CRIMINAL TRIAL PROCEDURES GUIDE

A guide on selected issues relevant to prosecuting wildlife and forestry related offences in Malawi

INTRODUCTORY NOTE

The purpose of this Criminal Trial Procedures Guide is to promote efficient and effective prosecution and adjudication of wildlife and forest crimes and related offences in Malawi. Rather than offering only a description of the governing law, the Guide: (1) identifies many of the procedural and associated issues central to wildlife cases in Malawi and (2) offers guidance for the prosecution of wildlife and forestry cases in light of national law and leading international best practices.

Although this Guide attempts to address many of the most important and recurring issues that arise in wildlife crime cases, it is not meant to serve as a substitute for independent legal research and analysis. The Guide is designed to offer a basic orientation and foundation for prosecutors and judicial officers to be supplemented with case-specific research as warranted.

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FOREWORD

In modern Malawi, it is pertinent that public prosecutors demonstrate a wide range of knowledge, skills and abilities to ensure that their work commands public confidence that the law will be enforced effectively. Further, that it will be enforced with confidence, fairly, responsibly and with proper regard to the rights of the individual who may be suspected of the crime. This is crucial not only for the effective performance in their current role as prosecutors and the fight against criminality, but also if they are to make progress in their respective careers. The knowledge and understanding of the relevant law and procedures remain central to the role of any public prosecutor. The same applies to the ability to effectively apply the law and procedures in their day to day duties.

The Criminal Trial Procedures Guide for wildlife, forestry and other related crimes is presented in three sections – charging issues, evidentiary issues and other trial issues. The Guide has been updated to reflect recent changes in legislation and jurisprudence. The Directorate of Public Prosecutions (DPP) and Lilongwe Wildlife Trust (LWT) have worked together to ensure that the Guide is fully accurate and up-to-date, and reflects the content which is required by public prosecutors in today's prosecutorial work.

The Guide is primarily designed to assist public prosecutors in processing issues to be considered at different stages of a criminal trial (preparation for trial and trial). This is to achieve a fair, reasoned and consistent policy, which underlies the prosecution process. In serving this purpose, the Guide should be used in combination with the Criminal Procedure and Evidence Code (CP & EC). Every public prosecutor is fully aware of this particular piece of legislation.

From a wider perspective, the Guide is designed to provide an ongoing reference point for observers, actors and decision-makers in penal policy formulation, criminal trials and those seeking to protect wildlife. I believe that the Criminal Trial Procedures Guide for wildlife, forestry and other related crimes will play a critical role in the fight against wildlife criminality.

If you are using this Guide to prepare for trials, may I take this opportunity to wish you the best of luck in those processes and I hope that the Guide will assist you in the quick disposal of cases and, in the long run, contribute towards the much-needed protection of wildlife.

I am so pleased with the publication of the Guide for prosecutors and other court actors in Malawi.

Steven W.S. Kayuni, Ph.D.
Director of Public Prosecutions

OVERVIEW

I. CHARGING ISSUES

A. BEST PRACTICES IN CHARGING

When deciding to bring a charge for an offence, a prosecutor should assess: (1) whether the available evidence establishes a prima facie case, i.e., whether the available evidence, if unrebutted, is capable of establishing each element of the offence; (2) whether there are reasonable prospects of the offence being proved at trial; and (3) whether the prosecution will serve the public interest.[1]

An assessment of the prospect of success at trial includes consideration of the following factors:

- The availability, competence, reliability and credibility of any relevant witnesses;
- Whether any limitation period applies to commencing proceedings;
- Whe availability and strength of any expert evidence required to prove any element of the offence;
- The admissibility of the evidence;[2] and
- Whether there are any available defences the defendant(s) could raise.

Under international best practices, a prosecutor should proceed with a prosecution only where the case is "well-founded upon evidence reasonably believed to be reliable and admissible and will not continue with a prosecution in the absence of such evidence."[3] Under clause 4.3 of The Code of Conduct for Prosecutors in Malawi ("Code of Conduct"), prosecutors must "ensure that the institution of any criminal proceedings is entirely based on adequate evidence, reasonably believed to be reliable and admissible".

Further, a prosecutor must exercise discretion when deciding whether to bring a charge and commence criminal proceedings. Before a trial commences, the state must establish a prima facie case to suspect that an offence had been committed.[4] Under clause 2.2 of the Code of Conduct, this discretion must be exercised in the public interest.[5] In some cases, although the evidence is sufficient to provide reasonable prospects of conviction, the prosecutor may exercise this discretion not to prosecute where the offence is not serious and prosecution is not warranted in the public interest. The Code of Conduct also notes, in clause 4.11, that where young offenders are involved, prosecutors should consider waiving prosecutions, discontinuing proceedings or deviating criminal cases from the formal criminal justice system (see also Child Care, Protection and Justice Act (2010)).

The Directorate of Public Prosecutions (DPP) Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code[6] provide the following list of considerations relevant to discerning whether a prosecution is in the public interest:

- Where the court is likely to impose a very small penalty;
- Where the loss or harm can be described

1 *See* Article 14 of the *Guidelines on the Role of Prosecutors* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990 (hereafter "Prosecutors Guidelines"). Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx

2 *See* Ministry of Justice, *The Code of Conduct for Prosecutors in Malawi* (2009), at clause 4.3 (directing prosecutors to "ensure that the institution of any criminal proceedings is entirely based on adequate evidence, reasonably believed to be reliable and admissible").

3 *See* International Association of Prosecutors, *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (adopted on 23 April 1999), available at: https://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx.

4 Rashid Tayub and Transglobe Produce Export Ltd –v- The Attorney General (Director of Public Prosecutions) and Anti-Corruption Bureau Civil Division Case Number 326 of 2018 (unreported), per Justice D. Madise, para 46.

5 *See* Article 13 of the Prosecutors Guidelines; see also Ministry of Justice, *The Code of Conduct for Prosecutors in Malawi* (2009), clause 2.2 (directing prosecutors to "properly use discretion to institute or discontinue proceedings").

6 *See* Republic of Malawi, Directorate of Public Prosecutions, *Guidelines for Prosecutors on Nuisance-Related Offences in the Penal Code* (October 2017), available at: https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/02/PROSECUTION-GUIDELINES-DPP-Malawi.pdf.

as minor and as a result of a single incident;
- Where the defendant has no previous convictions, is ill, elderly or a youth;
- Where the offence is trivial, or obscure; or
- Where alternatives to prosecution are available, such as a caution, warning or other acceptable forms of diversion.

(I) ESTABLISHING A PRIMA FACIE CASE —IDENTIFYING THE ELEMENTS OF AN OFFENCE

▶ Key statutory and regulatory provisions: Sections 142, 254 and 270 of the Criminal Procedure and Evidence Code

A prosecutor must first be satisfied that there is admissible evidence to establish each element of an offence before bringing a charge. To ensure that the facts of the case fit the charges under consideration, prosecutors should map out the elements of the charges and identify corresponding evidence. Prosecutors should be involved in this process in all instances prior to filing charges in court — revisiting the analysis as other evidence comes to light. As a matter of best practice, prosecutors should guide investigations in serious, complex or high-profile cases to the extent permissible under the law; and in all cases, where possible, prosecutors should at all times have the final say or decision in the charges that are to be framed on a charge sheet.

A trial cannot take place in the High Court without a committal for trial process being undertaken before a subordinate court pursuant to Part VIII of the CP & EC. A prosecutor shall either produce a Committal Certificate from the Director of Public Prosecutions or a preliminary inquiry being undertaken by the subordinate court.

In trials before subordinate courts, if there is insufficient evidence to establish each element but a charge is nevertheless brought, prosecutors risk a "no case to answer" finding under section 254(1) of the CP & EC, exposing themselves to a potential claim for malicious prosecution[7] in favour of the accused or simply judicial criticism for wasting the court's time and human resources. Further, under section 142(2) of the CP & EC, a judge or magistrate who acquits or discharges a person accused of an offence brought by a private prosecutor may order costs against the private prosecutor if satisfied the prosecutor had no reasonable grounds for "making his complaint".

Again, the best practice for prosecutors is to, as soon as possible, map out the elements of the charges under consideration and identify corresponding evidence. While this is perhaps a common-sense exercise, the rush of prosecutorial practices can cause one to overlook this important initial step prior to laying charges.

Example

To establish an offence under section 15(c) of the National Parks and Wildlife Act (NPWA),[8] the prosecutor must prove three basic elements: (1) that the defendant gave false or misleading information, (2) to an officer entitled to receive such information and (3) that the defendant did so wilfully or recklessly.

Table 1 below sets out examples of evidence that could be relied upon to satisfy each of these three elements. Prosecutors should consider using a table such as this to check the elements and available evidence prior to bringing a charge.

(II) MENS REA

▶ Key statutory and regulatory provisions: Section 9 of the Penal Code

Most criminal offences require a showing of prohibited conduct through a physical act or omission (the physical element, known as *actus reus*) together with proving the accused's criminal state of mind (the mental element, known as *mens rea*).[9] The *mens rea* of an offence is often framed as an accused having the intent to commit the offence. However, *mens rea* is not necessarily limited to intent; in most common-law jurisdictions, criminal liability may flow from knowledge, recklessness or even negligence depending upon the offence in question.

7 However, a malicious prosecution claim cannot succeed where there was a prima facie case to be prosecuted. See Tayub Case footnote number 4.
8 National Parks and Wildlife Act, No. 11 of 2017.
9 For a general overview of *mens rea* in Malawi, see Lewis Chezan Bande, CRIMINAL LAW IN MALAWI 159 (Juta and Co. Ltd 2017).

Sometimes the mental element of an offence is set out in the statutory language used. For example, section 15(c) of the NPWA makes it a crime to "wilfully or recklessly give[s] to any officer false or misleading information which the officer is entitled to obtain under this Act." The inclusion of "wilfully or recklessly" means that the offence is not established unless the defendant knew or should have known that the information was false or misleading.[10]

On the other hand, many of the offences under the NPWA do not explicitly require proof of a mental element. For instance, section 86(1) makes it an offence to "possess . . . any specimen of a game species, protected species, endangered species or listed species" unless the person in possession holds a valid certification of ownership. The statute by itself does not clarify whether the person must have known that he or she was in possession of such a specimen.

