IN THE SUPREME COURT OF ZAMBIA **APPEAL Nos. 418, 419, 420, 421 of 2013**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

STELLA MUMBA CHIBANDA	**1ST APPELLANT**
DR. KATELE KALUMBA	**2ND APPELLANT**
FAUSTIN MWENYA KABWE	**3RD APPELLANT**
AARON CHUNGU	**4TH APPELLANT**

AND

THE PEOPLE **RESPONDENT**

Coram: Malila, CJ, Kaoma and Chinyama, JJS.

On 13th October 2022 and 29th December 2022

For the 1st and 2nd Appellants: Mr. G. Mileji of Malambo & Co

For the 3rd and 4th Appellants: Mrs. K. Liswaniso - Senior Legal Aid Counsel

For the Respondent: Mrs. M.K Chipanta-Mwansa - Deputy Chief State Advocate

---

J U D G M E N T

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Mucheleta v The People - SCZ Appeal No. 124 of 2015**
2. **Humphrey Masauso Phiri & 4 Others v The People - SCZ Appeal Nos. 153/154/155/156/157 of 2015**
3. **Bright Kaweme v The People - SCZ Appeal No. 140/2015**
4. **Sensenta v The People (1976) Z.R. 184**
5. **Joshua Mapushi v The Queen (1963–1964) N.R.L.R and Z.R 90**
6. **Patel v Attorney General (1969) Z.R. 97**
7. **William Muzala Chipango and Others v The People (1978) Z.R. 304**
8. **Maseka v The People (1972) Z.R. 9**
9. **Saluwema v The People (1965) Z.R. 4**
10. **Samuel Sooli v The People (1981) Z.R. 298**
11. **Mushemi Mushemi v The People (1982) Z.R. 71**
12. **Lumus Agricultural Services Company Limited, Linus Agricultural Services Company v Gwembe Valley Development Company Limited (In Receivership) (1999) Z.R. 1**
13. **Re Thomas Mumba (1984) Z.R. 38**
14. **Mutale and Phiri v The People (1995 – 1997) Z.R. 227**

15. **Imusho v The People (1972) Z.R. 77**
16. **The People v Winter Makowela and Robby Tayabunga (1979) Z.R.290**
17. **Manda v The People (1988 – 1989) Z.R. 129**
18. **Mutambo and 5 Others v The People (1965) Z.R. 15**
19. **Mwape v The People (1976) Z.R. 160**
20. **Salomon v Salomon (1897) A.C. 22**

Statutes referred to-

1. **Anti-Corruption Commission Act No. 46 of 1996, sections 29(1), 29(2), 41 and 46**
2. **Criminal Procedure Code, Cap 88, sections 88(a), 89, 206**
3. **Constitution of Zambia, Cap 1, Article 18(1), (2)(c)(e)**
4. **Mutual Legal Assistance in Criminal Matters Act, Cap 98, sections 9, 38, 39, 40**
5. **Authentication of Documents Act, Cap 75, section 3**
6. **Zambia Security Intelligence Act, No. 14 of 1998, sections 11, 12**
7. **Banking and Financial Services Act, Cap 387**
8. **Penal Code, Cap 87, sections 21, 22**
9. **Anti-Corruption Commission Act No. 2 of 2012, section 66(3)**
10. **Anti-Corruption Commission Act No. 38 of 2010, section 61(2)**

Works referred to:

1. **Archbold, Criminal Pleadings, Evidence and Practice, 1969 Edition, paragraph 3491**
2. **Black's Law Dictionary, Brian A. Garner, page 371**

1.0 Introduction

1.1 When we initially heard these appeals on 12th October 2016, we sat with Mr. Justice Gregory Phiri. The learned judge subsequently retired from Judicial Office. The panel having been depleted and for reasons beyond this Court's control, we had to rehear the appeals. We deeply regret the long delay in determining this matter.

2.0 Background

2.1 The four appellants, Stella Mumba Chibanda, Dr. Katele Kalumba, Faustin Mwenya Kabwe and Aaron Chungu, together with other persons, who included Professor Benjamin Mweene were charged with

offences relating to corrupt practices under the **Anti-Corruption Commission Act No. 46 of 1996** (the Act).

2.2 The 1st and the 2nd appellants were public officers employed in the Ministry of Finance and National Planning. The 1st appellant served initially as Director-External Resources Mobilisation (ERM) and later as Permanent Secretary (PS) while the 2nd appellant was the Minister of Finance from July 1999. The 3rd appellant was a director and Chief Executive Officer in Access Financial Services Limited (AFSL) while the 4th appellant was a shareholder and Executive Director in AFSL.

2.3 As far back as 1994, the Government of the Republic of Zambia (GRZ) had been executing memoranda of understanding (MOU) and contracts with System Innovations and Wilbain Incorporated (the two American companies). The MOU and contracts were for the supply and installation of communication and security systems and equipment and steel fencing at Government premises.

2.4 The premises included State House (Village Complex), the Vice President's residence, the Ministry of Defence headquarters, the New Cabinet Office building, the Ministry of Finance, the Judiciary (popularly known as the High Court) at Lusaka, and the Lusaka International Airport. The Zambia Security Intelligence Service (ZSIS) or Office of the President (OP) headed by then Director-General, Xavier Franklin Chungu (Mr. Chungu), was involved in the making of the MOU and the contracts.

2.5 Professor Benjamin Mweene, the then Secretary to the Treasury in the Ministry of Finance who was the competent authority at the time signed two such contracts, between GRZ and System Innovations relating to the supply and installation of communication equipment at State House dated 18th March 1997 and at Cabinet Office dated 7th July 1998. The two contracts were the basis of the offences against Professor Benjamin Mweene and one of the two offences against the 3rd and 4th appellants.

2.6 PW2, Gideon Lintini, who was a Director in the Investment and Debt Management Department at the Ministry of Finance from 2003, produced the MOU and the contracts in issue, at the trial. He labelled them as "security contracts" based on the involvement of the OP. He agreed, in relation to the two contracts signed by Professor Mweene that the professor was merely signing to conclude a process began by others, long before he became Secretary to the Treasury.

2.7 The Ministry of Finance raised and processed the payments under the subject contracts and the payments were remitted through the Bank of Zambia (BoZ) to the ZAMTROP account at the Zambia National Commercial Bank (ZANACO), London Branch for onward payment to the two American companies. The ZAMTROP account was operated under the control of Mr. Chungu, who was the sole signatory.

2.8 It was accepted that the failure or delay in effecting payments to the two American companies would be sanctioned by a penalty under a term in the contracts, which was costly to the Government.

2.9 On 31st May, 1995, Mr. Chungu, as Director-General of the ZSIS, wrote a letter (Exhibit P250) to Mr. G.A. Ruskosky of System Innovations advising that the ZSIS would be providing funds to the company from time to time and would be instructing the company on the disbursement of the funds.

2.10 There was undisputed evidence that on 29th December 1995 and 16th January 1996, Wilbain Incorporated (not System Innovations) remitted funds in the sums of US$147,988.19 and US$114,982.96 respectively to the ZAMTROP account. However, the evidence did not show any explanation for the payment of the said monies.

2.11 Allegations of overpayments to the two American companies arose. The1st and 2nd appellants were alleged to have received unconventional gifts for the role they played in facilitating and authorising payments to the ZAMTROP account while the 3rd and 4th appellants were alleged to have corruptly given a farm to the 1st appellant and constructed a cottage for Professor Mweene.

2.12 Consequently, the four appellants and their co-accused were charged with various offences and they appeared before the Subordinate Court at Lusaka presided over by the Principal Resident Magistrate, E.L. Musona (as he then was). However, the prosecution withdrew the

charges against two of the accused before trial commenced and they were discharged in accordance with **section 88(a)** of the **Criminal Procedure Code, Cap 88**. The appellants and the remaining accused persons were tried and they were convicted of some of the offences.

3.0 Charges against the 1st appellant

3.1 The 1st appellant was convicted of five out of nine counts of corrupt practices by a public officer contrary to **sections 29(1)** and **41** of the Act. In count 1, it was alleged that between 1st January 1999 and 31st December 1999, while serving as Permanent Secretary in the Ministry of Finance, the 1st appellant corruptly accepted Farm No. 3585, Kabwe as gratification from Mr. Chungu and the 3rd and 4th appellants as inducement or reward for facilitating and authorising release of funds from the Ministry of Finance to the ZAMTROP account, belonging to the ZSIS held at ZANACO London Branch resulting in overpayments of US$11,493,375 and US$8,999,985 respectively to two American companies.

3.2 The remaining four counts related to the corrupt receipt of money in cash gratification from Mr. Chungu on 22nd December 1998 in the sums of US$15,000, on 27th September 1999 in the sums of US$ 11,400 and US$13,325, and on 6th October 1999 in the sum of US$18,000 as an inducement or reward for facilitating and authorising payments to the ZAMTROP account resulting in the said overpayments.

3.3 The 1st appellant was sentenced to five years simple imprisonment on each one of the five counts to run concurrently and the disputed farm was forfeited to the State.

4.0 Charges against the 2nd appellant

4.1 The 2nd appellant was convicted of one out of three counts of corrupt practices by a public officer contrary to **sections 29(1)** and **41** of the Act. It was alleged that on 10th July 2000, being Minister of Finance, he corruptly received cash money gratification in the sum of £4000 from Mr. Chungu, as an inducement or reward for facilitating payments into the ZAMTROP account resulting in the overpayments to the two American companies. He was also sentenced to five years imprisonment with hard labour.

5.0 Charges against the 3rd and 4th appellants

5.1 The 3rd and 4th appellants were convicted of two counts of corrupt practices with a public officer contrary to **sections 29(2)** and **41** of the Act. It was alleged that between 1st September 1998 and 28th February 1999, whilst acting with Mr. Chungu, they corruptly erected a cottage as gratification for Professor Benjamin Mweene who, at the time was Secretary to the Treasury in the Ministry of Finance for having signed a contract with System Innovations and authorising the release of funds to the ZAMTROP account resulting in the overpayments to the two American companies.

5.2 On the second count, they were alleged to have, between 1st January and 31st December 1999 acted jointly with Mr. Chungu in corruptly giving as gratification Farm No. 3585, Kabwe to the 1st appellant as an inducement or reward to her for facilitating the release of funds to the ZAMTROP account which resulted in the said overpayments. They were each sentenced to five years imprisonment with hard labour on each count to run concurrently.

6.0 Evidence against the 1st appellant

6.1 The evidence relating to the 1st appellant was that requests for release of funds to pay towards the subject contracts were initiated within the ERM Department which she headed as Director. A numbered payment instruction would be sent to the BoZ authorising remittance of a stated amount of funds to the ZAMTROP account in favour of any of the two American companies.

6.2 It was common cause that the process of raising a payment required details of the contract in respect of which the payment was being made to be availed to the accounting personnel for purposes of verifying the value of the payment and reconciling the amount due. However, those details were not available because the contract documents from which the information could have been obtained were not in the Data Base. The 1st appellant's explanation was that the contracts were of a security nature and were kept by the ZSIS.

6.3 Officers such as PW11, Patricia Mayepa Nyirenda who was Head Programme Analyst responsible for inputting information regarding the contracts into the Ministry Data Base, did not believe the explanation because there were military related contracts in the Data Base, which she felt qualified to be of a security nature but were not treated as such. She acknowledged, however, that there were other payments being made for contracts that were not in the Data Base.

6.4 It was undeniable that the non-availability of the contract documents impeded the reconciliation of the accounts and made it very difficult for the accounting personnel to ascertain whether there was underpayment or overpayment on the contracts in issue.

6.5 It was not in contention that the 1st appellant was quite abrasive in pushing for the payments to the two American companies to a point where she would threaten staff with transfers and even resorted to using her secretary to follow up the payment process.

6.6 There was evidence that other officers played required roles in the payment process such as PW8, Bernard Mungulube who was a Senior Internal Auditor. He testified that the 1st appellant was in charge of the payments to the two American companies even when she was Director ERM. He complained about the difficulty in verifying the legitimacy of a payment in the absence of the contracts whenever payments were sent to him for pre-audit. He passed about seven payment instructions

because he was told that they were of a security nature and that the debts would accrue interest if there were delays.

