention the earlier *Chizumira case* despite the fact that 'many authorities cited in it [Chinthiti] and the reasoning in it was the background to the [Chinthiti] decision'.

In short, on whether this court is to admit the confessions of Steven and Tionge or the evidence of being forced to be examined by a doctor (not experimented upon) or forced to undress, I shall follow the judge Mwaungulu approach because (to ironically quote Justice Nyirenda) **'many legal provisions are capable of abuse, but that does not make them repugnant to the rule of law, justice and human rights'**. The Mwaungulu approach is wider. It provides for a way forward for the magistracy, I would say, on how to envisage a limitation (when duress is proved in a case) when applying s. 176.

Confessions cannot be inadmissible at a mere suggestion that it was obtained by force. It must be proved that force was in fact used. Or the court must make a finding that force was in fact used. In fact even if force is used that fact goes to the weight to be attached to the evidence.

There is also another angle to be examined; what if the confession contains the truth. Now to find this truth, we go look for corroboration, or independent evidence. Like in this case the state has through its witnesses

proved that Tionge is a man. He has all along preferred to be in women clothes and amongst women. We also find it proved that he cheated a police officer that he was a woman. He also cheated at the lodge and several places that he was a woman. This behavior (see: ***R v Kaluwa 1964-66 ALR mal 356 at 365)*** is corroboration enough that he played the role of a woman. We also find the evidence of the witness who described a bedsitter as a dwelling house of the two to be true. This is where the two are said to be living as husband and wife. There was also the introduction of the 'wife' in Tionge to his grandmother by Steve. All these and many others do work as independent pieces of evidence supporting the two men's statements that they used to carress each other and had anal sex for five months before going public into a chinkhoswe ceremony.

Having made these findings and remembering that

" *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice";*

I find the evidence is so strong against the two men as to leave only a remote possibility in their favour The case is proved beyond reasonable doubt **I find that the state has established its case beyond reasonable doubt and we find Steven Monjeza guilty of buggery(c/s 153(a),i.e. having carnal knowledge of Tionge through the anus of the said Tionge, which is against the order of nature and therefore I convict him accordingly.**

For the same reasoning as above we also find that the state has established its case beyond reasonable doubt and we find Tionge Chimbalanga guilty of permitting buggery (c/s 153(c) i.e allowing Steven to have carnal knowledge through the anus of his (Tionge's) which is against the order of nature and therefore convict him accordingly. I warn myself for convicting the two on corroborated evidence.

Following the arguments based on circumstantial evidence I would also arrive at the same convictions:

Given that "Circumstantial evidence works **cumulatively in Geometrical Progression** eliminating other possibilities. It is like a rope comprising several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. "

And also observing that "In circumstantial evidence there may be a ***combination of circumstances none of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together";***

And " that if the court is to find a case against an accused person based on circumstantial evidence, the evidence should be such that it is not in anyway compatible with the innocence of an accused person except the accused person's guilt.

When we take all this above into consideration we find it is fanciful to think that this was a rare conventional couple where people could only be deemed married and have sexual intercourse, only after the engagement and not before.

Therefore the Prosecution's proof beyond reasonable doubt of a man who behaves like a woman and likes to be treated as such; the wearing of female clothes by one; the engagement or purported engagement of the two (to the extent of hiring a photographer); the soundness of their mind; their both being male; and the lie which Tionge had been telling people that he was a woman; all these leave us with one rational conclusion or inference leading to only the guilt of Steven having anal carnal knowledge of Tionge and Tionge permitting it by the anus c/s 153(a) and (c) respectively and therefore convict both of them of the offence of buggery. Otherwise"the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice".

In the altenative and according to the State (see the case of ***R v Pearce (1951) 1 All ER 493)*** we find that two male persons are found to be in gross indecency because the prosecution has proved that they were acting in consent. And there is no reason why, where two persons are jointly indicted for such an offence and the necessary evidence is forthcoming, one should not be convicted and the other acquitted. We also find **Indecency** established as defined by the ***Oxford Advanced Learners Dictionary (1989 4th Ed).*** That is being indecent or doing indecent behavior ; where 'indecent' is defined as something offending against accepted standards of morality. Surely, "indecent and obscene" convey one idea namely offending against the recognized standards of propriety, indecent being on the lower end of the scale and obscenity being on the upper end of the scale.