Nevertheless, even if an offence provision does not explicitly require proof of a mental element, this does not necessarily mean it is a strict liability offence (i.e., that proof of *mens rea* is not required). In a case involving charges of theft, the High Court of Malawi applied the English law principle that "*mens rea* is an essential ingredient of every offence unless some reason can be found for holding that is not necessary."[11] Further, section 9 of the Penal Code provides as follows: "subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."[12]

Table 1. Sample Elements & Evidence Section 15(c) of the National Parks and Wildlife Act

Elements of the Offence	Examples of Evidence
(1) the defendant gave false or misleading information	• Police report of encounter with notes of defendant's false or misleading statement (if given in oral form) • Copy of document containing false or misleading information (if given in written form) • Officer statement regarding false or misleading nature of information (if given in written form)
(2) to an officer entitled to receive such information	• Police report of encounter (if given in written form) • Officer statement (if given in written form)
(3) defendant did so wilfully or recklessly	• Evidence suggesting the defendant knew or should have known that s/he was giving false or misleading information. Absent a confession, this evidence will usually be circumstantial. • For instance, in a case involving a false report of the number of specimens captured, the defendant's statement in contradiction of the physical evidence will by itself imply a wilful or reckless state of mind. Thus, if the defendant stated that s/he had captured a certain number of specimens permitted by a hunting license, but officers found a higher number under the defendant's control, this would qualify as evidence suggesting that defendant wilfully or recklessly provided false information.

10 S*ee Chimwemwe Gulumba v Republic*, Misc. Criminal Application Case No. 51 of 2003, [2003] MWHC 27 (15 April 2003) (holding that the statutory term "wilfully" includes conduct taken either intentionally or recklessly and suggesting that the latter is satisfied when one knows or ought to know of the relevant circumstance or result) ("The defendant did not intend to damage the complainant's shirt. He knew or ought to have known that, in attacking the complainant like the defendant did, his action, albeit directed to the person, would damage the complainant's shirt."). See also Lewis Chezan Bande, CRIMINAL LAW IN MALAWI 197-98 (Juta and Co. Ltd 2017) (discussing the meaning of "recklessness").
11 *See Republic v Nankhope*, Confirmation Case No. 318 of 2000, [2000] MWHC 9 (12 May 2000) (citing and approving the decision in Sweet v Parsley [1970] AC 132, 149).
12 Penal Code, Cap. 7:01, section 9(1).

(III) POSSESSION

Possession as an element of an offence arises in several wildlife offences under the NPWA. For example, possession is the central element of an offence under sections 88(2) and/or 110(b) for possession of any specimen of protected species. Under both Malawi statute and common law, the concept of possession goes beyond being in physical possession of something (i.e., being found with the relevant object on one's person or in one's belongings) and can extend to something kept in another place but under the control of the accused. The definition of "possession" in section 4 of the Penal Code makes this clear.

"[P]ossession", "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person; and if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them[.][13] By way of example, a person could be charged with possession of a pangolin (*Smutsia temminckii*) even though the animal is being kept in a cage at the house of another person who may or may not have been aware that it was being kept there.

(IV) FRAMING A CHARGE AND SELECTION OF CHARGES

▶ Key statutory and regulatory provisions:
Sections 126, 127 and 128 of the Criminal Procedure and Evidence Code

Sections 126 through 128 of the Malawi CP & EC contain specific rules as to how charges should be framed.

Under section 126, a charge must contain particulars of the offence or offences with which the accused is charged. Particulars are the details that identify the "act, matter or thing" said to provide the foundation for the offence, and which specify the time, date and location of the offence.

Section 128 contains further detailed rules about framing a charge, including that the particulars of the offence shall be set out in "ordinary language, giving reasonable information as to the commission of the offence and avoiding as far as possible the use of technical terms."

Continuing on the topic of providing sufficient notice to the accused, the common law rule against duplicity in charging prohibits a prosecutor from describing two or more different offences in a single "count" or "charge."[14] The rule is designed to ensure that the defendant can know the precise nature and number of charges at issue and, in turn, be in a position to prepare and present a defence to each charge.

The rule against duplicity has been incorporated in the CP & EC in section 127. As set out in that section, the rule does not prevent a prosecutor listing two or more different offences in a single charge sheet. Instead, section 127 simply requires that, where more than one offence is included in the same charge sheet, a description of each offence be set out in a separate paragraph called a "count." As such, section 127 ensures that the accused has proper notice of the charges in play, satisfying the basic purpose of the rule against duplicity.[15]

The High Court's decision in *Zaperewera v Republic* illustrates how imprecise pleading can in some cases lead to dismissal for violation of the rule against duplicity. In *Zaperewera v*

13 Penal Code, Cap. 7:01 section 4.
14 *R v Greenfield [1973] 1 WLR 1151*; see also Crown Prosecution Service, Drafting the Indictment (12 December 2018), available at *https://www.cps.gov.uk/legal-guidance/drafting-indictment* ("The rule was that generally no single count on an indictment should charge a defendant with two or more separate offences.").
15 *Benjamin Zaperewera v Republic*, Criminal Appeal No. 50 of 2001, [2001] MWHC 2 (31 December 2001).

Republic, the High Court dismissed a charge for duplicity because it alleged that a single offence of theft took place over three different days. The High Court stated that the alleged conduct for each day should have been set out in separate counts. Because the prosecution did not do this, the High Court found that the defendant could not properly defend himself and was "materially prejudiced" as a result. Nevertheless, where an accused has been committed for trial in the High Court, the Public Prosecutor appearing before that Court can amend or add charges (see sub-section B below).

Even if the prosecution correctly uses separate counts to charge multiple offences within the same charging instrument, courts in Malawi have authority under certain circumstances to hold more than one trial. Under section 127(3) of the CP & EC, if the court is of the opinion that an accused may be "prejudiced or embarrassed to plead in his defence" by reason of being charged with more than one offence in the same charge sheet—or for any other reason it is desirable to direct that the person should be tried separately for one or more offences—the court may order a separate trial of any count or counts of the charge sheet.

Finally, section 127(4) governs the circumstances in which two or more persons may be joined in one charge and tried together, including persons accused of the same offence committed in the course of the same transaction, or a person accused of abetment or of an attempt to commit an offence committed by another person.

Related to the question of how a charge should be framed, is the question of which offence or offences are most appropriate to bring against an accused. Although prosecutors must be conscious of the rule against duplicity, prosecutors must also be careful not to "over-charge" or "overload the charge sheet" with more charges than are necessary to address the alleged criminal conduct of the accused. As a starting point, each charge of an offence against an accused should be supported by sufficient evidence to both establish a prima facie case and to provide reasonable prospects of conviction. However, even where the evidence supports a number of charges, the prosecutor should be careful to avoid overloading the charge sheet, in particular by excluding trivial counts that add little or even detract from the seriousness of the conduct of the accused.[16]

B. OPPORTUNITIES TO AMEND CHARGE SHEET AND TO DISCONTINUE PROCEEDINGS

▶ Key statutory and regulatory provisions
Sections 77, 81, 151, 292 and 254 of the Criminal Procedure and Evidence Code

The opportunity to amend the charge sheet is an important part of court proceedings. As highlighted above, as a matter of best practice prosecutors should be encouraged to be involved in the investigation and in the selection of charges to be brought before a prosecution is commenced, particularly in serious, complex or high-profile cases, to the extent permissible under law. Where this is not feasible, the possibility of amending charges allows an investigation to continue after the initial filing, and provides space for the prosecutor's input. The amendment mechanism allows for the filing of charges in a timely manner, while retaining the flexibility to alter those charges if new information requires such changes.

Under sections 151(2), 292(2) and 254(2) of the CP & EC, a charge can be amended, or a new charge substituted for an existing charge, by an order of the court. Under section 151(2), such an amendment may be made for any of the following reasons:

(a) The charge is defective in substance or form;
(b) The evidence discloses an offence other than the offence charged; or
(c) The accused desires to plead guilty to an offence other than the charged offence.

Any such alteration can only be made if, having regard to the merits of the case, it does not

16 *See R v Ambrose* [1973] 57 Cr. App. R. 538.

cause injustice to the accused. An example of an injustice would be if a prosecutor applied to amend a charge to substitute a new offence for an existing offence in a situation where the prosecutor would have otherwise been out of time to commence a prosecution for the new offence under the time limit set out under section 261 of the CP & EC. Further, where the amendment causes significant delay to the trial, the accused may argue that in addition to the amendment causing him or her an injustice, it amounts to an abuse of process.

Where a charge is amended, once read and explained to the accused, the court will call upon the accused to state whether s/he is ready to be tried on the new or altered charge (see subsections (4) and (5) of section 151). If the accused claims lack of preparedness to proceed, then the court may only proceed with the trial if satisfied that doing so would not prejudice the accused in his or her defence or the prosecution in the conduct of the case.

Finally, under section 81 of the CP & EC, a public prosecutor may, in any trial before a subordinate court, withdraw from the prosecution at any stage before judgment is pronounced either with the consent of the court or on the instruction of the Director of Public Prosecutions. If a public prosecutor withdraws a charge under this section before the accused is called upon to make his defence, this does not operate as a bar to a new prosecution on a later date in respect of the same facts.[17] However, if a prosecutor withdraws all charges against the defendant after the defendant is called upon to make his or her defence at trial, then the defendant will be acquitted of those charges in accordance with section 81(b). Note that this withdrawal mechanism is distinct from the Director of Public Prosecutor's power to enter a discontinuance under section 77.

Under section 77(1) of the CP & EC, the Director of Public Prosecutions may enter a discontinuance (instead of amending a charge) at any stage before judgment is pronounced—and, within six months' time, unless the accused person has been acquitted pursuant to section 77(1)(b), lay the same or a different charge in respect of the same facts.

C. MINOR AND COGNATE OFFENCES, ATTEMPTS AND CONSPIRACIES

(i) Minor and cognate offences

▶ Key statutory and regulatory provisions: Section 150 of the Criminal Procedure and Evidence Code

Section 150 of the CP & EC sets out the circumstances in which a court may convict an accused of a minor offence even though the accused was not charged with such offence. In such cases, the alternative offence should not only be minor, but also cognate to the offence charged.[18] Accordingly, the phrase "and cognate" mirrors the intention of parliament to demonstrate the relationship between a lesser offence and a greater offence while sharing several of the elements, same class or category. This allows prosecutors to list only the major crimes in the charge sheet without risking that the accused will walk free if the evidence proves guilt of a minor and cognate offence encompassed within the charged offence.