6.7 PW8 insisted that the payments were not going through the set standard procedures and whenever he reported to the PS about irregular payments, he was referred to the 1st appellant. According to PW8, the PS could control all other directors but not the 1st appellant; she was too powerful. He wanted to raise the issue in the post-audit but the 1st appellant did not approve his work plans for two years. He mentioned the issue to a principal accountant who was transferred to another Ministry and the payments continued for a long time leading to anxiety as to when they would end.

6.8 As regards the alleged overpayments to the two American companies, PW12, Norrine Ngwenya, a former Senior Economist at BoZ testified that at some point, the 1st appellant with another signatory, authorised a final instalment payment to System Innovations. This was the ninth (9th) payment instruction dated 6th November 1997 (Exhibit P150). However, instructions to pay System Innovations resumed as shown in payment instructions dated 10th December 1997 and later payment instructions.

6.9 According to PW12, some payments were made more than once on the same payment authorisation number, for instance, payment instructions dated 10th December 1997, 20th January 1998, 27th May 1998 and 27th August 1998, which were all numbered as tenth

instalment on the renegotiated agreement on the Village Complex contract. There were several other payments numbered repeatedly as eleventh and thirteenth instalments.

6.10 PW4, Fabian Hara, who worked for the BoZ as Assistant Director-Banking produced several payment authorisations in favour of the two American companies made between February 1996 and March 2000 valued up to US$40 million. During cross-examination, he was shown the contracts for the installations made by the two American companies at the various Government premises whose total value he put at about US$66 million. Arising from the contract values and the payment authorisations he produced; he opined that there was no overpayment as there was money still outstanding.

6.11 He admitted that transactions at the Ministry of Finance involving the ZSIS were conducted on a "need to know" basis for security reasons and that only the OP knew the details.

6.12 PW6, Likolo Ndalamei, who was Director of Budget in the Ministry of Finance, also testified that most security projects were not in the budget but were funded based on the approval by Parliament in a supplementary budget. He did not see anything irregular in the manner payments to System Innovations were being funded. According to this witness, when funds were paid into the ZAMTROP account, they remained Government funds and the only person who could account for the funds was the Director-General.

6.13 PW15, Christopher Daka, an accountant in the ERM Department, testified, based on the documents put to him in cross-examination that as at 25th September 2001, the Government still owed System Innovations and that Wilbain Incorporated had not been overpaid. He also stated that the overpayments were not reflected in the documents dated 14th September 2001, reconciling the payments.

6.14 However, PW15 clearly said the reconciliation was done without the benefit of the contract documents and that there was correspondence, indicating that despite the ZSIS being funded, the two American companies were not being paid in some instances, leading them to threaten to pull out their equipment and as late as 2002 payments were being made to the two companies.

6.15 PW18, Stephen Mbewe, who became Director-ERM after the 1st appellant, clarified that the reconciliations done on the indebtedness did not provide full information as regards the initial amount owed (the "original debt") and the balance due. He later saw the contracts; and in his view, there was nothing of a security nature about them.

6.16 PW32, Maulu Hamunjele, a Senior Inspector at the BoZ, seconded to the Task Force on Corruption, conducted a forensic examination of financial documents surrounding the ZAMTROP account. He analysed the ZAMTROP bank statements, payment authorisations originated by the Minister of Finance to move the money to the ZAMTROP account and source documents such as payments out.

6.17 He also examined documents from Meer, Care and Desai, a law firm based in London, which was receiving money from the ZAMTROP account, with instructions on the disbursement of the funds; and some documents from Cave Malik and Company, another firm of lawyers.

6.18 Documents from AFSL, including those from the United States of America, some of which originated from System Innovations were also analysed together with the contracts in issue. PW32 was investigating the basis on which money went to the ZAMTROP account and payments raised by officers who were connected with the transfers of the money to that account.

6.19 After examining the relevant documents, PW32 prepared a report, to which he attached the relevant documents. At the trial, the defence objected to the admission of some documents that were photocopies and those earlier rejected by the court because there was no Presidential consent. The learned DPP informed the trial court that the attachments were copies of documents already admitted in evidence and that PW32 would speak to the contents of the report after it was admitted in evidence.

6.20 The trial court admitted the Report and the attachments as Exhibit P248 but excluded the disputed documents, which were all later admitted in evidence through PWs 33, 34, and 35. However, PW32 did not speak to the details of his Report after it was admitted in evidence and none of the defence counsel cross-examined him.

6.21 PW33, Friday Tembo, a Senior Investigations Officer with the Anti-Corruption Commission seconded to the Task Force on Corruption, and one of the arresting officers spoke to PW32's conclusions in the Report and confirmed that the allegation that there were overpayments was arrived at with the help of PW32.

6.22 PW33 also produced the following documents: a memorandum from the 2nd appellant to the Secretary to the Treasury (P200), a copy of the funding profile approved by the 2nd appellant (P201), a letter authored by the 2nd appellant and addressed to the Republican President, Dr. F.T.J. Chiluba (P249) on delayed payments to the American companies and the Ruskosky letter (P250). PW33 refused to comment on the assertion that the Auditor-General had said there was no overpayment.

6.23 PW34, Cecilia Sikatele, Deputy Parliamentary Legal Counsel produced the parliamentary proceedings as they transpired on Thursday, 11th July 2002 (P252), which contained the special address to Parliament by the Republican President, Dr. Levy Patrick Mwanawasa, SC, who was compelled to reveal the transactions of the ZAMTROP account.

6.24 PW35, Nalishebo Imataa, who was then Senior Clerk of Court, Subordinate Court at Lusaka and had initially testified as PW24, was recalled to produce the ZAMTROP statement of account for account number 58/C40/070185/01, ZANACO, London Branch that PW33 could not produce due to lack of Presidential consent. She also produced certified copies of the statements for the ZAMIN Kwacha

account (P253), the ZAMIN Dollar account (P254), the ZAMTROP account for the period 11/12/95 to 31/12/98 (P255) and the ZAMTROP account for the period 30/12/98 to 27/02/01 (P256).

6.25 On the alleged corrupt receipt of the farm, the evidence was that the farm was given to the 1st appellant by Mr. Chungu with the connivance of the 3rd and 4th appellants because the money that paid for it came from the ZAMTROP account. The prosecution relied on documentary evidence produced by PW26, Grace Inonge Muyunda, who was Head-Internal Audit, Compliance and Controls at ZANACO headquarters and PW30, Geoffrey Chilufya Mulenga, who was Legal Counsel at BoZ.

6.26 PW5, Enock Mwale, who was Head of Treasury and Credit at AFSL testified that the farm was paid for by AFSL between May and July 1999 on instructions from the 4th appellant and Sebastian Mathew who was General Manager. PW5 also testified that he was told by both the 3rd and 4th appellants that the ZAMIN account held at AFSL had received funds from which the payment for the farm was drawn.

6.27 PW5 refused that AFSL gave a loan to the 1stappellant to buy the farm and he was not aware that she repaid the money. However, he agreed that AFSL used to raise funds for use in its business from various sources that comprised individuals and institutions, including the ZSIS and as a non-banking financial institution it had to satisfy its clients in accordance with the client's instructions.

6.28 PW10, Desmond Mungawa, an officer from the Debt Recovery Department at ZANACO, explained that the bank sold the farm in issue as mortgagee in possession. AFSL bid for the farm but later gave instructions that the farm was being sold to Niseo Farms Limited in which the 1st appellant was a shareholder.

6.29 PW1, Lynn Syanziba Habanji, Registrar of Lands and Deeds confirmed that records at Lands and Deeds Registry showed that Niseo Farms owned the farm, having been assigned from Shimukowa Shalaulwa on 22nd October 2001. PW19, Liywali Mukelabai, an Inspector at the Patents and Companies Registry also confirmed that the 1st appellant was among the directors and shareholders of Niseo Farms Limited.

6.30 Regarding the alleged corrupt receipt of the monies, the prosecution relied on documents produced by PWs 4, 26 and 30, which established that the 1st appellant had participated in authorising payments to the ZAMTROP account about the times she received the farm and the money gratifications drawn from that account.

7.0 Evidence against the 2nd appellant

7.1 PW4 testified that the 2nd appellant was appointed Minister of Finance from 29th June 1999. Before that, Ms. Edith Nawakwi was the Minister of Finance and during her tenure, payments to the two American companies were ongoing and when the 2nd appellant took over, the payments continued.

7.2 PW6, Likolo Ndalamei, testified that after the 2nd appellant became Minister of Finance, he gave instructions that all approvals (for funding to pay Government foreign creditors) were to be made by him in order for him to keep a close eye on expenditure in view of the country's indebtedness. Thus, from August 2000 until February 2001, there was no payment to System Innovations. He confirmed that in June 2000 the 2nd appellant received the £4000 drawn from the ZAMTROP account.

7.3 There was also evidence from PW29, Denny Kalyalya, the then Director of Economics at the BoZ that in early 2001, he attended a meeting with the 2nd appellant and Mr. Chungu where the former inquired why there were delays in paying the two American companies. Afterwards, there was one payment to System Innovations. PW29 also alluded to a document dated 6th August 2001 where the 2nd appellant wrote a comment, asking for an end to the System Innovations contract.

8.0 Evidence against the 3rd and 4th appellants

8.1 PW7, Peter Roland Chungu was running Garden Plumbers, the firm that constructed the cottage for Professor Mweene. He testified that the 3rd appellant invited him to tender for the works; he won the contract and performed it. The 3rd appellant was a director in Garden Plumbers as shown in the printout from PACRA produced by PW19. PW5 testified that the 3rd and 4th appellants gave the instruction to pay Garden Plumbers for the job done. The money was later reimbursed from the

money that Sebastian Mathew said came from Meer, Care and Desai in favour of the ZSIS.

8.2 There was also evidence from PW25, Joseph Munyoro, a Senior Inspector in the Non-Bank Supervision Department at BoZ that in December 2002 he conducted an inspection of the activities at AFSL. He established, inter alia, that there was no record that AFSL was managing funds for the ZSIS but funds came from Meer, Care and Desai, a firm of lawyers based in London. He confirmed in cross-examination that in November and December 1998 AFSL made payments to Garden Plumbers from the ZSIS funds.

8.3 However, PW25 said he found no relationship between AFSL and Wilbain Incorporated or between the 3rd Appellant and Wilbain or dealings between the 4th Appellant and the 1st Appellant or Wilbain.

8.4 On the allegation that the 3rd and 4th appellants and Mr. Chungu, corruptly gave the disputed farm to the 1st appellant for facilitating and authorising the release of funds to the ZAMTROP account, resulting in the overpayments to the two American companies, there was evidence that AFSL paid ZANACO, at the instruction of the 3rd and 4th appellants and Sebastian Mathew and that AFSL did not give a loan to the 1st appellant to purchase the farm. The money was traced to the ZSIS and the 1st appellant never paid it back.

8.5 PW14, Swatulani Munthali testified that the 3rd appellant (who was the majority shareholder) and he incorporated a company called Syblis that

had one client only, System Innovations, to which it provided maintenance support for the security systems installed for the Government. Syblis presented its bills for payment to System Innovations through AFSL where the 3rd appellant was a shareholder. PW19, Liywali Mukelabai confirmed that the directors of AFSL listed at PACRA included the 3rd appellant and PW14 while shareholders included the 3rd appellant and his wife Ireen Kabwe.

9.0 The case for the appellants

9.1 The 1st appellant testified that she served in the public service at the Ministry of Finance and rose through the ranks, up to the position of Director, ERM and then Permanent Secretary (PS). As PS, she had no power to contract debts on behalf of the Government; only the Minister of Finance and the Secretary to the Treasury could.

9.2 She conceded that information on the contracts in issue was not in the Data Base but explained that this was the case even before she started dealing with the debts and that the contracts were of a security nature. According to her, PW11 was too junior to be informed why they treated the contracts in issue in that manner.