Here the State also proved that the two lived together as husband and wife and we conclude that ***an engagement in a Malawian setting indeed takes place between a man and a woman.*** So when two persons, both

being male, were living as husband and wife, and later they went further to have an engagement ceremony; we find bthis is conduct which is totally against the accepted moral standards.

The engagement and the living together as husband and wife of the two accused persons, who are both males, transgresses the Malawian recognized standards of propriety since it does not recognize the living of a man with another as husband and wife. Both these acts were acts of gross indecency.

Both the two accused persons voluntarily submitted themselves to the "marriage" and the engagement ceremony and they intended to do just that. One has to see the smiles and ceremony in pictures which we admit in evidence to complete the intention.

All in all the court, upon the evidence adduced above, find, even in the altenative, Steven Monjeza and Tionge Chimbalanga guilty of indecent practices by males c/s 156 and we convict them accordingly. Otherwise ''the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice''.

DELIVERED in Open Court at Blantyre, Republic of Malawi this 18th day of May year 2010

CHIEF RESIDENT MAGISTRATE COURT SEAL SO

Nyakwawa Usiwa-Usiwa

CHIEF RESIDENT MAGISTRATE (SOUTHERN REGION)

Case called on 20th May 2010

Coram as before

SENTENCE

We convicted Steven Monjeza Soko, 26, and Tiwonge Chimbalanga Kachepa, 20, two days ago. They were convicted of buggery contrary to section 153 of the Penal Code. In the alternative charge, they were also convicted of the practicing of indecent acts by males, contrary to section 156 of the same Code.

Since the main charges were buggery and permitting buggery under sections 153 (a) and (c) of the Code; and for the purposes of sentencing we shall deal with these alone, leaving aside the sentence for practicing indecent acts by males. Suffice to state that **all the offences carry with them a sense of shock against the morals of a Malawian society.**

The **maximum penalty** under s. 153 is 14 years imprisonment with hard labour (IHL).

In an attempt to guide the court the State in its submission cited a number of sodomy cases. In ***Rep v Raphael Malira Conf. No. 13 of 2008 (ZA High Court Registry)*** the appellant was convicted of having anal sex with his niece. He was sentenced to 14 years Imprisonment with Hard Labour; but which was reduced to 7 years by the High Court. After reconsidering the factors of being young and a first offender.

In the case of ***R. v Betland Crim Case 159 of 2007*** a sentence of 6 ½ years was reduced to 6 years by the High Court. But 6 years was confirmed in ***R v Christopher Masaknira (Crim. Cas. 629 of 2007***.

The State then went on to say that the present case must surpass these cases because the convicts have not shown any **remorse**. They actually seem proud of what they did. And I agree. Further the court is called upon to consider " **the scar** the case will leave on our morality". That was the conclusion by **Supt. Babra Mchenga** assisting her **RPO Supt. Mtete.**

Then the Defence took its turn; in what I have considered the longest mitigation plea that has ever been presented before me. And it was well argued; very moving. In fact in this case I have to put it on record that both sides were articulate and very able.

Mr Mawuya Msuku of counsel for the Defendants made a long submission that could be summarized under three heads: **First**, that the convicts are first offenders who do not deserve custodial sentence under **sections 339 and 340** of the **Criminal Procedure and Evidence Code.** Unless there is a reason to do so. Otherwise there are so many ways of disposing of the

case like passing suspended sentence; or a custodial sentence that can be backdated to have them released. The two deserve some sympathy in line with the dicta of the late Justice Kumange in ***Rashid Hussein James v Rep Appeal No 12 of 1999***.

Secondly, he argued that many circumstances of the case work in the favour of the convicts. For example that Tionge is a friendly person and a dedicated church goer; a hard worker, who even earned the sympathy of the employer's children at Mankhoma Lodge. So the remedy according to Counsel is that the convicts ought to be "forgiven, loved, preached unto and incorporated". Or just be counseled per Mr Phiri of Zomba Mental Hospital.