Example

Imagine that a charge is brought under section 47 of the NPWA alleging that the accused hunted for a protected species without a licence. If the court is not satisfied that the animal was a protected species, then the court may instead find the person guilty of an offence under section 82(b), which makes it an offence to molest or provoke a wild animal without just excuse or cause.

Accordingly, as a matter of best practice, instead of relying on the court's power under section 150, a prosecutor may include alternative charges in a charge sheet, with the less serious offence charged in the alternative. This approach can be useful to assist the Court in identifying the lesser charge while avoiding overcharging (discussed above in section A).

17 *See* Criminal Procedure and Evidence Code, 8:01 section 81(a).
18 *Republic –v- Richard 8 MLR 297*

(ii) Attempts

▶ Key statutory and regulatory provisions:
Section 152 of the Criminal Procedure and Evidence Code; Section 400 of the Penal Code

Under section 152 of the CP & EC, a person can be convicted of attempting to commit an offence, even if he or she was not charged with the attempt but was instead charged with committing the offence. Although "attempt" is not defined in the CP & EC, section 400 of the Penal Code offers the following definition: "when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence."[19]

According to the High Court of Malawi in *The Republic v Nankhope*, an "overt act" is one that goes beyond mere "preparatory acts." Rather, "the overt act must be such that it points to an act that constitutes the crime."[20] Thus, for instance, if a defendant thrusts his hand into another person's pocket, that would suffice as an overt act sufficient to constitute attempted theft. This "overt act" requirement is meant to ensure that individuals are not prosecuted for merely contemplating crime or even for taking some preparatory actions but, instead, for attempting or trying to commit a crime.

In the wildlife trafficking context, the "overt act" element will require careful analysis in some cases. This can be illustrated by the following hypothetical situation: if a person is caught at Kamuzu International Airport while boarding an international flight with an African civet (Civettictis civetta) hidden in his suitcase, that person would clearly be liable for attempted export of an endangered species in violation of section 98 of the NPWA.

On the other hand, if the defendant had merely possessed the civet at his home and was considering the purchase of an airplane ticket, that would likely not suffice to establish attempted export (though the defendant could well be guilty of another crime). In between these two scenarios, there are a range of situations that would require careful consideration of the "overt act" requirement.

As a matter of best practice, prosecutors may wish to consider explicitly including an alternative attempt charge in the charge sheet. Although it did not address the issue of attempts, the decision in *Chimwemwe Chimbanga v Republic* (Criminal Appeal No. 13 of 2017) MSCA, highlights the importance of bearing in mind an accused's rights to notice and a fair trial. While it would be a real stretch to interpret *Chimwemwe Chimbanga v Republic* as calling into question the section 152 framework, pleading attempt in the alternative will eliminate any claims of lack of notice—even if such claims are ill-founded in the first instance.

(iii) Conspiracies

▶ Key statutory and regulatory provisions:
Sections 404, 405 and 406 of the Penal Code

Special considerations also apply to conspiracies. Although the Penal Code classifies as crimes conspiracy to commit a felony (section 404), conspiracy to commit a misdemeanour (section 405) and other conspiracies (section 406), it does not define the term "conspiracy." Nevertheless, under well-established case law, a conspiracy is an agreement where two or more people agree to carry out a crime or criminal scheme.[21]

In many jurisdictions, especially in the United States, an agreement alone is often not enough. Rather, there must also be an *actus reus* beyond the agreement itself—an "overt act" or "substantial step" in furtherance of the conspiracy.[22] In England, this additional element is not required.[23] Malawi appears to follow the English rule. As the Malawi High Court explained in *The Director of Public Prosecutions v Dr. Hastings Kamuzu Banda and others.*, a conspiracy is "complete as soon as the agreement was reached."[24]

That being said, acts in furtherance of a conspiracy retain important evidentiary value; even if not required as an element of the crime, an overt act can stand as powerful proof

19 Penal Code, section 400.
20 *Republic v Nankhope*, Confirmation Case No. 318 of 2000, [2000] MWHC 9 (12 May 2000).
21 *See* The Director of Public Prosecutions v Dr. Hastings Kamuzu Banda and Others, MSCA Criminal Appeal No. 21 of 1995, [1997] MWSC 2 (31 July 1997); see also Mulcahy v R [1868] LR 3 HL 306; R v Warburton [1870] LR 1 CCR 274; R v Tibbits and Windust [1902] 1 KB 77, 89; *R v Meyrick and Ribuffi [1930] 21 Cr.* App. R. 94; R v Saik [2006] UKHL 18.
22 Note, however, that the requirement of an overt act is not universal in the United States. For instance, while the general federal criminal conspiracy statute requires an overt act, the federal drug conspiracy statute does not. United States v. Shabani, 513 U.S. 10 (1994).
23 O'Connell v. Republic [1843] 5 St. Tr. NS 1; Criminal Law Act 1977, section 1.
24 The Director of Public Prosecutions v Dr. Hastings Kamuzu Banda and Others, MSCA Criminal Appeal No. 21 of 1995, [1997] MWSC 2 (31 July 1997).

that an agreement exists. For example, if the charge is that Individual A and Individual B conspired to illegally export a specimen of a listed species via passenger airplane, evidence that Individual A purchased a plane ticket for Individual B would strongly suggest the existence of a criminal agreement between Individual A and Individual B.

As regards *mens rea*, conspiracy requires knowing participation in the conspiracy. As the Malawi High Court explained in *The Director of Public Prosecutions v Dr. Hastings Kamuzu Banda, and others.*, the accused "[m]ust actually know about the conspiracy, not simply take acts in furtherance of an agreement unknown to her."[25] Thus, a person who unknowingly assists a conspiracy—acting, in essence, as an unwitting instrument—cannot be charged as a co-conspirator.

On the other hand, individuals who later knowingly join an existing agreement are just as guilty of conspiracy as the original conspirators.[26] To illustrate the difference, imagine a case involving three individuals who made an oral agreement to traffic elephant ivory from Malawi to Mozambique. Following this initial agreement, the three conspirators recruited a fourth individual to assist with the logistics of transporting the ivory across the border. If the fourth individual did not realize he was being asked to transport ivory (e.g., if the ivory was cleverly hidden among other cargo), it would be impossible to charge him with conspiracy. If, on the other hand, the fourth individual knew he was transporting ivory and was doing so in furtherance of a pre-existing conspiracy, that individual would be just as guilty of conspiracy as the three original conspirators, in addition to his guilt of any other crimes (e.g., attempted unlawful export).

D. TIME LIMITS AND SPEEDY TRIAL RULES

▶ Key statutory and regulatory provisions: Sections 35, 161, 250, 261, 273, 302, 302A and 349 of the Criminal Procedure and Evidence Code; Section 46 of the General Interpretation Act

There is no statutory time limit in which a prosecution must be commenced *for offences punishable by imprisonment of more than three years.*[27] For all other offences, sections 261(1) and 302A(1) of the CP & EC specify that (a) the trial of the offence must be commenced within twelve months from the date the complaint arose (or, if the accused is at large at the time of the complaint, then the trial must start within twelve months of his or her arrest[28]), and (b) that the trial be completed within twelve months from the date the trial commenced.[29] In the case of delay not caused by the prosecution, the court may extend the time for completion of the trial as it considers necessary.[30] Sections 261(4) and 302A(4) go on to provide that if the trial has not been completed within the period prescribed by subsection(1)(b) (i.e., within twelve months from the date the trial commenced), then the accused shall not be liable to be tried, or to continue to be tried, and the accused shall stand discharged.

Unless the prosecution can provide a compelling excuse for the delay, the courts will apply the time limits in section 261 and 302A strictly.[31]

25 *Ibid.*
26 A portion of the Court's reasoning in The Director of Public Prosecutions v Dr. Hastings Kamuzu Banda and Others, MSCA Criminal Appeal No. 21 of 1995, [1997] MWSC 2 (31 July 1997), hinged on this distinction. The Court wrote as follows: "in our view, none of the police officers who followed orders without any knowledge of the existing conspiracy to kill the four victims could be said to be a conspirator to the original conspiracy. In our view, an element of knowledge of the existence of the conspiracy is required for any person who does an act, which is deemed to be part of the performance of the conspiracy to be said to be one of the conspirators." *Ibid.*
27 *See* Criminal Procedure and Evidence Code, 8:01 sections 261, 302A.
28 Criminal Procedure and Evidence Code, 8:01 sections 261(2), 302A(2) (2010).
29 *Ibid.* at sections 261, 302A.
30 Criminal Procedure and Evidence Code, 8:01 sections 261(3), 302A(3) (2010).
31 *Gift Munthali v Republic*, Criminal Review Case No. 9 of 2016, [2017] MWHC 13 (4 January 2017) (applying the 12-month time limit in which to commence a trial in a case where the trial commenced 17 months after the complaint).

However, the Supreme Court has held that a discharge under sections 261(4) and 302A(4) does not amount to an acquittal (meaning that the State can reinstitute proceedings on the same facts if not otherwise time-barred), and that in deciding whether to discharge an accused, a trial court must consider whether the "delay in bringing the [accused] to trial has led to a miscarriage of justice and that it cannot guarantee a fair trial."[32]

For offences punishable by imprisonment of more than three years—and therefore not captured by the above time limits—a prosecutor is nevertheless required under section 46 of the General Interpretation Act to commence a prosecution by bringing a charge "without undue delay."[33] Further, the accused's right to a fair trial under section 42(2)(f)(i) of the Constitution includes the right to a trial "within a reasonable time after having been charged." In *Paul v Attorney General*, the Court articulated the following test regarding delay and its relation to the right to a fair trial:

[T]hat (in the absence of malpractice or misbehaviour by the prosecutor) the attention of the court is directed to the single issue whether, because of the delay which has occurred, a fair trial of the accused or defendant will or may be prejudiced. This is in recognition of the fact that the overriding right when it comes to issues of delay is the right to a fair trial. Indeed, the real question which the court has to consider in all cases where delay is alleged is whether the delay has prejudiced the prospects of a fair trial. This involves the court asking itself whether the risk of prejudice from the delay is so grave that no direction by the trial judge could be expected to remove it.[34]

Further, both the Constitution and the CP & EC impose strict time limits regarding (a) the detention of a person without charge, and (b) when a trial must commence for an accused in custody. First, the Malawi Constitution provides every person the right to freedom and security of person, including the right not to be detained without trial.[35] Additionally, every person accused of an offence has the right to a fair trial within a reasonable amount of time and the right to be sentenced within a reasonable time after conviction.[36] Both the Malawi Constitution and the CP & EC specify time limits that protect these rights,[37] summarised in Table 2 below.