9.3 She denied that Mr. Chungu acting with the 3rd and 4th appellants gave her the farm or that it was an inducement or reward. She explained that the farm was advertised by ZANACO as mortgagee in possession. Since she had an account with ZANACO, she requested a loan to buy

the farm but the bank refused as it wanted cash. She then approached AFSL that agreed to bid for the farm on her behalf and to finance the purchase. The 4th appellant was her contact.

9.4 AFSL bid for the farm, paid for it, and later advised her to take possession to avoid vandalism. By then she had not paid anything for the farm. The farm was registered in the name of Niseo Farms Limited, which she was advised to incorporate. The farm had nothing to do with the payments to the two American companies.

9.5 The 1st appellant admitted knowing Mr. Chungu. She said she worked for the ZSIS as an agent and interacted with him. She was also a member of several enterprises operated by the ZSIS. The ZSIS remunerated her in cash and in kind for her services; and the payments came from the ZAMTROP account.

9.6 She said she intended to repay the money used by AFSL to buy the farm as shown by the Stanbic cheque payment dated 15th May 2001 in the sum of K4,375,000, which DW4, Wamulume Mataa, Head Service Support at Stanbic Bank confirmed.

9.7 She admitted receiving the US$15,000 from Mr. Chungu through the ZAMTROP account but said the money was paid a day earlier than the date stated in the charge. She said the ZSIS could give the reason for the payment; otherwise, it was payment for work done.

9.8 She also admitted receiving the £8,000 in batches of £5,000 and £3,000 on 27th September 1999 that was equivalent to the US$13,325 she was

charged with. She explained that this was for airfares and payment of per diem for two officers, a Mr. Gwaba and a Mr. Lungu, who accompanied her to Russia to renegotiate a debt. She denied having received the sum of US$18,000.

9.9 She agreed that her signature appeared on the payment authorisations but she was only a co-signatory. Accountants raised the payment authorisations. Her secretary just typed the form on information given by the accountants. She never signed the payment authorisations. She said the Ministry of Finance used to fund the ZSIS but only the ZSIS could explain how it used the money.

9.10 On the payments that appeared to have continued after the "final" ninth payment and those that appeared to have been repeated, she explained that the system would indicate that the payment was final but the OP would clarify that the payment was not final on account of a penalty or miscalculation or extra work done.

9.11 Wilson Yotam Zulu, a former Executive Director of the ZSIS, called as a witness by the 1st appellant explained that the ZAMTROP account was personally handled by the Director-General and audited by the Auditor-General who reported to the President. He said he used to interact with the 1st Appellant in the ZSIS work; that allowances would be paid with a bit extra; and that the ZSIS was not prohibited from giving gifts to anyone and it operated on a "need to know" basis.

9.12 He said he introduced the 1st appellant to the 4th appellant at AFSL when she wanted to secure funds to buy the farm and he never encountered any audit suggesting that the two American companies were overpaid.

9.13 The 1st appellant called Mr. Chungu as a witness but when he appeared in court in answer to the summons, he explained that he was unable to testify and gave reasons for his inability to do so.

9.14 The 2nd appellant testified that he was appointed Minister of Finance on 1st July 1999 and he served up to January 2002. He confirmed that in 2000 requests for funding went to him as Minister instead of the PS because at the time Zambia had the challenge of dealing with the US$7billion foreign debt but during his tenure, he never saw the contracts relating to the two American companies and he raised questions on the integrity of the payments. Because of the measures, he put in place fewer general payment authorisations were issued.

9.15 He admitted that he signed for the £4,000, although an intelligence officer he could not recall received the money. He explained that the money was meant to cover the cost of entertaining guests and paying "thank you" tokens to informers while performing the ZSIS work. He too was a ZSIS operative and was paid for the work he did. He denied that he was paid the money for authorising payments to the two American companies.

9.16 The 3rd appellant's response to the allegation that he erected the cottage for Professor Mweene was that he was approached by Mr. Chungu to find a contractor to undertake the works. He informed PW7 and introduced him to the professor. He confirmed that AFSL received funds from the ZSIS from which Garden Plumbers was paid and that Garden Plumbers belonged to his wife, who lived in the USA. PW7 came in to run the company while his wife was away. He denied any knowledge of the transaction relating to the farm.

9.17 The 4th appellant declared ignorance of the construction of the cottage and lack of knowledge about the existence of the two American companies. He said he learnt about the matters in court and knew about the ZAMTROP account when investigations started in 2002.

9.18 In relation to the farm in Kabwe, he said Yotam Zulu went to AFSL with the advertisement for two farms and requested AFSL to bid for the farms on behalf of the ZSIS. He took Mr. Zulu to Sebastian Mathew, whom he advised to bid for the farms. The bid was successful and the ZSIS provided the funds and instructed that the farm be registered in the name of Niseo Farms Limited but ZSIS did not provide any reason as it operated on a "need to know" basis. He insisted that all the documents he signed were in his official capacity as Executive Director and that the relationship between AFSL and the ZSIS was that of banker and client.

10.0 **Consideration of the matter by the trial court**

10.1 On the evidence before him, the learned trial magistrate accepted that the Government and the two American companies had entered into the contracts in issue and he found nothing wrong with the contracts or the initial payments made by the Ministry of Finance under the contracts. He found that the payments were being properly made as required under the contracts as long as there was no unlawful intention or ulterior motive on the part of the officers involved in the payments. He also found that the 1st and 2nd appellants, were ZSIS agents who were involved in the contracts.

10.2 The trial magistrate further found that there ought to have been nine payments to liquidate the amounts due on the contracts and concluded that there were more than thirteen overpayments comprised in the funds paid after the final payment indicated in the numbered payment authorisations in which the 1st appellant was one of the signatories. The court was surprised that further payments continued to be made even after the 1st appellant had participated in authorising the final payment to the two companies.

10.3 The court found that the overpayments were planned and that the 1st and 2nd appellants received the farm and other gratifications at the time the payments were going into the ZAMTROP account from the Ministry of Finance. The court also found that the overpayments could not have been a mere error in numbering because they passed through the usual

process of payment employed in government and concluded, spurred by the contents of Exhibit P250 that the overpayments were a deliberate scheme to syphon money from the Government.

10.4 The court observed that although the 2nd appellant had directed that he must approve all payments in order to keep a close eye on them, he continued approving the payments when the Government was supposed to have cleared its debt to the two companies.

10.5 In relation to the alleged corrupt receipt of the farm, the court reasoned that the 1st appellant did not make a formal application for a loan to AFSL or the ZSIS but AFSL bid for the farm on instructions from the ZSIS and used funds traced to the ZAMTROP account facilitated by the 3rd and 4th appellants. The court noted that the 1st appellant paid nothing towards liquidating the purported loan in the long period that passed between her taking possession of the farm and commencement of the investigations.

10.6 The learned magistrate further noted that the transactions pertaining to the farm took place at the time when the 1st appellant was involved with the payments to the two American companies and found that she corruptly accepted the farm from Mr. Chungu and the 3rd and 4th appellants. He concluded that even though the trio did not own the farm, the giving lay in their roles as Director-General of the ZSIS and as Chief Executive Officer and Executive Director respectively for AFSL, which bid for the farm and facilitated payment of the purchase price

from the ZAMTROP account. The trial magistrate was satisfied that the conduct of Mr. Chungu and the 3rd and 4th appellants was corrupt and that the 1st appellant accepted the farm corruptly. He found her guilty of that offence.

10.7 In respect of the sum of US$15,000, the trial magistrate opined that the money was part of the US$40,000 drawn from the ZAMTROP account on 22nd December 1998 and noted that the 1st appellant admitted receiving the money and signing for it as revealed by the documentary evidence. On that basis, he regarded the payment of the money from the ZAMTROP account and the receipt of the money by the 1st appellant to be corrupt and convicted her.

10.8 Pertaining to the sum of US$13,325, the learned magistrate found the offence proved on the basis that the 1st appellant signed for the receipt of the sum of £8000 which was equivalent to the US$13,325. As to the sum of US$18,000, the trial court was satisfied that even though the documents showed that the payment was in respect of cash, the fact that the 1st appellant signed for the money established that she received it. He, therefore, found her guilty of that offence.

10.9 Coming to the 2nd appellant, the trial magistrate found that he admitted receiving the £4,000 at the time he was Minister of Finance. Taking into account the explanation given by the 2nd appellant, he noted that the 2nd appellant did not retire or account for the money and although he showed concern for the way the Ministry of Finance was dealing with its

expenditure, he curiously received the money and spent it on dinners, cocktails and paying informers. He found the offence proved against the 2nd appellant.

10.10 Concerning the 3rd and 4th appellants, the trial magistrate found that they were actively involved in the construction of the cottage; that the 3rd appellant was the person who took PW7 to the construction site and introduced him to the professor; and "co-ordinated" with Mr. Chungu regarding the construction works. The court was satisfied that the appellants were aware of the payments for the construction of the cottage and that the 3rd appellant gave the instruction to pay.

10.11 The trial court was also alive to the relationship between Mr. Chungu, PW7 and the two appellants. He noted that PW7 was married to Mr. Chungu's sister and was a shareholder and company secretary in Garden Plumbers. He found that the 3rd appellant had interest in the construction contract as he was a member in Garden Plumbers and Mr. Chungu had an interest as the cottage was to be constructed by a company where his brother-in-law was a member.

10.12 The trial magistrate was satisfied, because the 3rd and 4th appellants were directors in AFSL which financed the construction of the cottage, that they effectively participated in erecting the cottage. He found both guilty of that offence and convicted them.

10.13 In relation to the giving of the farm to the 1st appellant, the court took the view that since she did not pay back the money expended on the

farm and took occupation before she had paid any money for it, the 3rd and 4th appellants in collaboration with Mr. Chungu, effectively gave the farm to her. He opined that the two appellants, AFSL and Garden Plumbers were actively involved with or connected to the ZSIS and to the security contracts and the payments. He accordingly found the two appellants guilty of the second offence and convicted them.

10.14 The 1st and 2nd appellants appealed to the High Court against their convictions and sentences while the 3rd and 4th appellants appealed against conviction only. The High Court presided over by Justices Kabuka, Hamaundu and Mutuna (as they then were) acquitted the 1st appellant on Count 5 concerning the alleged corrupt receipt of the sum of US$11,400 but upheld the convictions and sentences on the other four counts. The 2nd appellant's appeal against conviction and sentence also failed. The appeal by the 3rd and 4th appellants against conviction equally failed.

11.0 **The appeals to this Court**

11.1 Having lost their appeals in the High Court, save for Count 5 on which the 1st appellant was acquitted, the appellants escalated their appeals to this Court. The 1st appellant mounted thirteen grounds of appeal while the 2nd appellant raised six grounds against both conviction and sentence. The 2nd appellant's grounds 1 and 2 are a duplication of the 1st appellant's grounds 10 and 3 while grounds 4, 5 and 6 are a repetition of

grounds 11, 12 and 13 respectively. Some grounds of appeal are also a replica of the grounds argued in the High Court. The 3rd and 4th appellants raised five joint grounds of appeal against conviction only. Grounds 2, 3 and 4 are also a repetition of the three grounds they argued in the High Court.

11.2 Both the appellants and the respondent filed heads of argument in support of the appeals. Astonishingly, the State does not support the convictions and the position it has taken on appeal oddly favours the appellants. The learned DPP, Mrs. Lillian Shawa-Siyuni, who had taken over conduct of the matter from her predecessor, Mr. Mutembo Nchito, SC who had personally prosecuted the matter and defended the appeals in the High Court, has gone to great lengths, to persuade us to acquit the appellants in a way that questions the integrity of the DPP's prosecution of the appellants.

11.3 However, this Court has consistently taken the position that even where the prosecution does not support the conviction or sentence, the court still has to carefully, examine the evidence deployed in court and how the court applied the law to the facts. In other words, the court considers whether the grievances raised by the appellant against the trial court are legitimate. The fact that the State does not support the conviction does not mean the appeal must inevitably succeed.