Thirdly, Mr Msuku submitted that though a felony, the case has been a technical one: that there is "no real complainant" and no victim in this case. The two lived for 5 months like husband and wife and there was no harm to society. Some offences are committed honestly. They innocently stayed together and wanted the public to celebrate with them without malice aforethought. He said quoting the State that the case was "**the first of its kind**" so that "**the Court sitting in place of society**" can just admonish them ie giving them some light sentence. He cited cases where serious offences attracted non custodial sentences.

Finally counsel said that because these were consenting adults, **sending them to prison is like sending married people to prison** as nobody got bruised nor injured by these relatively young men who must be protected by the court.

After listening to these submissions, I was reminded of the eloquent **Mr Morgan** sometime in 1972 when he was making submissions before Chief Justice Mr Skinner in order to save **Mr Ajaj Georges Yaghi** and his friend **Mr Fouad Abu Kamil** in the case which is reported as ***Rep v Kamil and Yaghi (1971-2) ALR Mal 358***.

This is a case that teaches us in sentencing that "**maximum sentences are intended for use in the worst instances of the offence.**" See also **Justice Tambala, SC** in ***Ayami v Rep [1990] 13 MLR 19 at pp28-29*** .

Going back to the eloquence of Mr Morgan in the case of ***Kamil and Yaghi*** he argued before the Court, among other things, that in that case

"... there was no brutality. There was no battery, there was no thuggery in the sense of assault, and indeed there was no injury to anybody."

I found this argument very powerful and persuasive like Mr Msuku's. The only difference was that the ***Kamil and Yaghi case*** was a case where the two men had hijacked a South African Airways plane from Salisbury onto Chileka Airport.

At that time Malawi had not legislated against high jacking as we have it today in the **Highjacking Act.** It was **the first of its kind**. No wonder the men were charged with and convicted of offences like "demanding property with menaces". Because, among other things the men demanded money not less than $ 5m or blow up the aircraft. They had dynamite and cigarette lighters to make their threat sound real. Passengers were held hostage.

Finally, Chief Justice Skinner did not take what Counsel Morgan, Wills and Kumitsonyo said. He among other sentences passed a **five-year sentence for "demanding property with menaces"**. His reasoning was like this:

" I bear in mind that they are men of previous good character, but people who do desperate things like this are likely to do it again, and **the public must also be protected from others who may be tempted to emulate their example.**"

Coming to the present case when Learned Counsel for the Defendants said that **sending them to prison is like sending married people to prison** I thought he was equating the **bizarre** marriage in this case to a normal practice of any other lawful marriage in Malawi. Be it as it may, I want to put it on record here that this I find to be grossly wrong.

Fortunately, Learned Counsel put this court in a very correct context: that we are sitting in place of the Malawi society. Which I do not believe is ready at this point in time to see its sons getting married to other sons, or cohabiting or conducting engagement ceremonies. I do not believe Malawi is ready to smile at her daughters marrying each other. **Let posterity judge this judgment.**

So this case being **"the first of its kind"**, to me, that becomes **"the worst of its kind"**. I cannot imagine more aggravated sodomy than where the perpetrators go on to **seek heroism**, without any remorse, in public, and think of corrupting the mind of a whole nation with a *chinkhoswe* ceremony. For that, I shall pass a **scaring** sentence so that **"the public must also be protected from others who may be tempted to emulate their [horrendous] example".**

By the way, in the ***Kamil and Yaghi case*** five years IHL was the maximum sentence for demanding property with menaces, among other offences. So I sentence Steven Monjeza and Tionge Chimbalanga to **14 years IHL each** and that is the maximum under section 153 of the Penal Code, for the reasons I have explained above.

I need not remind Counsel that both the conviction and this sentence are appealable before the High Court of Malawi.

PRONOUNCED in Open Court at Blantyre, Republic of Malawi this 20th day of May year 2010

CHIEF RESIDENT MAGISTRATE COURT SEAL SOUTH

Nyakwawa Usiwa-Usiwa

CHIEF RESIDENT MAGISTRATE (SOUTHERN REGION)