32 *Felix Paul v Attorney General*, Misc. Civil Cause No. 37 of 2011, [2011] MWHC 10 (25 October 2011).
33 General Interpretation Act 1966, cap. 1:01, section 46.
34 *Felix Paul v Attorney General,* Misc. Civil Cause No. 37 of 2011, [2011] MWHC 10 (25 October 2011) (referencing *Attorney-General's Reference* (No. 1 of 1990) [1992] QJ3 630).
35 Malawi Const. Ch. IV, section 19(6).
36 Malawi Const. Ch. IV, sections 42(2)(f)(i); 42(2)(f)(x).
37 *See* Malawi Const. Ch. IV, section 42(2) and Criminal Procedure and Evidence Code, 8:01 sections 35, 73, 102, 161C-H, 261, 302A.

Table 2. Time Limits Under the Criminal Procedure and Evidence Code

Stage	Provision	Action	Time Limit	Consequence if Time Limit Lapses
Time Limits when Accused in Custody				
Initial Appearance before a Court	Section 42(2)(b) of the Constitution and Section 35(1) of the CP & EC	An accused who has been taken into custody must be brought before a court having jurisdiction to either (a) be charged, or (b) be informed of the reason for his or her further detention, or alternatively the prosecution must release the accused. If a police officer makes an arrest without a warrant for an offence that is not serious, the police officer in charge may release the accused on the execution of a bond, with or without sureties.	This must be done "as soon as possible", and no later than 48 hours after arrest.	If the accused is not brought before the court to be charged or to be informed of the reason for his or her further detention within this timeframe, the accused must be released, with or without bail, unless the interests of justice require otherwise.
Pre-trial Custody	Sections 161A-161H of the CP & EC	An accused may be held in "lawful custody", meaning custody sanctioned by a court order, in relation to an offence while awaiting: (1) the commencement of trial in a subordinate court; (2) committal for trial (s.262 and Part VIII CPEC); or (3) trial in the High Court.	(1) 30 days under s.161D (2) 30 days under s.161E (with exceptions for certain serious crimes) (3) 60 days under s.161F	If the custody time limit or extension expires, under s.161I the court may on its own motion or on application, by or on behalf of the accused or on information by the prosecution, grant bail to the accused. Note, under s.161J that the court's power under s. 161I is without prejudice to the accused's right to otherwise apply for bail (if available).
Pre-trial Custody Period Extension	Section 161H of the CP & EC	The prosecution may ask the court for an extension of this custody period, and the court may grant one if there is good and sufficient cause.	Extension for a maximum of 30 days in total.	See above.

General Time Limits – Applicable Regardless of whether Accused in Custody				
Trial Commencement	Sections 261 and 302A of the CP & EC	For offences punishable by imprisonment of less than three years, the CP & EC sets a time limit in which a trial must commence in both subordinate courts and the High Court. The court may extend the time limit as it considers necessary if the delay is not caused by the prosecution.	Within 12 months of the complaint or arrest of the accused, if later.	The accused shall be discharged of the offence and not be tried or continue to be tried when the time limit expires.
Trial Postponement in the High Court	Sections 286(1) and 302(2) of the CP & EC	The High Court may, upon application of the prosecution or the accused, postpone any trial to a subsequent session of the High Court if there is sufficient cause for delay.	Until the subsequent session of the High Court.	N/A
Adjournments in Subordinate Courts	Section 250 of the CP & EC	Under sub-section (1), in its discretion, the court may adjourn the hearing to a subsequent time and place before or during the hearing of any case.[38] Under sub-section (2), the court may release the accused, without security or upon a bond with or without sureties or commit the accused to prison.	If the accused has not been committed to prison, the court can adjourn under sub-section (3)(a): No more than 3 months with the consent of the parties, and no more than 30 days without the consent of the parties. If the accused has been committed to prison, under sub-section (3)(b) the court can adjourn for no more than 15 days.	Under sub-section (5), if the adjournment exceeds the maximum period, the adjournment shall not of itself affect the validity of the proceedings or the power of the presiding magistrate to continue to hear and determine the case. Under sub-section (6), the High Court may, on the application of the subordinate court or of either party, or of its own volition, give such directions as it deems necessary for the resumption of adjourned proceedings.
Overall Time Limit for Trial	Section 261 of the CP & EC	For offences punishable by imprisonment of less than three years, the CP & EC sets a time limit in which a trial must be completed. Where the cause of the failure or delay to complete the trial is not attributable to any conduct on the part of the prosecution, the court shall order such extension of time as it considers necessary to enable the completion of the trial.	Completed within 12 months of commencement.	Failure to bring the accused before a higher court within the specified period shall not itself invalidate the proceedings, under section 14(8).

38 The transfer of a case to another subordinate court before inquiry or transfer of trial follows the same time limits. *See id.* section 73.

Committal for Sentence	Section 273 of the CP & EC	Any person committed for sentence must be brought before the court to which he or she is committed at the first convenient opportunity. Under section 14(6), a court may commit the accused to the High Court or to another subordinate court of higher grade than itself for sentencing. All individuals committed by a subordinate court for trial at the High Court shall under section 273 be committed for trial at the next convenient session of the High Court.	No later than 14 days.	Failure to bring the accused before a higher court within the specified period shall not itself invalidate the proceedings, under section 14(8).
Appeal	Section 349 of the CP & EC	The appellant shall give notice in writing to the High Court of his intention to appeal.	Within 10 days of the date of the finding, sentence or order appealed.	The High Court may, for good cause, admit an appeal although the periods of limitation prescribed in this section have elapsed, under section 349(4).
		At the time when appellant gave notice, if the appellant asked for a copy of the finding, sentence or order appealed against, the appellant must enter a petition.	Within 30 days of his receipt of such copy, or his appeal shall not be entertained.	
		At the time when appellant gave notice, if the appellant did not ask for a copy of the finding, sentence or order appealed against, the appellant must enter a petition.	Within 30 days of the date of the finding, sentence or order appealed against, or his appeal shall not be entertained.	

II. EVIDENTIARY ISSUES

A. BURDEN OF PROOF AND STANDARD OF PROOF

▶ Key statutory and regulatory provisions: Sections 187 and 188 of the Criminal Procedure and Evidence Code

Section 187 of the CP & EC establishes the burden of proof required for a criminal conviction. Specifically, section 187 provides that a person who wishes a court or jury to believe in the existence of a fact has the burden of proving that fact, and goes on to specify that the burden of proving the guilt of any accused lies on the prosecution.[39]

The standard of proof the prosecution must meet in a criminal case is proof of guilt "beyond a reasonable doubt," as specified in section 188 of the CP & EC .[40] The High Court has cited with approval the following formulation of the reasonable doubt standard:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable' the case is proved beyond reasonable doubt, but nothing short of that will suffice."[41]

To meet the overall standard, a criminal prosecution requires sufficient evidence regarding all elements of the crime. Thus, for example, if a crime includes a *mens rea* element (e.g., knowledge or intent), that element must also be proven beyond a reasonable doubt.

Note, as well, that a reasonable doubt can arise from either the insufficiency of the prosecution's evidence or the strength of the accused's evidence in defence. As section 188 provides, "the accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by *either* the prosecution or the defence creates a reasonable doubt as to the guilt of the accused in respect of that offence." [42]

B. TYPES OF EVIDENCE

To prove or defend against a criminal charge, the parties to the case may use several varieties of evidence. Table 3 provides a basic summary of the key categories, with more detailed treatment available in subsequent sections of this Guide.

39 *Ibid.* section 187 (2010).
40 *Ibid.* section 188 (2010).
41 *Muyaya v Republic* (Criminal Appeal Case No. 33 of 2015) [2017] MWHC 4 (13 January 2017) quoting *Miller v. Ministry of Pensions* [1947] 2 ALLER 372, at page 373 (internal quotation marks omitted).
42 *See also Maggie Nathebe v Republic,* Misc. Criminal Application No. 90 of 1997, [1998] MWHC 3 (31 March 1998) (quoting Woolmington v Director of Public Prosecution [1935] AC 462, 481-82) ("If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal.").

Table 3. Summary of Key Categories of Evidence	
Lay Testimonial Evidence	A statement offered by someone with personal knowledge of the fact to which s/he is speaking. The most common source of personal knowledge is sensory perception, i.e., information derived from what the person saw, heard, touched, tasted or smelled.
Expert Opinion Evidence	An opinion statement offered by someone with expertise on the matter in question. Expert opinion testimony is not subject to the personal knowledge rule. See Appendix A for a more detailed discussion of expert opinion evidence in Malawi.
Physical Evidence	A real or tangible object offered in evidence. In criminal cases, physical evidence will often consist of the proceeds, objects, or instrumentalities of the alleged crime. Thus, in a hypothetical wildlife crime case, the prosecution might offer money, specimens of fauna and a weapon as exhibits to prove the offence.
Demonstrative Evidence	In contrast to physical evidence, demonstrative evidence is evidence that did not play an actual role in the underlying events. Instead, demonstrative evidence is a prepared exhibit used to illustrate or clarify testimony. Common examples include graphs, charts, maps and so forth.
Documentary Evidence	Documentary evidence refers to any written evidence relevant to the facts in question. Although documentary evidence may be considered a sub-type of physical evidence, the key difference is that documentary evidence is relevant because of what it communicates as opposed to what it is. Examples may include receipts, permits, letters, contracts, photographs, video footage, audio recordings and more.

In addition to the above categories, prosecutors and judicial officers should be familiar with the terms "circumstantial evidence" and "direct evidence." These terms refer less to categories or types of evidence and more to a distinction in how the evidence relates to the factual issue in question.