11.4 The reason the appeal does not automatically succeed when the State does not object to the appeal is because our judicial oversight role as

the higher court over lower courts, to correct and give appropriate guidance where it is warranted, would be lost if we did not judiciously examine the judgments of the lower courts, coming to us with a claim that the law was misapprehended or misapplied, or that there was some procedural or substantive injustice occasioned.

11.5 In the case of **Mucheleta v The People**[1], we stated that the Supreme Court's obligation goes beyond the prosecution's wishes after a lower court has pronounced a verdict under which an individual is liable to suffer criminal sanctions. We stated in that case as follows:

> **To us, it does not, as a matter of course, follow that when the State does not support a conviction on appeal the appellant must necessarily be set at liberty. We would be shirking our obligation as the appellate court if we did not adopt the same level of diligence and caution in assessing whether, on the facts and the evidence before the court, the conviction of the appellant was safe. In other words, much as the State may indicate its misgivings, and perhaps disdain of the verdict of the trial judge, objective assessment of the merits of the conviction will not, in the least be coloured by the absence of support for the conviction by the State.**

11.6 We reached the same conclusion in the case of **Humphrey Masauso Phiri & 4 Others v The People**[2] and in **Bright Kaweme v The People**[3]. In the latter case we stated as follows:

> **To us, it matters not that the State does not support the decision of the lower court. We are obliged to consider the propriety or otherwise of the decision or decisions alleged to have been made in error or in disregard of the law and make an assessment whether the criticism against the judge or trial magistrate were, in the circumstances, justified.**

11.7 It is also clear from the case of **Sensenta v The People**[4] that although the appellants lost their appeals in the High Court where they had

challenged the decision of the trial court, the appeal to this Court is mostly against the judgment of the trial court that convicted them. In this case, since the High Court did make an order quashing the conviction and sentence of the 1st appellant on Count 5, which related to the alleged corrupt receipt of the sum of US$11,400 and acquitted her of that offence, we are not barred from considering the decision of the High Court, where relevant, in determining these appeals. For ease of reference, we shall appraise the respondent's arguments soon after those of the respective appellants.

12.0 **Arguments by the 1st appellant**

12.1 The learned counsel for the 1st appellant argued grounds 1, 3, 4, 9 and 11 individually while grounds 2 and 6, 5 and 10, 7 and 8 and 12 and 13 respectively were argued together in that order.

12.2 Ground 1 of the 1st appellant's grounds of appeal attacks the trial magistrate's ruling in which he stopped the defence counsel from cross-examining PW2 on Folio 2 contained in a file the trial court had admitted as Exhibit P4 on the ground that the document had not been referred to in the examination in-chief of PW2. The court felt that no prejudice had been occasioned to the 1st appellant.

12.3 It was contended that the decision by the trial court restricted the defence in the manner it was supposed to conduct its case. That this contravened **Article 18(2)(c)(e)** of the **Constitution of Zambia**, **Cap 1**

that guarantees the right to be given facilities for the preparation of the defence to any person charged with a criminal offence and to be afforded facilities to examine, in person or by legal representative, the witnesses called by the prosecution.

12.4 It was also argued that the decision created substantial prejudice against the 1st appellant in that she was convicted without affording her an opportunity to bring out issues related to the document which may have led to a favourable judgment. According to the 1st appellant, this should entitle her to an acquittal in accordance with the cases of **Joshua Mapushi v The Queen**[5], **Patel v Attorney General**[6] and **William Muzala Chipango & Others v The People**[7].

12.5 Grounds 2 and 6 question the 1st appellant's conviction for the offence relating to the alleged giving and receipt of the farm as gratification or inducement or reward. It was contended that the trial court did not fully or properly appreciate the evidence before it and that the 1st appellant could not have known that the money used to pay for the farm came from the ZSIS. Counsel argued that her innocent disposition was confirmed by her cheque payment towards the money expended by AFSL on purchasing the farm, which she could not have done if the farm was given to her as a gift.

12.6 The case of **Maseka v The People**[8] was cited where it was held, inter alia, that an explanation which might reasonably be true entitles an accused to an acquittal even if the court does not believe it and that an

accused is not required to satisfy the court as to his innocence but simply to raise a reasonable doubt as to his guilt.

12.7 Citing the cases of **Saluwema v The People**[9] and **Samuel Sooli v The People**[10], among others, counsel for the 1st appellant contended that the presumption that the farm was corruptly given as an inducement or reward could not hold as the explanation the 1st appellant gave on how she acquired the farm and intended to pay for it was reasonable.

12.8 Ground 3 relates to the alleged corrupt receipt of the US$15,000. It was argued that the money received by the 1st appellant on 21st December 1998 was not the same money paid on 22nd December 1998 from the US$40,000. Besides, the money was earned from work done for the ZSIS, which Mr. Chungu could explain.

12.9 According to counsel, the trial court glossed over or ignored the evidence favourable to the appellant. The case of **Mushemi Mushemi v The People**[11] was cited where this Court held that a conviction which is based on a finding of fact which is in direct conflict with the overwhelming balance of the evidence, that evidence having been glossed over, cannot be upheld.

12.10 It was submitted that the trial court should have shown, in its judgment, the reason it disbelieved the 1st appellant on the date of the payment or that she was not paid for work she had done for the ZSIS. We were urged to acquit the 1st appellant on this count.

12.11 Ground 4 questions the legitimacy of the documentary evidence produced by PWs 26 and 30 to establish the movement of funds within and between the ZAMTROP account and Meer, Care and Desai and AFSL. It was contended that contrary to **sections 9, 38, 39** and **40** of the **Mutual Legal Assistance in Criminal Matters Act, Cap 98** and **section 3** of the **Authentication of Documents Act**, **Cap 75** there was no evidence that the documents were obtained following a request by the Zambian Attorney General to the sovereign of the foreign country, in which the documents where, for assistance to obtain the desired documentary evidence or that the documents were authenticated by a notary public. As a result, the documents lacked validity and were inadmissible. The case of **Lumus Agricultural Services Company Ltd, Linus Agricultural Services Company v Gwembe Valley Development Company Ltd (in Receivership)**[12] was also relied on.

12.12 What is at issue in ground 9 is the constitutional validity of **section 49(2)** of the **Act**, which provides for the making of a presumption that a payment was solicited, accepted or obtained or agreed to be accepted, received or obtained corruptly where it is proved that a person charged with an offence under Part IV of the Act solicited, accepted or obtained or agreed to accept or attempted to receive or obtain any payment unless there is a satisfactory explanation.

12.13 The gravamen of the submission is that the requirement for a satisfactory explanation to displace the presumption amounts to telling

the accused person that if they kept quiet, they would be presumed corrupt, which is in conflict with **Article 18(1)** of the **Constitution** which provides that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

12.14 Citing the case of **Re Thomas Mumba**[13], it was submitted that the decision of the trial court that there was no conflict between the impugned section and the Constitution because a satisfactory explanation need not come from the accused, cannot be sustained as the accused has a duty to explain, meaning keeping quiet is never an option. Counsel argued that the court pronounced itself on a constitutional issue on which it lacked jurisdiction. Therefore, we must find the charges to be incompetent and acquit the appellants.

12.15 In respect of grounds 5 and 10, it was contended that the only person who should and could have explained why the appellants were paid and given the "gifts" and the movement of the funds in the ZAMTROP account was Mr. Chungu, the Director-General and controlling officer of the ZSIS. Hence, the prosecution had not established that the farm and the money were intentionally given and received corruptly especially that the evidence showed that the movement of funds was never the work of one person and when there was overpayment, it was failure of the system, not a specific person alone.

12.16 Counsel argued there was no evidence that in signing the payment authorisations, the 1st appellant's predominant intention was personal

benefit. We were referred to the dicta by Widgery J, in the case of **R v Llwellyn-Jones** cited in **Archbold, Criminal Pleadings, Evidence and Practice, 1969 Edition** at paragraph 3491.

12.17 Grounds 7 and 8 accuse the trial court of admitting intelligence documents and requiring the 1st appellant to give evidence without written consent of the Republican President contrary to **sections 11** and **12** respectively of the **Zambia Security Intelligence Act No. 14 of 1998**. It was submitted that the failure to obtain the consent of the President to use intelligence material upon which the 1st appellant was eventually convicted and for her who was a ZSIS agent, to testify prejudiced her right to defend herself and went against the clear requirement of the law; and rendered the conviction unsafe.

12.18 Ground11 accuses the trial court of a cursory and superficial assessment of the prosecution evidence when it put the 1st appellant on defence on all of the charges and yet acquitted her on one charge at the close of the trial as no evidence had been adduced to support that charge. The argument was that this amounted to injustice, which entitled the 1st appellant to an acquittal.

12.19 Lastly, grounds 12 and 13 attack the sentence imposed by the trial magistrate. It was submitted that the sentence was excessive and shocking given the penalties stipulated in **section 41** of the Act. Under that provision, a first-time offender may be liable to a term of imprisonment not exceeding twelve years and a second or subsequent

offender to imprisonment for a term of not less than five years and a term not exceeding twelve years.

12.20 Counsel argued that the sentence of five years imprisonment should be reserved only for first-time offenders where there were aggravating circumstances, which was not the case here. Further, in imposing the sentence, the trial court relied on the failure by the 1st appellant to refund the monies she allegedly corruptly received without considering her circumstances over which she had no control. Therefore, the sentence was wrong both in law and in principle and we must interfere with the discretion of the trial court.

13.0 **DPP's response to the 1st appellant's appeal**

13.1 The learned DPP did not respond to each one of the grounds of appeal. In each case, her response was general, in fact, confirming most of the arguments by the appellants. As we said earlier, the State does not support the convictions of the appellants.

13.2 In brief, the DPP agreed with the 1st appellant that the absence of the contracts in the payment process could not be blamed on her as their availability was restricted because they were of a security nature and that the process of authorising payments was such that no single person could do it alone. In other words, any unscrupulous payment would have been detected and halted.

13.3 The learned DPP took the view that the 1st appellant was merely doing her duty in the payment process as a focal person and that her abrasive attitude against other officers was due to her desire to save Government funds by paying on time to avoid contractual penalties. Moreover, there was no evidence that she manipulated others to pass the payments against their will or better judgment.

13.4 She argued further that the allegation that the 1st appellant was motivated by the receipt of gratification from Mr. Chungu was not substantiated as that was not the only inference to be drawn from her participation in the payment process. She cited the case of **Mutale and Phiri v The People**[14] on the need to adopt an inference that is more favourable to an accused person if there is nothing in the case to exclude it.

13.5 As regards the overpayments, the DPP submitted that the finding by the trial court that there was overpayment was against the weight of the evidence because all material prosecution witnesses, particularly PWs 2, 4, 6, 8 and 15 declared that there was no such overpayment. Based on the case of **Imusho v The People**[15], which allows the setting aside of a finding made on a mistaken view of the facts, counsel submitted that the finding by the trial court should be set aside as it went against the weight of the evidence. That this was fortified by the fact that even after the 1st appellant left, the Government continued paying the debts.

13.6 According to the learned DPP, the case against the 1st appellant depended on proof that there were overpayments and without establishing this allegation then the crime did not exist.

13.7 Concerning the ZAMTROP account, the DPP submitted that the money was paid into the account at the behest of the ZSIS Director-General and the account was funded in order to pay the debts to the two American companies. That it was the duty of the O.P. to pay the two companies and since the account was under the exclusive control of the Director-General, he was the one who could account for any transaction relating to that account.

13.8 The learned DPP also referred to the 1st appellant's explanation that she worked for the O.P; the trial court's finding that she was a secret agent; and the testimonies of PWs 2, 6, 8 and 13 that Government officials were permitted to receive allowances from other Ministries or Institutions for the work they did as experts in various fields.

13.9 She further alluded to the evidence of DW1 that people who were not on the O.P. payroll were paid in cash or kind for services rendered to the Agency and that they were not told what the payments were for; that receipts were sometimes not given; and that the O.P. was not prohibited from giving gifts to anybody. It would, therefore, be unfair, in these circumstances for the 1st appellant to be convicted for receiving rewards from the O.P.

13.10 In conclusion, the learned DPP argued that the trial court misdirected itself in its analysis of the evidence and in finding the 1st appellant guilty of the alleged crimes as there were a number of inferences that could be rightly drawn from the evidence and that the prosecution had failed to prove the essential elements of the offences charged beyond reasonable doubt.

14.0 **Arguments by the 2nd appellant**

14.1 Grounds 1 and 2, and 5 and 6 were argued together while ground 4 was argued alone. We have not seen any arguments covering ground 3. Hence, we deem this ground as abandoned and we dismiss it.

14.2 Grounds1 and 2 revolve around the inference drawn by the trial court that the sum of £4,000 paid to the 2nd appellant from the ZAMTROP account was gratification for facilitating the release of funds to that account from the Ministry of Finance which allegedly resulted in overpayments to the two American companies.

14.3 It was argued that the trial court grossly misdirected itself when it found that the £4,000 was gratification for facilitating the release of funds to the ZAMTROP account notwithstanding the instruction given by the 2nd appellant. That given the circumstances prevailing at the time of the instruction, that was not the only reasonable inference that could be drawn as the evidence showed that the 2nd appellant enforced

measures that restricted payments with the effect that there was no payment after the instruction until March 2001.

14.4 It was also submitted that the trial magistrate misdirected himself when he disbelieved the explanation given by the 2nd appellant; and that there was nothing curious about the receipt and use of the money on dinners, cocktail meetings and to pay informers when the evidence showed that the 2nd appellant was a secret agent. Further, there was nothing in the way payments were being made to the two American companies that suggested that he played any questionable facilitative role. In fact, the evidence indicated that he played an obstructive role, which any court properly assessing the evidence would have discerned.

14.5 The 2nd appellant's contention in ground 4, like that of the 1st appellant in ground 11, is that the trial magistrate took a cursory assessment of the prosecution evidence when he put the 2nd appellant on defence, which was demonstrated by the fact that later the court found no evidence supporting one of the two offences.

14.6 Grounds 5 and 6, like grounds 12 and 13 of the 1st appellant's grounds of appeal attack the sentence. It was argued that there are exceptional circumstances that justify a reduction of the sentence or imposition of a suspended sentence given that there were no aggravating circumstances relating to the 2nd appellant's case.

14.7 At the hearing of the appeal, counsel for the 2nd appellant pointed out that the conviction was anchored on the alleged overpayments to the two American companies, which the trial court said arose out of the thirteen instalment payments made between 6th November 1997 and January 1999 but the 2nd appellant only became Minister of Finance on 1st July 1999. Therefore, the inescapable conclusion is that the 2nd appellant did not cause the alleged overpayments.

15.0 **DPP's response to the 2nd appellant's appeal**

15.1 The learned DPP submitted that the trial magistrate misdirected himself when he convicted the 2nd appellant as there was no evidence to prove beyond reasonable doubt that he committed the alleged crime because as stated by PW6, his role was merely to approve the funding profiles and not the specific payments.

15.2 It was argued that the 2nd appellant, as Minister and consistent with his responsibility, undertook, by his directive, to ensure that only the scheduled payments were made and that the evidence does not show a meeting of minds between the 2nd appellant and Mr. Chungu to defraud the government.

15.3 It was submitted that there was no evidence that without the money paid to him, the 2nd appellant would not have taken the decision he took or that he accrued a private benefit without entitlement. Hence, the trial court ought to have drawn an inference favourable to him

particularly that the alleged facilitation of payments was to a Government account controlled by Mr. Chungu who should have been the one to explain any defect in paying the debts.

15.4 The DPP restated that there was no conclusive evidence of overpayments as most of the witnesses from the Ministry of Finance and BoZ agreed that there were no irregularities in the payments. It was contended that other than the court's finding that there were overpayments based on the report presented by PW32 and the failure to avail the contracts to accounting personnel, all the witnesses in the payment process attested to the fact that there were no overpayments or they were not sure because they did not have enough data to enable them to make informed conclusions and there was no evidence as to when the overpayments occurred. Therefore, it was unfair to relate the 2nd appellant's actions managing the liquidation of the debts to the alleged overpayments.

15.5 The DPP also referred to the prosecution evidence that only the Auditor-General could audit the OP and yet she was not called to testify and no alarm was raised from that office about any overpayments. She argued that the court failed to properly analyse the effect of the appellant's membership of the OP and the payments or rewards given as a result of such membership.

15.6 The learned DPP saw nothing curious in the 2nd appellant's explanation that he used the money to entertain and pay informers. She stated,

contrary to the trial court's finding that the money was paid corruptly because the appellant did not retire it, that there was no evidence how the ZSIS operatives retired money given to them.

15.7 She argued further that the trial magistrate should have acquainted himself with the provisions of the **Zambia Security Intelligence Service Act** in relation to the categorisation of the contracts as of a national security character, thus being kept out of sight of those involved in the payment process. She urged us to uphold the 2nd appellant's appeal.

16.0 <u>Arguments by the 3rd and 4th appellants</u>

16.1 Ground 1, like the 1st and 2nd appellants' grounds 11 and 4 respectively, faults the trial court for putting the two appellants on their defence, without any justification. The case of **The People v Winter Makowela and Robby Tayabunga**[16] and **section 206** of the **Criminal Procedure Code** were relied on. It was submitted that on the evidence on record, the prosecution failed to prove most (if not all) of the essential elements of the offences the two appellants were convicted for and that the evidence was so discredited as a result of cross-examination that no reasonable tribunal could safely convict on it.

16.2 It was contended, in relation to the farm that it was bought for Niseo Farms Limited not by the two appellants but by their employer, a private limited liability company, with funds belonging to the ZSIS and

AFSL likewise paid the money to Garden Plumbers to construct the cottage from funds that belonged to the ZSIS.

16.3 Therefore, the element of "acting corruptly" in conjunction with Mr. Chungu was not proved as the aspect of motive on the appellants' part had not been established. As authority for this proposition, counsel cited the definition of the word "corruptly" at page **371** of **Black's Law Dictionary** by Bryan A. Garner.

16.4 It was further argued that there was no evidence from the prosecution that the appellants exhibited a wrongful desire or derived a benefit from the transactions besides executing their roles as directors in AFSL for which they were duly remunerated; and there was no evidence of collusion between them and Mr. Chungu. Therefore, the court should have acquitted and not put them on their defence and it was incumbent upon the court to give an explanation why its findings had departed from the evidence on record and the law.

16.5 Ground 2 assails the trial court for not [adequately] considering the ingredients of **section 29(2)** of the Act. The gist of the arguments is that the 3rd appellant was not aware of or involved in the transaction relating to the farm while the 4th appellant had no knowledge of the transaction relating to the cottage; and that other officers of AFSL managed the transactions directly.

16.6 Further, no single witness testified to any benefit accruing to the 3rd and 4th appellants who were merely officers of a corporate entity with a

legal personality distinct from its shareholders, directors and employees. Moreover, there was no evidence that the actions of the appellants were contrary to their duties as officers of AFSL or to the company's regulations or to the law.

16.7 Furthermore, counsel argued that AFSL was operating under the **Banking and Financial Services Act, Cap 387** handling accounts for the ZSIS, among other clients and that Niseo Farms Limited, Garden Plumbers and ZANACO Bank were all corporate entities. Thus, the trial court misdirected itself when it made adverse inferences against the 3rd and 4th appellants without addressing these issues. Citing the cases of **Mutale and Phiri v The People**[14] and **Manda v The People**[17] counsel submitted that unless there is something more, the court is duty bound to consider the inference most favourable to an accused where various inferences could be drawn.

16.8 In support of ground 3, which faults the trial court for finding the 3rd and 4th appellants guilty of corruptly erecting the cottage for Professor Mweene, it was submitted that the 3rd appellant's association with Garden Plumbers was not enough to impute the offence on him; and there was no evidence that he derived any personal benefit from the transaction. As for the 4th appellant, counsel argued that there was no evidence that he was involved in that transaction. Counsel reiterated that the trial court took a wrong approach in establishing the identity of the giver and the motive and that no corruption was proved.

16.9 As regards ground 4 that faults the trial court for convicting the 3rd and 4th appellants of corruptly giving the farm to the 1st appellant, it was argued, inter alia, that it was not proved beyond reasonable doubt that the two appellants corruptly gave the farm to the 1st appellant.

16.10 It was submitted that the farm was purchased for Niseo Farms Limited not by the 1st appellant as the trial court found; that the farm did not belong to the two appellants and the funds used to purchase the farm by AFSL came from the ZSIS. Counsel argued that the 3rd appellant was not aware of the transaction and did not know the 1st appellant and that the 4th appellant dealt with the transaction with other officers of AFSL. He was not aware of the 1st appellant's involvement at the time of bidding and settlement of the purchase price with ZANACO.

16.11 It was contended that there should have been something more apart from coincidence and association by employment to connect the 3rd and 4th appellants to the offence, that once the identity of the giver fails there is no ingredient of corruption, and motive collapses.

16.12 In arguing ground 5, which impugns the trial court for not considering who laid the complaint against the two appellants and the reasons for doing so, it was submitted that the court misdirected itself on a point of law by not considering who the complainant was since no witness testified as to having knowledge of the bribery.

16.13 Counsel further submitted that the funds belonged to the State and the public officers alleged to have received the gifts were public officers

carrying out Government duties. Therefore, the State could not have bribed or corrupted its officers, using its own funds and no witness, including the prosecution's star witness, PW2, testified that the Government had initiated legal proceedings to recover monies paid or allegedly overpaid to the two American companies.

16.14 Furthermore, the prosecution called no witness from the ZSIS to testify that the Government suffered injury or loss because of the relationship existing between the ZSIS and AFSL. Consequently, the evidence did not support the convictions of the 3rd and 4th appellants and sentences passed against them. We were, asked to reverse the convictions and the sentences for being unsafe.

16.15 At the hearing of the appeals, Mr. Muzenga submitted that no adverse finding could properly be made against the 3rd and 4th appellants in the absence of evidence that the money belonging to the ZSIS held by AFSL was not applied in line with the purpose for which the ZSIS was established or for which the money was used. Counsel also argued that the State failed to obtain authority from the President to allow key witnesses from the ZSIS to testify. Therefore, the State ought not to have prosecuted the appellants.

17.0 **DPP's response to the 3rd and 4th appellants' appeal**

17.1 The learned DPP narrowed down the issues in contention to three legal issues, namely: joint participation in the crimes by the 3rd and 4th

appellants with Mr. Chungu; lifting of the corporate veil; and whether there was only one inference to be drawn from the evidence.

17.2 On joint participation, she submitted that there was no evidence suggesting a meeting of minds between the appellants and Mr. Chungu regarding the corrupt construction of the cottage for Professor Mweene and the giving of the farm to the 1st appellant to justify the findings of guilt in terms of **sections 21** and **22** of the **Penal Code, Cap 87**. She also quoted the cases of **Mutambo and Others v The People**[18] and **Mwape v The People**[19] to support that argument.

17.3 On the lifting of the corporate veil, the learned DPP referred to case authorities on the relationship between a body corporate and the human members that constitute it and submitted that AFSL was a corporate entity operating the legitimate business of providing financial services under the **Banking and Financial Services Act**. That the ZSIS was one of the clients with which AFSL had transacted on numerous occasions; and the appellants were employees in AFSL who along with other employees handled the transactions relating to the cottage and the farm in those capacities.

17.4 Hence, there was no evidence that the appellants acted in their personal capacities or that AFSL was only a façade specifically created by the appellants to carry out acts of fraud to justify removal of the corporate veil; or that the appellants exerted undue influence on other officers as regards the ZSIS account for their personal gain.

17.5 On whether the inference of guilt was the only one that the trial court could draw on the evidence before it, the DPP reiterated that the appellants were acting in their official capacities in the normal course of duty as employees of AFSL. That there was no evidence that the 3rd appellant took part in the purchase and giving of the farm to the 1st appellant while the 4th appellant had no role in the construction and payment for the cottage for Professor Mweene.

17.6 Further, there was no evidence from which guilty knowledge could be imputed on the appellants that the construction of the cottage and the giving of the farm were corrupt gratifications connected to the facilitation of payments to the ZAMTROP account, which allegedly resulted in the overpayment to the two American companies.