• ***Direct evidence*** may be defined as "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[43]

• ***Circumstantial evidence*** is "evidence based on inference and not on personal knowledge or observation."[44]

A simple example illustrates the difference. Imagine a case where it is relevant to determine whether it was raining at a certain time in a certain town. If a witness testifies that, while working as a store clerk, she saw a man enter the store with a wet umbrella, that would amount to circumstantial evidence that it was raining. This is because an inference is required to arrive at the ultimate proposition that it was raining. Although the inference may seem eminently reasonable—if an umbrella is wet, it is likely raining—it is an inference nonetheless. In contrast, if the same witness testified that she stepped outside of the store at the time in question and *saw that it was raining and felt drops on her arms*, that would be direct evidence that it was raining. No inference is required.

As in other common law jurisdictions, criminal convictions in Malawi may rely exclusively on *circumstantial evidence*.[45]

This is consistent with UK jurisprudence, which allows for a case built solely on circumstantial evidence to result in conviction if it satisfies the overall standard of proof.[46] As the High Court of Malawi explained in *Sanyika v Republic*, *circumstantial evidence* may support a conviction so long as the prosecution "establish[es] beyond reasonable doubt that guilt is the only inference."[47]

Despite popular impressions to the contrary, *circumstantial evidence* is not inherently less

43 Black's Law Dictionary 577 (7th ed. 1999)
44 *Ibid.* at 576.
45 *Samanyika v Republic* (Criminal Appeal No. 33)[2002] MWHC 49 (Oct. 3, 2002) (finding that the circumstantial evidence did not meet the burden of proof, but observing that "[o]ften the prosecution establishes guilt by circumstantial evidence"), available at https://malawilii.org/mw/judgment/high-court-general-division/2002/49.
46 *R v. Taylor*, Weaver, and Donovan (1928) 21 Cr. App. R 20.
47 *Samanyika v Republic* (Criminal Appeal No. 33) [2002] MWHC 49 (Oct. 3, 2002) (citing Nyamizinga v Republic (1971-72) ALR (Mal) 258).

reliable than direct evidence, particularly when combined with other, complementary pieces of *circumstantial evidence*. In fact, jurists have long commented on the power of *circumstantial evidence* to create inferences of guilt by eliminating other possible explanations surrounding the fact at issue.[48] In an English decision cited with approval by the High Court of Malawi in *Samanyika v Republic*, Judge Pollock likened circumstantial evidence to cords in a rope:

One strand of the cord might be insufficient to sustain the weight, but three stranded together may be of quite sufficient strength. Thus, it may be in circumstantial evidence—there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.[49]

In sum, *circumstantial evidence* should not be viewed as inherently suspect or of diminished legal significance.

C. SPECIAL CONSIDERATIONS REGARDING DOCUMENTARY EVIDENCE

▶ Key statutory and regulatory provisions: Section 2 of the CP & EC; Sections 4 through 15 of the Authentication of Documents Act; Criminal Procedure and Evidence (Documentary Evidence) Rules

Under the CP & EC, documentary evidence is defined as "all documents produced for the inspection of the court."[50] "Document" is then defined to include anything in writing, as well as anything "from which sounds, images or writing can be produced," as well as "any disc, tape, soundtrack or other device on which sounds or other data, not being visual images, are embodied" and "any film, negative, tape or other device on which one or more visual images are embodied."[51] In sum, "document" is a broad term that covers almost any item, no matter the form, containing written, visual, or audio information or data.

Before a document can be admitted into evidence, a prosecutor must first lead evidence of provenance (where the document came from) and its authenticity. This can be done through examination of a witness who created the document and can testify to its authenticity or, where this is not possible, by following authentication procedures, such as having the document signed and sealed by either a notary public or government official. The rules and procedures for authentication are particularly important when it comes to wildlife import and export permits, hunting licenses and other licences and authorizations raised in defence to wildlife charges.

The Authentication of Documents Act covers the rules and procedures for authentication.[52] Three main categories of documents are covered:

1) Documents signed and intended for use in Malawi;[53]
2) Documents emanating in Malawi and intended for use elsewhere;[54] and
3) Documents emanating outside of Malawi and intended for use in Malawi.[55]

Authentication of a document usually requires the signature and seal of either a notary public or appropriate government official.[56]

48 *See*, e.g., *R v. Taylor, Weaver, and Donovan* (1928) 21 Cr. App. R 20 ("It has been said that the evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."). See also *Kihungu v Republic*, High Court of Kenya, Crim. App. No. 1697 of 1983.
49 *R v Exall* (1866) 4 F & F 922; 176 ER 850.
50 Criminal Procedure and Evidence Code, *Interpretation*, 8:01 section 2 "evidence" (b) (2010).
51 Ibid.
52 Authentication of Documents Act 1967, c. 4:06.
53 *Ibid.* at sections 4-6 (The signature of an administrative officer or notary public is generally enough to authenticate a document, official government documents are authenticated by the signature of the Malawi Government official and the seal or stamp of their ministry or department).
54 *Ibid.* at sections 7-8 (Authentication of such a document is done according to the rules of the country where the document is to be used).
55 *Ibid.* at sections 9-14 (Affidavits must be attested by a notary public of Malawi or a commissioner for oaths of Malawi, official documents with the signature of a government official of Malawi require the official's signature and the stamp or seal of their ministry or department, documents from the Commonwealth only require the signature and seal of a notary public or appropriate government official, other documents may be authenticated with the signature and seal of a Malawi Consular Officer or another appropriate official).
56 *Ibid.* at sections 4-14.

Malawi recognizes that some forms of evidence are self-authenticating, including but not limited to certified copies, newspapers and government maps.[57] When a document has more than one appropriate manner of authentication, any one of those manners may be used and the possibility of other means is not grounds for objecting to the acceptance of the document.[58]

The Criminal Procedure and Evidence (Documentary Evidence) Rules ("Documentary Evidence Rules") set forth a number of cases where the Court is entitled to assume that any authentication requirements for a document have been met. Rule 3(5) of the Documentary Evidence Rules also specifies certain circumstances where a party may give secondary evidence of the existence, condition or contents of a document that is not before the court in its original form. For example, Rule 3(5)(c) authorizes secondary evidence "[w]hen the original has been destroyed or lost or is in the power of a person not legally bound to produce it, and who refuses to or does not produce it after reasonable notice."

How to Proceed in the Event of Disappearance of Court Files?

▶ Key statutory and regulatory provisions:
Rule 3(5) of the Criminal Procedure and Evidence (Documentary Evidence) Rules

This is an issue that can particularly arise during appeals where the court file from the trial court goes missing, especially if a long period of time has passed since the trial. This problem arose in a number of criminal appeals to the High Court contesting mandatory death penalty sentences for murder, beginning with the *Kafantayeni* case in 2005.[59] In that case and all others affected by the mandatory death sentence law which was held unconstitutional, the High Court ordered a re-hearing on sentence on the basis that proceeding without a re-hearing:

- Would be contrary to the interests of justice;
- Would cause further breaches of the plaintiff's constitutional rights to a fair trial, including sentencing and access to justice; and
- Would mean that the Court had failed to provide an essential and effective remedy to the breaches of constitutional rights already suffered by the plaintiffs at that time.[61]

The issue of missing files also arises during trial. This might occur, for example, if the court misplaces a case file—or if an accident causes the file to be damaged or destroyed—during the course of the proceedings or, in some cases, is intentionally misplaced.

As a matter of good practice, a prosecutor needs to work hand in hand with the investigation department on any issues as regards structuring of the file for purposes of the flow of evidence. Further, a prosecutor should keep copies of all documents tendered into evidence in proceedings in case the original document is misplaced by the court or otherwise damaged or destroyed. The exception to the production of original documents set out in Rule 3(5) of the Documentary Evidence Rules could then be relied upon in the event that a court file containing original documents and exhibits is lost or destroyed.

D. SPECIAL CONSIDERATIONS REGARDING PHYSICAL EVIDENCE

Tangible physical evidence that cannot be identified through distinctive markings, such as a serial number, often requires establishing a chain of custody to satisfy the authentication requirement. A proper chain of custody serves to ensure that physical evidence has been maintained untampered from the time it is obtained in the field to its presentation in court. Establishing chain of custody is usually done by calling each person who had custody to offer testimony of: (1) the person from who they took custody, and when they did so (or

57 Criminal Procedure and Evidence (Documentary Evidence) Rules 1968, Government Notice 7/1968.
58 Authentication of Documents Act 1967, *More than one mode of authentication*, c. 4:06, section 15.
59 See generally, *Republic v. Lucius Chicco Banda* Criminal Appeal Number 1 of 2007, MSCA, Unreported.
60 *Francis Kafantayeni and others v. The Attorney General*, Constitutional, Case No. 12 of 2005 (unreported).
61 See excerpt from *Kafantayeni* cited in *R v Dzimbiri* (4/2015) [2015] MWHC 1 (01 June 2015).

how and when they took the item into custody in the case of the original collector of evidence at a crime scene); (2) any precautions taken to preserve the item; (3) the absence of alteration and/or tampering; and (4) when and to whom they relinquished custody.

The United Nations Office on Drugs and Crime (UNODC) has recommended several steps to ensure traceability and continuity from the time evidence is collected to its use in the courtroom.[62]

Key steps to follow are:

- Beginning with the person who first picks up the evidence, keep a running record for every object collected from the scene.
- Record the date, time and names of the person transferring and receiving the item each time evidence is transferred.
- Cross-check that all necessary statements are on the chain of custody form during transfers and before presentation to a court. [63]

Is it necessary to present the object of the crime as physical evidence?