17.7 The learned DPP submitted that instead of finding individual culpability in respect of the appellants, the trial court placed a blanket responsibility on them. She argued that whereas the 3rd appellant could be said to have had some motive, because Garden Plumbers in which he was a director was benefiting, the same could not be said of the 4th appellant who was merely a shareholder and director at AFSL where ZSIS was a client.

17.8 The case of **William Muzala Chipango v The People**[7] was cited where this Court emphasised the need for a trial court to treat allegations against accused persons individually and not collectively to avoid the error of glossing over the evidence.

17.9 Thus, she contended that the prosecution failed to prove corrupt intention on the part of the appellants and did not distinctly prove that they facilitated the payments in their personal capacities. In addition, the principal offender, Mr. Chungu was never found guilty in this matter. In the end, the DPP submitted that the prosecution had failed to present irrefutable evidence to justify the convictions.

18.0 **Consideration of the appeals by this Court**

18.1 We propose to determine the appeals in the order presented before us except where the issues are related and can be dealt with at once or have already been resolved, considering where appropriate, the decision of the High Court. We have considered the arguments by both the appellants and the respondent and the authorities relied upon.

18.2 The first issues raised in ground 1 of the 1st appellant's grounds of appeal relates to the refusal by the trial court to allow the appellant to cross-examine a prosecution witness on Folio 2 of Exhibit P4. Reliance was placed on **Article 18(2)(c)(e)** of the **Constitution**.

18.3 In our view, this is a non-issue because it was adequately and properly dealt with by the High Court, which considered **Article 18(2)(c)(e)** of the **Constitution** and the extent of cross-examination of a witness at the trial. The High Court found in favour of the 1st appellant that the trial court misdirected itself and departed from the principle as

enshrined in the above Constitutional provision when it refused to allow the 1st appellant to cross-examine the prosecution witness on Folio 2.

18.4 We also agree with the High Court that Mr. Chungu's letter dated 14th April 1995 to then Minister of Finance, Mr. R.D.S. Penza, asking for financial assistance and suggesting, how the debt the ZSIS owed to its supplier was to be treated, did not in any way link the 1st appellant to the offences. In fact, the letter shows that the ZSIS had a relationship with the Ministry of Finance long before any of the appellants came onto the scene. Hence, the refusal by the trial court to allow the defence to cross-examine the prosecution witness on the said letter did not significantly prejudice the 1st appellant to entitle her to an acquittal.

18.5 The second grievance in ground 1 is that the trial magistrate restricted the 1st appellant in giving her testimony but allowed the prosecution to be at liberty thereby leaning in its favour. This again is a non-issue as it was suitably dealt with by the High Court, which found that the direction given by the trial court did not amount to restricting the 1st appellant in the manner, she tendered her evidence. The trial magistrate was merely guiding the 1st appellant to be mindful of the various charges otherwise it was going to be difficult for the court to determine which offence/s had or had not been answered. Consequently, we find no merit in the first ground of appeal.

18.6 In ground 2, the 1st appellant attacks the trial court for convicting her of corrupt receipt of Farm No. 3585, Kabwe when she had given a

reasonable explanation. In ground 6, she assails the trial court for holding that the farm was bought with OP money when she was remitting funds to AFSL and she was not privy to the administration of AFSL. As we already stated, the two grounds were argued all at once.

18.7 We do not agree with the 1st appellant that she gave a reasonable explanation or that she was remitting funds to AFSL. She wants us to believe that Niseo Farms Limited, in which she was a director and shareholder, acquired the farm; that she could not have known that the farm was paid for with money from the ZSIS. She also wants us to believe that her innocent disposition was confirmed by the cheque payment towards the money expended on acquiring the farm, which she could not have done, if the farm was given to her as a gift.

18.8 It is clear from the 1st appellant's own evidence that she acquired the farm for herself but registered it in the name of Niseo Farms Limited on advice given to her by AFSL. This was confirmed by the 4th appellant who testified that the ZSIS instructed AFSL, after the farm was paid for, that it must be registered in the name of Niseo Farms. Therefore, we are satisfied that the farm was acquired by the 1st appellant and that Niseo Farms Limited was only used as a shield to veil her ownership.

18.9 The issue of whether the 1st appellant was aware that AFSL paid for the farm with money from the ZSIS, appears, at first, to have been an internal matter within the knowledge of AFSL. However, the

circumstances in which the 1st appellant acquired the farm show that she knew who paid for it.

18.10 Since AFSL did not gift the 1st appellant the farm or advance her a loan to buy it, although she claimed she applied for one, it was only reasonable that she found out who her benefactor was and the reason she was given such gift. We have no doubt on the entirety of the evidence on record that she knew that the ZSIS paid for the farm through AFSL.

18.11 The 1st appellant admitted in her submissions that she did not receive the farm as a gift from the ZSIS or as payment for services rendered to the ZSIS as a secret agent. She insisted that the farm had nothing to do with the contracts or disputed payments and that she intended to repay the money used by AFSL to buy the farm.

18.12 We are alive to the argument that the 1st appellant wanted to start paying back the money AFSL used to buy the farm. However, it is plain from the evidence that AFSL did not give her a loan; therefore, she could not have started paying back money she did not borrow. Moreover, the alleged cheque payment came after investigations had begun and long after she had taken possession of the farm. In our view, the alleged payment did not change the fact that the ZSIS paid for the farm, which the appellant registered in the name of Niseo Farms Limited, which she incorporated on the advice of the ZSIS for the singular purpose of registering the farm in the company name.

18.13 Additionally, if the 1st appellant truly got a loan and genuinely bought the farm and she was remitting the money to AFSL, there would have been no need to mask her ownership under the company name.

18.14 We are satisfied that the explanation the 1st appellant gave that she acquired the farm innocently could, at all, be reasonably true and the learned trial magistrate properly considered and rejected that explanation. The trial magistrate found ulterior motive on the part of the 1st appellant in the role, she played in the payment process, particularly in authorising the thirteen overpayments after the final ninth payment. The trial court also relied heavily on Exhibit P250 in concluding that the overpayments were a planned ploy to syphon money out of Government; and that the giving of the farm and the money, which coincided with the overpayments, was corrupt. We cannot fault the trial court for arriving at that conclusion.

18.15 Further, we are not persuaded by the 1st appellant's contention that she was not the only one who passed the payments or the DPP's spirited argument that she was merely doing her duty in the payment process as a focal person and that her abrasiveness was due to her desire to save Government funds by paying on time to avoid penalties.

18.16 PW33 was categorical that many people who were involved in the payment process were not charged because they never benefited, while the 1st appellant did. The trial magistrate found as a fact that the 1st appellant received the farm and the monies at the time she was

facilitating the payments. We cannot fault the trial court for arriving at that finding. We find the 1st appellant's aggressiveness in pushing for the payments, to the extent of threatening members of staff involved in the payment process and their families to have gone beyond what would be acceptable.

18.17 We admit that the subject contracts were believed to be of a security nature. However, the fact that there were no documents attached to the payments, or information in the Data Base, or reconciliations of the accounts meant that only a few people, amongst them, the 1st appellant who was in charge of the payments to the two American companies and freely interacted with Mr. Chungu knew the actual status of the accounts. We are not swayed by the argument that only Mr. Chungu could explain how the money moved from the ZAMTROP account or why the 1st appellant was given the farm or the monies.

18.18 There is no doubt on the totality of the evidence as correctly found by the trial court that the farm was given to the 1st appellant as a reward for facilitating the movement of funds from the Ministry of Finance to the ZAMTROP account. We are satisfied that she received the farm corruptly from the 3rd and 4th appellants who were working together with Mr. Chungu, who was the sole controlling officer of the ZAMTROP account. The fact that Mr. Chungu was not charged together with the appellants or that he refused to testify when summoned by the 1st appellant does not absolve her or anyone of the appellants, of blame.

18.19 It is true that in each offence charged, the allegation was that the actions of the appellants resulted in overpayments to the two American companies and the learned DPP vivaciously argued that there was no conclusive evidence of overpayments and that several inferences could be drawn from the evidence on record.

18.20 As we said earlier, there was no dispute that the Government was obliged to pay the two American companies, monies due to them under the contracts and the trial magistrate correctly found that there was nothing wrong with the initial payments until after the ninth instalment, which was said to be the final payment.

18.21 It is also clear that the court rejected the 1st appellant's explanation as regards the payments that appeared to have continued after the ninth payment and those that appeared to have been repeated. We do not fault the trial magistrate for rejecting the explanation.

18.22 We accept that there were some inconsistencies in the prosecution evidence as to the alleged overpayments and the role the 1st appellant played in facilitating the payments. We also accept that where there is disharmony in the evidence, the trial court should resolve the conflict and give reasons for believing one witness as against another.

18.23 Some prosecution witnesses, such as PWs 4 and 15 testified based on the documents they saw (in court) that there was no overpayment or that the debt was not paid in full. However, PW4 acknowledged that while the BoZ processed the payments, the Ministry of Finance

decided who to pay and how much and that payments that went straight to the two American companies were not availed to the court.

18.24 Then again, witnesses such as PWs 8, 11, 15 and 18 testified that they never saw the contracts, payment schedules, or any supporting documents pertaining to the payments in issue. They did not know the original contract figures, the interest rates or the penalties and it was difficult for them to verify or reconcile the accounts or to tell whether there were underpayments or overpayments.

18.25 However, PW32 the expert witness, who did the forensic investigation of the financial documents surrounding the ZAMTROP account and produced the Report, Exhibit P248 determined that there were overpayments and surprisingly, he was not cross-examined by any of the defence counsel regarding his findings in the Report.

18.26 Further, PW33 confirmed that from the forensic investigation done by PW32, they were able to determine that there were overpayments and he referred to a colour-coated chart, which was part of Exhibit P248, which showed the overpayments in red. It is plain from the whole of the evidence on record why the trial magistrate preferred the evidence of PW32 although the magistrate did not state why he did so.

18.27 Therefore, we should be slow, as an appellate court to disturb the finding of fact made by the trial magistrate that there were overpayments after the final ninth instalment because the evidence

supported the finding and we note that there is no ground of appeal challenging that finding. Hence, grounds 2 and 6 must fail.

18.28 We turn now to the other three counts to which grounds 3, 5 and 10 seem to relate. In ground 3, the 1st appellant accuses the trial court of drawing adverse inferences against her, in ground 5, she faults the trial court's finding that the payments to the ZAMTROP account were corruptly done, and in ground 10 she alleges that the conviction was unsafe, unsatisfactory and against the weight of evidence.

18.29 With regard to the receipt of the US$15,000, we agree with the 1st appellant that the evidence was that US$40,000 was withdrawn from the ZAMTROP account on 22nd December 1998 whilst she allegedly received the money on the previous day. Her argument seems to be that logically, she could not have received the money before it was withdrawn. On the surface, the argument sounds convincing. However, the 1st appellant did not dispute at the trial that she received the money in question or that the money came from the ZAMTROP account. She only questioned the date of receipt of the money.

18.30 The trial court rejected her explanation, on the totality of the evidence before him that she was paid for the work she did for the OP. Like the High Court, we cannot fault the trial magistrate for rejecting that explanation or for finding that the money was corruptly received since it was paid at the same time the 1st appellant was involved in the authorisations of the payments to the two American companies.

18.31 Although no mention is made in the 1st appellant's arguments of the sums of US$13,325 and US$18,000, we have decided to refer to the two payments for completeness. As regards the US$13,325, the 1st appellant admitted receiving a total sum of £8000 and that it was equivalent to US$13,325 that formed the basis of Count 6. Her explanation, which the court rejected, was that the money was for airfares for officers who accompanied her to Moscow to re-negotiate a debt. She allegedly paid a Mr. Gwaba and a Mr. Lungu and got the difference and they allegedly went to Russia on 27th September 1999.

18.32 However, she conceded in cross-examination that according to her passport she did not go to Russia or get any visa for Russia. When she was shown the passport for Mr. Gwaba she said he was not the one she went with to Moscow and she did not intend to call the right Mr. Gwaba as a witness. Quite clearly, if the 1st appellant did not go to Russia, she lied about the reason for the receipt of the US$13,325. Therefore, her explanation could not be reasonably true.

18.33 As to the US$18,000, while the 1st appellant admitted that the signature on the document was hers, she disputed receiving the money. The trial magistrate found the offences relating to the receipt of the monies proved on the evidence that the 1st appellant signed for the receipt of the money. He found that the 1st appellant corruptly received the money because it was paid at the same time that the appellant was involved in the authorisation of the payments to the two American

companies. The magistrate based his finding on the totality of the evidence. Clearly, there is no merit in the third ground of appeal and it must fail.

18.34 With regard to grounds 5 and 10, the gist of the 1st appellant's arguments relates to the release of the funds to the ZAMTROP account. Her position is that if the funds that went into the ZAMTROP account were Government funds, it was the duty of the controlling officer to account for the funds and to answer the question whether or not there was overpayment.

18.35 She further contended that the finding by the trial court did not satisfy **section 29** of the Act; that the performance of her duty removed all speculation or suspicion of a criminal motive; and that the State should prove that in signing of the authorisations to release funds, her dominant intention was personal benefit.

18.36 We reiterate that the charges against the 1st appellant related to accepting the farm and receiving the various sums of money as gratification, inducement or reward for having facilitated and authorised the release of funds to an account belonging to the ZSIS which resulted in the said overpayments and not to the movement of the funds from the ZAMTROP account.

18.37 We earlier on explained the role the 1st appellant played in the movement of funds from the Ministry of Finance where she and others actively participated in the release of the money to the ZAMTROP

account. We have said while she was not the only one who authorised the payments, she personally benefited. She received the farm and the monies at the time the payments were being made and according to PW33, the payments would have been delayed without the inducement. We also said her abrasives in ensuring that the monies were released went beyond what would be acceptable. She went as far as using her secretary and threatening members of staff and their families and at the trial she claimed she was just joking with PW12.

18.38 The trial court accepted and properly so that the payments to the two American companies continued after the 1st appellant authorised the ninth and final instalment and the 1st appellant conceded that in the case of the Village Complex, there were repeated payments, made on the same payment authorisation numbers. There was also undisputed evidence that no works were carried out at the Lusaka International Airport.

18.39 We also stated earlier that on 29th December 1995 and 16th January 1996, US$147,988.19 and US$114,982.96 respectively were remitted to the ZAMTROP account from Wilban Incorporated and that the evidence did not show any accompanying explanation for the payments.

18.40 Exhibit P213 shows that the tactic that was used to move the money was to create a situation as if the money was being paid to the two American companies when in reality that was not the case. That

explains why the money paid to Wilban Incorporated found its way back to the ZAMTROP account and this supports the conclusion by the trial court that the ZSIS used to get back the money it used to provide to the two American companies.

18.41 Even if the 1st appellant was not responsible for movement of funds from the ZAMTROP account to the beneficiaries, it was highly irregular that the money which was paid to Wilban for the service of a debt, was paid back without any explanation. While the 1st appellant refused to comment on Exhibit P250, she properly agreed that it did not make sense that a contractor who was owed money by the Government should be paying money to the ZSIS.

18.42 The totality of the evidence established that the release of funds to the ZAMTROP account, although it was a Government account was being corruptly done. We refuse to accept that the 1st appellant would aggressively push for payments to the ZAMTROP account so that the debts to the two American companies could be settled on time to avoid penalties without her knowing what was happening to the money. Her involvement in facilitating and authorising the payments was not without a criminal motive or personal benefit.

18.43 The trial magistrate correctly relied on the contents of Exhibit P250 to conclude that the overpayments could not have been a simple error but were a deliberate scheme to syphon money from the Government and that the 1st appellant received the monies as rewards for the role

she played in authorising the payments to the ZAMTROP account. We cannot fault the trial court for reaching the above conclusions. Grounds 5 and 10 must equally fail.

18.44 Ground 4 deals with the objections to the use of the documents obtained from the ZANACO London Branch and the London High Court concerning the transactions on the ZAMTROP account. The argument is that the provisions of **sections 9, 38, 39** and **40** of the **Mutual Legal Assistance in Criminal Matters Act** and **section 3** of the **Authentication of Documents Act** were not complied with.

18.45 Again, the High Court competently dealt with this issue and we shall not belabour the point. Suffice to add that the admissibility of documents in terms of the above statutes was not raised at the trial. The objections related to the competence of PW26 to produce the documents that were in her custody as she was not the author; and the admissibility of copies of documents tendered by PW30 obtained from the London High Court following an action by BoZ.

18.46 The trial magistrate dismissed the first objection on the ground that the witness was competent since the documents had been in her custody. He also dismissed the second objection on the ground that the copies were the best evidence available, the originals being outside jurisdiction. The 1st appellant did not pursue these issues any further and she cannot now bring very different issues.

18.47 Nevertheless, as found by the High Court, it is not in every case in which it is intended to use evidence procurable in a foreign jurisdiction that the two Acts will apply. A proper reading of the **Mutual Legal Assistance in Criminal Matters Act** shows that the legislation becomes applicable in cases where it is impossible to obtain the required evidence from a foreign jurisdiction without the co-operation of that foreign jurisdiction.

18.48 In this sense, the enactments are complementary in that where documents are obtained pursuant to the **Mutual Legal Assistance in Criminal Matters Act**, the foreign documents must be authenticated in terms of the **Authentication of Documents Act** but we must emphasise that the two statutes operate independently of each other. It follows that there is no merit in ground 4.

18.49 Ground 9 relates to the constitutional validity of **section 49(2)** of the Act which is section **66(3)** in the current **Anti-corruption Commission Act No. 2 of 2012** which repealed and replaced the **Anti-Corruption Act No. 38 of 2010** where the provision was **section 61(2)**. The 2010 Act is the one that repealed the **Anti-Corruption Commission Act No. 46 of 1996** which originally provided for the presumption of corruption in section 49(2) which is the subject of this discussion. Therefore, the outcome of our determination of ground 9 would have an impact on section 66(3).

18.50 The Constitutional provision alleged to have been contravened is **Article 18(1)**, which provides that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial. The question is whether **section 49(2)** contravened **Article 18(1)**.

18.51 There can be no doubt that **Article 18(1)** entrenches one of the enduring principles on which criminal law practice in our jurisdiction and other jurisdictions that apply the adversarial system of law is predicated. It ensures that in the conduct of criminal prosecutions, an accused is not placed at a disadvantage and it buttresses the requirement that the prosecution bears the burden of proving the guilt of an accused on the whole of the case. Therefore, any legislation that is viewed as whittling away this protection must be struck down.

18.52 However, the constitutional protection does not mean that an accused person in a criminal trial should not answer allegations or evidence that implicates and would, if left unchallenged, lead to a conclusion of culpability. For instance, where the prosecution proves that the accused person was found in possession of property that was recently stolen, it would be foolhardy for him or her to insist on his or her right to remain silent if there is no other evidence to vindicate him or her.

18.53 A reasonably true response is all that is required to deflect an adverse finding. This does not take away the accused person's right to remain silent. Rather, the circumstances are such that a response from the

accused person is desirable. Once certain facts are established to lead to a conclusion that the accused acted corruptly, it is to the accused person's advantage that he gives an explanation, which may deflect the adverse conclusion in the absence of other favourable evidence.

18.54 We, agree with the High Court that **section 49(2)** of the Act does not contravene **Article 18(1)** of the **Constitution**. Therefore, we find no merit in ground 9.

18.55 We proceed to deal with the issues raised in grounds 7 and 8 relating to the interpretation of **sections 11(1) and 12(1)** of the **Zambia Security Intelligence Act**. Section 11(1) reads as follows:

> **"An intelligence officer or employee of the service shall not without the consent in writing given by or on behalf of the President, publish or disclose to any person, otherwise than in the course of that officer's or employee's duties, the contents of any document, communication or information whatsoever, which relates to, and which has come to that person's duties or employee's knowledge in the course of that person's duties or to which that person has had access owing to the position that person holds or has held or through any person who holds or has held any such office ."** (Underlining supplied)

18.56 We understand the appellant's argument, in the context of the above provision, to be that the contracts, MOU and payment authorisations should not have been produced without the consent of the President because they related to the ZSIS. We do not agree.

18.57 Clearly, this piece of legislation prohibits the indiscriminate and unauthorised divulging by an intelligence officer or an employee of the ZSIS of documents and information acquired in the course of the officer or employee's duties. It does not prohibit the officer or employee

from divulging documents or information so acquired where the course of duty requires it. The provision does not prohibit the divulgence of such documents and information in court proceedings; courts always being guided by the evidentiary rules of admissibility and, in cases such as the one before us, by public interest considerations.

18.58 In the present matter, the 1st appellant and others faced criminal charges. Criminal proceedings are taken out in the name of the people. There was no need for the presidential consent required under section 11(1). In any case, any officer or employee producing the documents or information should be regarded as doing so in the course of duty. Accordingly, ground 7 has no merit and must fail.

18.59 Turning to ground 8 the 1st appellant's contention is that she should not have testified without the consent of the President required under section 12(1) which provides:

> **Notwithstanding the provisions of any other written law, officers or representatives of government ministries or departments, organizations, institutions, statutory bodies or any other unauthorized person or individual shall not, without the consent or authority of the President, or any other person designated in writing by the President in that behalf, enter any premises or component of the Service or <u>have any access to books, records, returns or other documents</u>. (Underlining ours for emphasis only)**

18.60 Quite clearly, this provision restricts access to the ZSIS premises and information materials in the possession of the Service. It has nothing to do with restricting an officer or employee of the Service such as the 1st appellant from testifying in her defence before a court of law.

Anyhow, the 1st appellant is not claiming that she was denied access to the ZSIS premises or information materials. We find no merit in ground 8 and it fails.

18.61 Ground11 assails the trial court for putting the 1st appellant on her defence on a charge she was eventually acquitted of. At the close of the prosecution case, the trial court found that there was evidence to support the charge, which alleged that the 1st appellant had corruptly received US$2,000 from Mr. Chungu but at the end of the trial, the court found no evidence to support that charge.

18.62 The High Court sufficiently dealt with this issue and properly discussed **section 206** of the **Criminal Procedure Code** and the relevant case authorities and found in favour of the 1st appellant. Yet again we do not want to belabour the point. Suffice to reaffirm that it is improper and a travesty of justice for a trial court to put an accused person on defence when there is no evidence to support the charge or any element of the offence. However, the success of this ground of appeal does not affect the outcome of the appeal.

18.63 We turn lastly to grounds 12 and 13, attacking the custodial sentence of five years imprisonment. The main argument is that the sentence was excessive and must come to us with a sense of shock given the penalties provided for in **section 41** of the Act and the absence of aggravating circumstances. The second argument is that the trial court should not have relied on the appellant's failure to refund the

money as the reason not to suspend the sentence as it did with the others accused whose sentences were suspended.

18.64 We are inclined again to adopt the reasoning of the High Court on this issue. Corruption is a very serious offence and the courts should be slow to suspend sentences in such cases, especially long sentences as were imposed in this case. For the trial magistrate to impose the sentence of five years imprisonment on each count, he must have been convinced that the offences or the combination of the offences charged was very serious and that a deterrent sentence was proper.

18.65 To suspend such sentence in its entirety because the culprit has refunded the money or shown remorse would be against public interest and would defeat the fight against corruption especially amongst public officers. Further, the fact that the law provides for a statutory minimum sentence of five years for a subsequent offender does not mean a first offender cannot and should not receive such a sentence where the circumstances warrant.

18.66 We do not believe that the sentence of five years imprisonment on each count to run concurrently was wrong in principle or excessive in the circumstances of this case; and the sentence does not come to us with a sense of shock as it is within the parameters of the law. Therefore, the appeal against sentence fails in its entirety.

19.0 **The 2nd appellant's appeal**

19.1 The real issue raised by grounds 1 and 2 is whether the trial magistrate drew adverse inferences against the 2nd appellant that he was corruptly paid and received the sum of £4,000 from the ZAMTROP account without ruling out inferences that were favourable to him.