Imagine a person is accused of trafficking elephant ivory from Malawi to Hong Kong. *The undisputed evidence shows that the accused worked with a poacher in Malawi to procure the ivory, and then worked with a cargo worker at Kamuzu International Airport to secure passage of the ivory (hidden inside a crate) out of the country to Hong Kong. Can the prosecution prove the offence without introducing the object of the crime (i.e., the ivory itself) into evidence?*

Corpus delicti *(meaning "body of the crime" in Latin) is essentially the common-sense principle that the prosecution must prove that the criminal acts charged in fact occurred (in other words, the actus reus) to secure a conviction.[64] However, despite its name, it does not require presentation of the victim's "body" in the case of a murder charge, or the "ivory" in the above example of ivory trafficking. Instead, proof that a crime occurred can be established through circumstantial evidence.[65] In the above scenario, examples of circumstantial evidence that could be relied upon to prove the offence include:*

(1) Witness testimony from persons who observed the accused liaising with the poacher and cargo worker to transport the ivory;
(2) Photographs and video evidence taken through police surveillance or airport surveillance showing the accused participating in the movement of the ivory;
(3) Evidence of the accused receiving payment from Hong Kong that can be linked to the sale of the ivory; and
(4) Admissions (confessions) made by accomplices, such as the poacher or the cargo worker suggesting that they had received money from or otherwise interacted with the accused.

Although a single piece of circumstantial evidence may not be sufficient to prove the crime to the standard of beyond reasonable doubt, several pieces of circumstantial evidence taken together is often sufficient. **It is important to note that presenting the "object of the crime" may be impractical — or contrary to good animal welfare practices — in cases involving live animals.** For example, in a case involving the trafficking of live pangolins, bringing the pangolins to court would likely cause considerable stress to the animals. Alternative approaches should be used in such cases to avoid situations resulting in poor animal welfare.

62 UNODC, Guidelines on Methods and Procedures for Ivory Sampling and Laboratory Analysis 16 (2014).
63 Ibid. See page 109 for a sample chain of custody form.
64 *See* Justin Miller, "The Criminal Act," in Legal Essays in Tribute to Orrin Kip McMurray at 469, 478 (1935) ("One of the important rules of evidence in criminal cases is that which requires proof of the corpus delicti. Literally defined this term means "the body of the offense," or "the substance of the crime." In popular language it is used to describe the visible evidence of the crime, such as the dead body of a murdered person. Properly used, however, it is applicable to any crime and relates particularly to the act element of criminality; that is, that a certain prohibited act has been committed or result accomplished and that it was committed or accomplished by a criminal human agency."). Note that in the United States—and some other jurisdictions—a special *corpus delecti* rule has arisen around the need for additional evidence to corroborate an out-of-court confession. *See* generally Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delecti as a Condition of Admitting an Extrajudicial Confession*, 27 Univ. of San Francisco Law Review 385 (1993).
65 *Samanyika v Republic* (Criminal Appeal No. 33) [2002] MWHC 49 (Oct. 3, 2002) (discussing reliance of the prosecution on circumstantial evidence).

Following these steps ensures that evidence is in the control of a known individual at all times to prevent alteration, tampering or loss. Maintaining chain of custody prevents accusations of tampering or altering the evidence, while allowing transfers and laboratory and expert analysis to happen safely and securely.

E. VALUATION EVIDENCE

▶ Key statutory and regulatory provisions: Section 110 of the National Parks and Wildlife Act; National Parks and Wildlife (Values of Animals) Regulations; Sentencing Guidelines for Wildlife Crimes in Malawi Courts

All around the world, it is common for the monetary value involved in a crime to increase the severity of the punishment—or even to convert the crime into a more serious offence. In the wildlife context, increased punishment based on value can serve to deter traffickers from targeting "high value" wildlife.

For wildlife crimes in Malawi, section 110 of the NPWA calls for a fine that is not less than the value of the specimen involved.[66] When "value" is properly calculated, this should negate any profit that could have been made from the sale of such a specimen. In all events, any fine imposed should be sufficiently high to act as a deterrent, instead of the equivalent of a licence fee.

However, a problem arises when the crime involves a species that is protected or otherwise not subject to legal market activity. Does the "value" spoken of in section 110 refer to the price that the specimen would have fetched on the black market? Or is it the value that corresponds to the ecosystem role performed by the specimen in the wild? Or is it a combination of the two—or even something else altogether?

As a starting point, values for different species are set out in the two schedules to the National Parks and Wildlife (Values of Animals) Regulations:[67]

- Notice No. 103 provides a schedule listing the values of certain plants and fungi,[68] and
- Notice No. 104 provides a schedule listing the values of live animals.[69]

For example, under Government Notice 104 "Value of Live Animals" published in 2018, a live elephant is valued at $25,000 USD.

However, while the regulations provide values for certain plants, fungi, and live animals, they do not provide a value for animal trophies, such as ivory. How should the State proceed in such cases? Given that ivory is traded only on the black market, in an ivory trafficking case evidence of the value of the ivory could be established through either expert testimony or through official records of the value of traded ivory. For example, UNODC uses the declared import values to estimate the value of similar seized specimens, "not as a proxy for the true black-market price, but to act as a yardstick, giving a sense of the relative value of [the specimen]."[70] In order to assist the court in sentencing, the prosecution should be prepared to tender evidence establishing the value of the wildlife involved in the crime, especially where the National Parks and Wildlife (Values of Animals) Regulations does not provide a value for the species or specimen in question.

There are different approaches used around the world to determine the value of specimens. In the United States (U.S.), for example, where a court cannot discern the market price of a specimen, the court makes a "reasonable estimate" of the value based on any available evidence, including expert testimony.[71] Some U.S. jurisdictions use a Fish and Wildlife Service valuation table to determine replacement costs.[72] Other approaches include using the

66 Malawi National Parks and Wildlife Act 2017, *Penalties and Forfeitures*, c. XII section 110.
67 National Parks and Wildlife (Values of Animals) Regulations, G.N. 51/2011 c. 66:07.
68 National Parks and Wildlife Act 2018, *Value of Plants and Fungi*, c. 66:07 Government Notice No. 103 (starting on page 73 of the sentencing guidelines document).
69 National Parks and Wildlife Act 2018, *Value of Animals*, c. 66:07 Government Notice No. 104 (starting on page 76 of the sentencing guidelines document).
70 UNODC, World Wildlife Crime Report: Trafficking in Protected Species pp 12-14 (2016).
71 *U.S. v. Butler*, 694 F.3d 1177, 1181 (10th Cir. 2012); U.S. v. Siyam, 596 F.Supp.2d 1078, 1082 (N.D. Ohio 2008).
72 *U.S. v. Bertucci*, 794 F.3d 925, 928 (8th Cir. 2015).

offender's potential profit[73] or the opinion of a qualified taxidermist on the costs of acquisition and rarity of the wildlife.[74] In Malawi, prosecutors should be able to call an expert to determine the value of the specimen. Such expert would be subject to cross-examination if the defence so wishes. For example in the case of *Jose Manuel and 33 others v. Republic Criminal Appeal Number 17 of 2017 (unreported*), in an appeal against conviction and sentence by a Portuguese, Chinese and 33 other Mozambicans, for wildlife and forestry destruction of Lengwe National Park where thousands of mopane trees were illegally cultivated for export and profit, the High Court upheld the expert valuations of the massive destruction of thousands of mopane (Tsanya) trees indicating that the defence had an opportunity to cross-examine the expert witness who had made his assessment using technology.[75]

Another factor to consider in the valuation of specimens is the species' role in the ecosystem and its value to the tourism sector. The Valuing Nature Programme considers these additional factors in economic valuation of wildlife.[76] Because wildlife can provide both ecosystem services and bring tourism, it has value beyond its market price (whether legal or black-market).[77] Malawi law considers punishment for depreciating the value of property in section 406(b) of the Penal Code.[78] Appendices 4(b-e) of the Sentencing Guidelines consider offences affecting species that are a driver of tourism or other economic benefit to be an aggravating factor.[79] To consider the depreciation in value that comes from the loss of wildlife would increase the minimum punishment and serve as an enhanced deterrent.

F. CONFESSIONS

▶ Key statutory and regulatory provisions: Section 176 of the Criminal Procedure and Evidence Code

Evidence of confessions is generally a sensitive topic in most jurisdictions around the world, and Malawi is no exception. In fact, despite the CP & EC's seemingly permissive approach to the subject—which appears to suggest that even involuntary confessions are admissible—Malawi's judiciary has erected additional safeguards.

The first question is whether the statement in issue can properly be considered a "confession". The test under the common law, set out in the Privy Council case of *Jayalal Anandagoda v The Queen*,[80] is as follows:

The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstance in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts [sic]. It is not permissible in judging whether the statement is a confession to look at other facts which may not be known at the time or which may emerge in evidence at the trial. But equally it is irrelevant to consider whether the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession

73 *U.S. v. Oehlenschlager*, 76 F.3d 227, 230 (8th Cir. 1996).
74 *U.S. v. Asper*, 753 F.Supp. 1260, 1280 (M.D. Pa. 1990).
75 Jose Manuel and 33 others –v- Republic Criminal Appeal Number 17 of 2017 (unreported), per Justice Nyakaunda Kamanga
76 Valuing Nature Programme, Demystifying Economic Valuation 3 (Ece Ozdemiroglu & Rosie Hails eds., 2016).
77 *Ibid.*
78 Malawi Penal Code 1999, *Other Conspiracies,* c. 7:01 section 406(b).
79 The Honourable Justice AKC Nyirenda, Sentencing Guidelines for Wildlife Crimes in Malawi Courts 19-22 (2017) (starting on page 167 of the sentencing guidelines document).
80 Jayalal Anandagoda v The Queen [1962] 1 WLR 817.

even though the accused at the same time protests his innocence. The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together in the context inferentially admit guilt?[81]

Section 176(1) of the CP & EC provides that evidence of a confession by an accused shall, if otherwise relevant and admissible, be admitted into evidence notwithstanding any objection to such admission upon any one or more of the following grounds:

- That the confession was not made by the accused, or
- If the confession was made by the accused, that it was not freely and voluntarily made and without his having been unduly influenced thereto.

Yet, regardless of the language in section 176(1), the High Court in *Republic v Chizumila* held that a confession obtained under duress is "unusable,"[82] in light of section 42(2)(c) of the Malawi Constitution, which protects an accused from being compelled to make a confession or admission that could be used in evidence against them.

But the jurisprudence does not end there. Although the decision of *Republic v Chizumila* indicated that to the extent section 176(1) conflicts with section 42 of the Constitution, it will be invalid,[83] the subsequent decision of *Palitu and Others v Republic*, clarified that the right contained in section 42 of the Constitution is derogable (i.e. whether the right may be infringed in certain circumstances; a non-derogable right is one whose infringement is not justified under any circumstances)—and that section 176(1), as a rule of evidence and procedure, is a valid law which limits, but does not negate, the content of that right.[84]

In *Palitu,* the court held that section 176 provides for a confession to come into evidence, then leaves it for the judge to decide what weight should be attached to it. If the confession was obtained by force, then following the reasoning in *Republic v Chizumila,* the judge should attach no weight whatsoever to the confession. This case adhered to the principle set out in *Chiphaka and Others v Republic*, that following the enactment of section 176, "proof of threats, ill-treatment, intimidation, inducement and the like, go not to admissibility but to weight", and that "it is difficult to conceive of any reasonable court accepting a confession to be materially true in the absence of pointers of such cogency as virtually to amount to corroboration."[85]

Where evidence of a confession is accepted into evidence, section 176(3) provides that it must not be "taken into account" by a court or jury unless the court or jury is satisfied beyond a reasonable doubt that the confession was made by the accused and that its contents are materially true. In the decision of *Republic v Bokhobokho and Another*, the court set out the following test to be applied by a court or jury in order to be satisfied beyond a reasonable doubt that a confession is true:

- Is there anything outside of the confession to show that it was true?
- Is it corroborated? [although corroboration is not required in each case]
- Are the statements made in it of fact so far as we test them true?
- Was the [accused] a man who had the opportunity of committing the [crime]?
- Is his confession possible?
- Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us? [86]

The next question is at what stage of the trial the judge or jury should assess evidence of an accused's confession: is it at the case to answer stage, where the prosecution need only establish a prima facie case, or at closing

81 *Ibid*. at 823-824.
82 *Republic v Chizumila & others* (1994) MLR, 288, Mwaungulu, Ag J.
83 *Republic v Chinthiti & Others* (1997) 1 MLR 59.
84 *Palitu and Others v Republic* (Criminal Appeal No. 30 of 2001) [2001] MWHC 43 (19 September 2001).
85 *Chiphaka and Others v Republic* (S.C.A. Cr. Appl. No. 10 of 1971), 1971-72 ALR Mal. 214.
86 *R v Bokhobokho and Another* (MSCA Criminal Appeal No. 10 of 2000) [2001] MWSC 5 (17 October 2001).

submissions after the accused has presented his or her defence? This issue was considered in *Mseyama and Others v Republic*,[87] where the court held that under section 176(3), the court or jury must be satisfied that the confession was made by the accused and is materially true at the prosecution's case to answer stage in order to establish a *prima facie* case.

Finally, under section 176(2), a confession made by one person is not admissible as evidence against a second person except to the extent that the second person adopts the confession as his own. In *Mseyama and Others v Republic,* the court explained that this means where the basis of implicating an accused rests on the un-adopted confession of a co-accused, that evidence is inadmissible and independent evidence must be found to be used against the principal accused.[88] This rule has been applied in a number of cases, including in *Palitu and R v Bokhobokho and Another.*

G. EXPERT WITNESSES

▶ Key statutory and regulatory provisions: Sections 180 and 190 of the Criminal Procedure and Evidence Code; see also Appendix A to this Guide.

Expert testimony plays a critical role in prosecutions involving wildlife crimes. From the prosecutor's perspective, success or failure often turns on the ability to establish facts that are technical in nature. Thankfully, Malawian law generally embraces the use of expert opinion to prove any conclusion that depends upon specialized skill, knowledge or experience.

Section 180 of the CP & EC provides that a report prepared by an expert is, on its mere production by a party, admissible in evidence if either of the following conditions are met:

> (a) The other parties to the proceedings consent, or
>
> (b) Despite the other parties having been served with the report and put on notice of the serving party's intention to tender it seven days' prior, those other parties have not served a notice objecting to the report being tendered into evidence.

An "expert" is defined in sections 180(1) and 190 as a person who is "specially skilled" or qualified to carry out any examination or process requiring any skill in any body of knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience.

By way of example, a prosecutor may seek to rely on expert testimony to prove the following:

- Whether a specimen of ivory is synthetic or genuine;
- Whether a specimen is a part or derivative of a protected species;
- In the case of parts and derivatives—including processed parts like ivory or wooden bangles—identification of the underlying species; and
- Questions of valuation (discussed above).

Again, these are simply examples. They do not represent the full universe of situations in which expert testimony may be helpful.

Yet, while expert testimony is a powerful tool, prosecutors must analyse several key questions to ensure effective use of expert testimony and to avoid surprises in court. These questions include:

- Do I need an expert witness for my case? Does the person I have in mind qualify as an expert?
- What happens if my expert resides in a foreign country? Must the expert appear in Malawi for court proceedings?
- What are the key contents of an expert report?
- In what ways might the defence counsel challenge my expert and/or his/her testimony? How can I prepare my expert to respond to those challenges?

These and other questions are explored in Appendix A to this document.

H. ADMISSIBILITY AND GROUNDS FOR EXCLUSION OF EVIDENCE

▶ Key statutory and regulatory provisions: Sections 171 through 194, 240 and 260 of the Criminal Procedure and Evidence Code

87 *Mseyama and Others v Republic* (Criminal Review Case No. 6 of 2016) [2017] MWHC 12 (05 January 2017).
88 Ibid.

A general rule applicable to all types of proceedings is that evidence can only be relied upon in court if it is admissible. This basic rule gives way to several sub-rules and considerations.

Relevance

As a starting point, the evidence must be relevant to a fact or facts in issue in the case,[89] or fall under one of the established exceptions (such as credibility evidence). What makes a piece of evidence "relevant"? Simply put, relevant evidence is that which makes a consequential fact more or less likely to be true.

In addition to any factual questions made relevant by the very nature of the accusation and/or defence, section 181 of the CP&EC lists several categories of facts that are always relevant as a matter of law, including the following:

- Facts that "are so connected with a fact in issue as to form part of the same transaction," whether or not they occurred at the same time and place;
- Facts that go to the cause or effect of the core facts in issue, "or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction";
- Facts going to motive or preparation;
- Contextual facts necessary to explain or introduce a core fact in issue, to support or rebut an inference suggested by an otherwise relevant fact, to establish identity of a relevant person or thing, to establish time or place, or to show important relationships between people at issue;
- Facts that, while not otherwise relevant, become relevant due to their contradiction of alleged relevant facts and/or their tendency to make the existence of a fact in issue more or less probable;
- Facts that tend to show state of mind (e.g., intent) or body when state of mind or body is in issue or relevant;
- When there is a question as to the existence of any right or custom, facts that show a transaction or particular instance in which the right or custom was created, claimed, modified, recognized, asserted or denied or which were inconsistent with its existence or alleged character;
- When there is a question as to whether an act was an accident or, on the other hand, done intentionally or knowingly, facts tending to show that the act was part of a series of similar occurrences; and
- When there is a question as to whether a particular act occurred, facts relating to a course of business, according to which the disputed act would have naturally occurred. [90]

Applications to Exclude Evidence and Other Admissibility Considerations

Applications to exclude evidence play an important role in ensuring a fair trial. Most of the requirements for the admissibility of evidence boil down to procedural steps. Knowing those steps and adhering strictly to them can ensure both the admission of important evidence and its subsequent protection against opposing counsel's attempts to exclude it. The same knowledge is also useful in efforts to exclude evidence submitted by the opposing party.

There are three background principles of evidence in Malawi that are relevant to applications to exclude evidence in criminal proceedings. First, in what is sometimes called the "harmless error rule," the improper admission or rejection of evidence is not grounds for a new trial or reversal if the exclusion or inclusion of that evidence would not have changed the outcome of the case.[91] Second, is the timely-objection rule: if evidence is improperly admitted, the appropriate time to seek to exclude that evidence is during the trial, as it occurs or as soon as feasible. The third and final principle is the wide discretion subordinate courts enjoy to receive evidence in passing sentences. Essentially, the court may receive any evidence it thinks fit in order to inform itself as to the proper sentence. [92]

89 Criminal Procedure and Evidence Code, 8:01 sections 171 and 172 (2010).
90 Note also that section 181(4) contains a special provision on relevancy in the context of conspiracies
91 Criminal Procedure and Evidence Code, 8:01 section 240.
92 *Ibid.* at section 175.

Table 4 provides additional rules of evidence in specific scenarios, possible objections and grounds for exclusion, and basic guidance for the offering party to avoid exclusion of evidence (not forgetting proof of facts by written statement, under section 175 of the CP & EC, and proof by formal admission, under section 183). Note that this table is not meant to be exhaustive; it provides only a handful of examples, recognizing that many other situations may occur in practice.

Table 4 Additional Rules of Evidence and Objections

Scenario	Objection/Ground for Exclusion	How to Avoid
Either party proposes to give evidence of a fact that is not relevant by itself. The evidence is only relevant—and therefore admissible—upon proof of another fact, which has not been tendered.	Relevance.[93]	Use evidence to prove facts relevant to the case at hand. If you wish to introduce evidence that only becomes relevant upon proof of another fact, establish that other fact through evidence before attempting to introduce the conditionally-relevant evidence.
Either party submits a written statement rather than oral evidence, without complying with the requirements of section 175(2).	Procedural insufficiency (proof of facts by written statement).[94]	Follow the conditions in section 175(2)[95] or the exception in section 175(3).[96]
Either party submits a photograph or plan as evidence without authenticating the document.	Procedural insufficiency (lack of authentication).[97]	Offer the person who took the photograph or made the plan as a witness to authenticate the photograph or plan.
In the absence of consent or waiver, either party attempts to introduce an expert opinion report without calling the author to testify in court.	Procedural insufficiency (improper introduction of expert report).[98]	Admissible expert testimony requires either consent from the opposing parties or no objection from the other parties within seven days of notice of intent to tender the expert evidence. This does not apply if the expert can be called as a witness, answer written interrogatories, or is incapable of giving evidence. See Appendix A for more details on expert opinion evidence.
Either party calls a witness who testifies to something s/he heard from another.	Hearsay.[99]	All fact witnesses should have direct knowledge of the facts in their testimony. In general, prosecutors should only call a fact witness who saw, heard or otherwise directly perceived a relevant act or situation.[100]

93 Criminal Procedure and Evidence Code, 8:01 section 172
94 *Ibid.* at section 175
95 The conditions are: (a) the statement purports to be signed the person who made it; (b) the statement contains a declaration by that person that it is true to the best of his/her knowledge and s/he would be liable to prosecution if it were tendered as evidence if it contains anything which he/she knew to be false or did not believe to be true; (c) a copy of the statement is served on each of the other parties to the proceedings before the hearing at which the statement is tendered in evidence; and (d) none of the other parties objects to the statement being tendered in evidence within seven days of service of the copy of the statement.
96 A statement made by any person may be admissible as evidence if the party may call that person to give evidence or the court may require that person to attend before the court to give evidence.
97 Criminal Procedure and Evidence Code, 8:01 section 179.
98 *Ibid.* at section 180.
99 *Ibid.* at section 184.
100 This does not apply to expert opinions, see sections 180, 184(1)(d), and 184(2)(a) for more detail.