19.2 The 2nd appellant admitted that he signed for the money although he said it was received by an intelligence officer he could not remember. He explained that the money was meant to cover the cost of entertaining guests and paying the ZSIS informers where he also worked as an operative and the trial court accepted that he was an OP agent and that he was being paid for those services.

19.3 Nonetheless, the trial court rejected the explanation the 2nd appellant gave as lacking merit because that was not the duty of a Minister and the payment coincided with the writing of Exhibit P200. The court also opined that having signed for the money, the 2nd appellant had the duty to retire it showing proof that he used it for the intended purpose but he did not account for or retire the money.

19.4 We agree with the High Court that the trial magistrate did analyse the evidence, both for the prosecution and for the defence before he reached the conclusion to convict the 2nd appellant. The trial magistrate considered the alternative inference, which was favourable to the 2nd appellant and rejected it. The magistrate acknowledged that

the 2nd appellant questioned the integrity of the payments on the subject contracts and that as a result of the measures he put in place, fewer general payment authorisations were issued.

19.5 The trial court further analysed Exhibit DE 49, where the appellant had remarked that the relationship with System Innovations was "*curious*". He recognised the remarks as sounding very responsible by a concerned leader but considered the circumstances in which the 2nd appellant received the money and the expenditure of that money on dinners, cocktails and paying informers as equally "*curious*" especially that this was soon after writing Exhibit P200.

19.6 In our view, if the 2nd appellant's disposition was innocent, as he wants us to believe and being Minister of Finance and the country having been under HIPC, and as one concerned about the unending payments to the two American companies and considered the relationship with System Innovations suspicious, he would have established the status of the payments to the two companies.

19.7 Surprisingly, during his tenure as Minister, he never saw the contracts in issue, although his position was higher than that of PW11 whom the 1st appellant considered too junior to be told the reasons the two American companies were treated in that manner. Later, he approved the funding profile (Exhibit P201), which included a payment, in ink, to System Innovations.

19.8 Further, as the trial court said, PW29 testified that at one meeting held with Mr. Chungu, the 2nd appellant was not happy that payments to the two companies were delayed. He also wrote Exhibit P249 to the President over delays in settling the debts to the two American companies. However, the Minister had never had sight of the contracts on which those payments were based and he had, himself, questioned the integrity of the payments.

19.9 We cannot blame the learned trial magistrate for the manner in which he reached his conclusion to convict the 2nd appellant. The argument that the alleged overpayments had nothing to do with the 2nd appellant cannot be sustained. The payment to System Innovations on Exhibit P200 which the 2nd appellant approved was one of the overpayments captured by PW32 in Exhibit P248. We are satisfied that the trial magistrate gave good reasons for disbelieving the 2nd appellant's explanation, which we should not lightly interfere with.

19.10 Ground 4 of the 2nd appellant's grounds of appeal, like ground 11 of the 1st appellant's grounds, questioned the logic of putting the appellant on his defence when there was no evidence to support the charges in counts 18 and 20. Like the 1st appellant, the High Court found in favour of the 2nd appellant, therefore, he should not have duplicated this ground of appeal. We adopt what we said above in relation to the 1st appellant. However, the success of this ground does

not affect the outcome of the appeal against conviction. We find the conviction to have been safe and satisfactory.

19.11 As regards grounds 5 and 6, which attack the sentence of five years imprisonment, we again adopt what we said above in relation to the 1st appellant. Consequently, the 2nd appellant's appeal against sentence equally fails.

20.0 <u>The 3rd and 4th appellants' appeal</u>

20.1 Ground 1 of the 3rd and 4th appellants' grounds of appeal, which assails the trial court for putting the two appellants on their defence when there was no ground or explanation for doing so is similar to the 1st appellant's ground 11 and the 2nd appellant's ground 4.

20.2 We again adopt what we have said in relation to the 1st and 2nd appellants about the power of the court to acquit at the close of the case for the prosecution if there is no evidence to support the charge. We must add, however, that at the point of no case to answer, the prosecution need not prove the case beyond reasonable doubt. If on the evidence on record a reasonable tribunal would convict then the prosecution would have made out a case against the accused sufficiently to require him or her to make a defence.

20.3 In this case, the argument is that the prosecution failed to prove most, if not all of the essential elements of the two offences charged. For reasons we shall soon demonstrate, we are satisfied that there was

sufficient evidence on which the trial magistrate was entitled to put the two appellants on their defence. Thus, ground 1 must fail.

20.4 In ground 2, the 3rd and 4th appellants accuse the trial court of not adequately considering the elements of **section 29(2)** of the Act. Yet again, the High Court sufficiently dealt with this issue and we adopt its reasoning. We shall refer to the issue as we consider the questions about the construction of the cottage and the giving of the farm raised in grounds 3 and 4.

20.5 The trial magistrate found that the 3rd and 4th appellants together with Mr. Chungu corruptly constructed the cottage for Professor Mweene and gave the farm to the 1st appellant at the time the two were involved in the release of funds to the ZAMTROP account in favour of the two American companies, which resulted in the overpayments.

20.6 The trial magistrate accepted that at the time of the transactions, the 3rd appellant was employed as Chief Executive Officer while the 4th appellant was employed as Executive Director at AFSL, a body corporate, besides the membership of the 3rd appellant as a director and of the 4th appellant as a shareholder. It is contended that none of the other directors of AFSL was called to explain whether the appellants exceeded their mandate in conducting business on behalf of the company and that there was no basis for attributing the transactions to them in their personal capacities.

20.7 We are alive to the well-established principle of law expounded in the case of **Salomon v Salomon**[20] and all the other authorities cited. Of course, the burden was on the prosecution to prove the guilt of the appellants beyond reasonable doubt but we should not gloss over the evidence and the role played by the 3rd and 4th appellants in these transactions. In addition to Exhibits P183 to P194, Exhibit P213 (which was produced by PW24 and explained by PW25), gave the structure of AFSL and how the company operated, starting from the top management (Chief Executive Officer and Executive Director) down to the lower management.

20.8 It is clear from Exhibit P213 that the top management would discuss and agree business with the clients on the telephone. Largely by word of mouth, the top management would give instructions to the middle management on how to give effect to the transactions agreed. The middle management would then prepare handwritten notes for the lower management to implement the agreed transaction.

20.9 This set up was deliberately designed to break the transaction trail because AFSL was handling dealings for the ZSIS, which demanded that the said transactions should be undertaken discretely. The ZSIS account was the single largest account maintained by AFSL in terms of the volume of transactions.

20.10 Interestingly, the evidence of PW25 based on Exhibit P213 showed that funds for the ZSIS were used to settle obligations of some

directors and other people and to pay for purchase of shares for the 4th appellant. PW25 also referred to a memorandum by the 3rd appellant addressed to a Mr. Rozani (also a director in AFSL), proposing creation of a fictitious loan to deal with free allocation of shares to the 4th appellant, which they would write off over three years as a hidden expense. Exhibit P213 further shows that the loan was extinguished by a debt entry to the ZSIS account and a corresponding credit entry for the 4th appellant's share account.

20.11 Coming to the construction of the cottage for Professor Mweene, it is clear from the evidence that the 3rd appellant was spurred by his interest in Garden Plumbers which constructed the cottage. He had an obvious relationship with Mr. Chungu and Professor Mweene and he was a member of Syblis that did maintenance work on the System Innovations installations, which was the only client Syblis had.

20.12 The trial magistrate rightly took into account all the above factors, which pointed to only one conclusion that the 3rd appellant was personally involved in the transactions and could not hide behind the doctrine of separate legal personality. He personally introduced PW7 to Professor Mweene and told him to bid for the construction of the cottage; and his wife Ireen Kabwe owned Garden Plumbers.

20.13 We are satisfied that there was conflict of interest that clearly was detrimental to the interest of AFSL, and there was no evidence that the

3rd appellant disclosed the conflict of interest to the other directors or members of AFSL.

20.14 The 4th appellant has distanced himself from the transaction relating to the construction of the cottage while the 3rd appellant has pleaded ignorance of the transaction relating to the purchase of the farm. However, in relation to the cottage, PW5 clearly stated that the money was expended on the construction of the cottage under instructions from Sebastian Mathew and the 3rd and 4th appellants.

20.15 Further, PW33 stated in cross-examination by Mr. Sangwa, SC that Garden Plumbers was paid by the 3rd and 4th appellants who were directors of AFSL. Therefore, it cannot be true as argued by the 4th appellant that he did not know about the construction of the cottage or that he came to know about the ZAMTROP account in 2002 when the investigations began.

20.16 Admittedly, the 4th appellant was aware of the transaction relating to the farm and that the funds came from the ZSIS, the same account from which the money that paid for his shares in AFSL came. Moreover, the testimony of PW5 revealed that both the 3rd and 4th appellants disclosed that the ZAMIN account held at AFSL had received funds from which the payment for the farm was drawn. Therefore, the 3rd appellant could not have been ignorant about the transaction relating to the farm.

20.17 It is quite clear that the trial magistrate considered the coincidence of the payments and the services provided by the 3rd and 4th appellants to the 1st appellant and to Professor Mweene at the time the 1st appellant and Professor Mweene were authorising payments to the ZSIS account for payment to the two American companies.

20.18 Moreover, the findings in Exhibit P213 show that AFSL was used as a special purpose vehicle that was part of a wider network to facilitate various financial crimes. We are persuaded, based on all the foregoing that the 3rd and 4th appellants were privy to the transactions relating to the farm and the construction of the cottage.

20.19 On the totality of the evidence, both oral and documentary, we believe that the 3rd and 4th appellants exceeded their authority as officers of AFSL as they stood to gain personally from the transactions. We are also satisfied that they occupied such dominant positions in AFSL that they superimposed their own interest against that of the company to make them personally accountable.

20.20 On the facts of this case, it was not fatal to the prosecution case that none of the others members or officers of AFSL were called to explain whether the 3rd and 4th appellants exceeded their mandate in conducting business on behalf of the company. It is very clear from the evidence that they did.

20.21 We are satisfied that the trial magistrate adequately and correctly considered the ingredients of the offences under **section 29(1)** and **(2)**

of the Act before concluding that the actions of the 3rd and 4th appellants were tainted with corruption. He was also on firm ground when he convicted them for corruptly giving the farm to the 1st appellant and corruptly constructing the cottage for the Professor.

20.22 We finally, come to ground 5, accusing the trial court of not considering who laid the complaint against the appellants and the motive for doing so. In our view, the High Court properly dealt with this issue and we adopt what that court said. The 3rd and 4th appellants argue that the State could not have been the complainant since the money involved belonged to it and the appellants who were alleged to have received the gratifications were public officers.

20.23 PW33 who was one of the arresting officers explained how the Anti-Corruption Commission received a report of corrupt practices against some Ministry of Finance officials in the manner they received unconventional gifts from Mr. Chungu using third parties. The allegation was that the gifts emanated from the security contracts entered into between the Government and the two American companies. PW33 and other officers investigated the allegation, and later arrested, and charged the appellants and their co-accused.

20.24 Moreover, under **section 46** of the Act, no prosecution for an offence under Part IV which covered the subject offences could be instituted except by or with the written consent of the Director of Public Prosecutions.

20.25 As it turned out, the DPP issued the FIAT, prosecuted the matter and vehemently defended the appeals in the High Court, which confirms that the State was the complainant, based on information received. We, therefore, see no merit in ground 5 of the appeal. Therefore, the appeal by the 3rd and 4th appellants against conviction similarly fails. As stated earlier, the two appellants did not appeal against sentence.

21.0 Conclusion

21.1 The appeals of all the four appellants against convictions having failed, we dismiss the appeals and uphold their convictions on the respective counts. We also dismiss the appeals by the 1st and 2nd appellants against sentence and uphold the sentences imposed by the learned trial magistrate.

21.2 Consequently, all the four appellants must forthwith start serving the five-year sentences imposed by the learned trial magistrate. We accordingly revoke their bail pending appeal.

M. MALILA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

J. CHINYAMA
SUPREME COURT JUDGE