I. EXCLUSION OF ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE

The law's response to illegally or improperly obtained evidence is an enduring dilemma in criminal procedure. On the one hand, allowing such evidence to be used against the accused would seem to provide an incentive—or at least no clear disincentive—for unscrupulous conduct by police officers and investigators. On the other hand, if the evidence is otherwise relevant and reliable, should courts really refuse to hear such material? The trial as a quest for truth might seem to suggest that admission is the better option, all things considered. This section briefly examines the historic and prevailing approaches to this thorny issue in the U.K. and the U.S., before turning to Malawian law on the matter.

Under the historical common law approach in the U.K., all relevant evidence is admissible as a general rule, with some exceptions (such as hearsay, discussed below). As such, the historical approach held that if evidence is otherwise admissible, "the court is not concerned with how evidence was obtained."[101] Yet, even though this effectively established a presumption of admissibility of improperly obtained evidence, the default could be overcome through the sound exercise of judicial discretion. As the court in *Kuruma v Republic* explained, "the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."[102]

In contrast to this traditional approach, the modern approach in the U.K. emphasizes the court's discretion over a presumption of admissibility. Specifically, section 78 of the *Police and Criminal Evidence Act 1984* gives a court the discretion to exclude evidence from the prosecution "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". The courts have applied this discretion to exclude evidence obtained from an illegal search,[103] and evidence obtained in breach of the *Human Rights Act 1998*.[104]

The U.S. goes a step further in favour of the accused; there, the starting point is that evidence obtained in violation of the U.S. Constitution must be excluded under the "exclusionary rule."[105] Although there are several exceptions, the exclusionary rule creates a presumption of *inadmissibility*.

What does Malawi's law have to say on the matter? Neither the Constitution of Malawi nor the CP & EC explicitly outlaws the use of illegally-obtained evidence obtained against an accused.[106] In the face of this silence, Malawi courts have followed the common law position that the courts have discretion to admit evidence obtained illegally or improperly if "the probative weight [of the evidence] outweighs the prejudicial effect."[107] Yet, as a matter of best practice, clause 4.10 of the Code of Conduct for Prosecutors in Malawi provides that prosecutors should "[r]efrain from using against an accused person illegally obtained evidence, or which is reasonably and reliably believed to have been obtained through unlawful methods which constitute a grave violation of the human rights of the accused person such as torture or cruel treatment". In sum, the situation appears to be one of internal tension: While courts have been willing to admit improperly or illegally obtained evidence where its "probative weight outweighs the prejudicial effect," Malawi's Code of Conduct for Prosecutors counsel's prosecutors to avoid using such evidence in all cases.

101 *See* Kuruma v R [1955] AC 197 at 2-3.
102 *Ibid.*
103 *See* e.g. R v Khan and others [1993] Crim LR 54.
104 *See* e.g. R v Shannon [2001] EWCA Crim 1535, [2001] 1 Cr App R 168.
105 *See* e.g. *Mapp v. Ohio*, 367 U.S. 643 (1961).
106 *See* Pacharo Kayira, The Right to Fair Trial: Malawi's Quest to Meet International Standards (Master Thesis, 2006, Lund University), for a discussion of this issue, accessed at: https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1555131&fileOId=1563557.
107 *See Mike Appel & Gatto Limited v Chilima* (30 of 2014) [2016] MWSC 138 (22 June 2016), a civil case considering the court's discretion to admit or exclude evidence.

This arguably confused state of affairs likewise manifests itself in the context of involuntary or coerced confessions. As mentioned above, section 176 of the CP & EC provides that evidence of a confession by an accused, if relevant and otherwise admissible, *shall* be admissible notwithstanding that it was "not freely and voluntarily made and without his having been unduly influenced thereto."[108] Rather than barring admission, the law simply addresses the problem (however indirectly) by providing that such admissions may only "be taken into account by a court, or jury, as the case may be, if such court or jury is satisfied beyond reasonable doubt that the confession was made by the accused and that its contents are materially true."[109]

This position sits uncomfortably with the constitutional rights set out in sections 19(3) and 42(2)(c) of the Constitution of Malawi, which provide, respectively, that "[n]o person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment", and that every person arrested for, or accused of, the alleged commission of an offence shall have the right "not to be compelled to make a confession or admission which could be used in evidence against him or her".

On balance, the best guidance for prosecutors is surely that set forth in clause 4.10 of the Code of Conduct for Prosecutors in Malawi: Prosecutors should "[r]efrain from using against an accused person illegally obtained evidence, or which is reasonably and reliably believed to have been obtained through unlawful methods which constitute a grave violation of the human rights of the accused person such as torture or cruel treatment". To the extent that the law may nevertheless on occasion allow for the admission of such evidence, courts should take great care to ensure that they do not admit illegally obtained evidence unless required by law or, if it is a matter of discretion, only when the probative weight truly outweighs the risk of prejudice (including the risk of incentivizing abusive police or investigatory conduct).

J. HEARSAY

▶ Key statutory and regulatory provisions: Sections 173, 174, 176, 177, 180 and 184 of the Criminal Procedure and Evidence Code; Criminal Procedure and Evidence (Documentary Evidence) Rules

As in most common law jurisdictions, Malawian law generally prohibits the introduction of hearsay into evidence. By definition, "hearsay" is an out-of-court statement offered to prove the truth of the matter asserted.[110] Although the CP & EC does not define "hearsay," section 184 sets forth the general prohibition,[111] and the High Court of Malawi has adopted the above basic definition of what is, and what is not, hearsay.[112]

The typical hearsay situation includes two individuals: the declarant (i.e., the person making the out-of-court statement) and the witness (i.e., the person offering the out-of-court statement, or testimony based on that statement, to prove a fact). If the witness

108 Criminal Procedure and Evidence Code, Interpretation, 8:01 section 176(1) (2010).
109 *Ibid.* section 176(3) (2010) and see *R v Bokhobokho and Another* (MSCA Criminal Appeal No. 10 of 2000) [2001] MWSC 5 (17 October 2001).
110 *See Mphatso Chimangeni v Republic,* Crim. App. No. 2 of 2003, [2003] MWHC 34 (28 May 2003) ("Hearsay evidence covers statements by another by a person giving evidence to establish the truthfulness of a fact.").
111 Criminal Procedure and Evidence Code, 8:01 section 184
112 *See Mphatso Chimangeni v Republic*, Criminal Appeal No. 2 of 2003, [2003] MWHC 34 (28 May 2003) ("Hearsay evidence covers statements by another by a person giving evidence to establish the truthfulness of a fact."); see also Malawi Savings Bank Limited v Malidade Mkandawire t/a Malangowe Investments, MSCA Civil Appeal No. 38 of 2014, [2016] MWSC 134 (5 July 2016) (revised 21 February 2019) ("It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.") (quoting *Subramainian v Public Prosecutor* [1956] 1 WLR 965, 970) (internal quotations omitted).

attempts to testify to what the declarant said *in order to prove the truth of the declarant's statement*, that is a classic example of hearsay. For example, imagine a witness who testifies as follows in court:

Q: What did you see when you walked into the room?

A: I saw a pair of elephant tusks on a table, along with the rifle that the accused used to kill the elephant from which he had harvested the tusks.

Q: How do you know that the gun you saw was used by the accused to kill the elephant?

A: Because his wife told me so.

In this example, the witness's testimony that the accused "used" the rifle "to kill the elephant" is hearsay because (1) it is an out-of-court statement (i.e., the accused's wife made the statement out of court), and (2) it is offered to prove the truth of the matter asserted in that out-of-court statement (i.e., to establish that the gun was in fact used by the accused to slaughter an elephant). In contrast, the witness's statement that he "saw a pair of elephant tusks on a table, along with [a] rifle" is *not* hearsay—and is thus admissible barring any other grounds for exclusion—because those facts are based on the witness's own personal knowledge, derived through sensory perception. The witness did in fact see the tusks and the rifle. The only portion of the witness's testimony tainted by hearsay is the assertion that the rifle was the weapon "that the accused used to kill the elephant from which he had harvested the tusks."

As the above example shows, the general prohibition of hearsay flows from the personal knowledge rule, i.e., the basic principle that non-expert witnesses are to testify based upon what they personally know or believe to be true through contemporaneous sensory perception. This is evident in decisions like *Chimangeni v Republic*, where the Court contrasted inadmissible hearsay with "testimony on what [the witnesses'] experienced from all senses and faculties," the latter of which is "admissible to prove any fact in issue."[113]

The relationship between the hearsay rule and the personal-knowledge requirement is further evident from Section 184 of the CP & EC, which provides, inter alia, that oral evidence is generally only admissible: (1) "if it refers to a fact which could be seen" (e.g., elephant tusks in a room), it comes from a "witness who says he saw it"; (2) "if it refers to a fact which could be heard" (e.g., the firing of a gun), it comes from a "witness who says he heard it"; and (3) "if it refers to a fact which could be perceived by any other sense, or in any other matter" (e.g., the smell of a fire, the body heat of a recently killed animal, etc.), it comes from a "witness who says he perceived it by that sense or in that manner[.]" Hearsay runs afoul of the personal-knowledge rule because the witness relies not on his own sensory perception but rather on the word of another.

Note on Exclusions and Exceptions to the Hearsay Rule

In most jurisdictions, testimony that appears to be hearsay may nevertheless be admissible as either excluded or excepted from the hearsay rule. The terms "exclusion" and "exception" are used distinctly to signal the difference between (a) testimony that appears to be hearsay but is not hearsay by definition (and is thus excluded from the rule's reach), and (b) testimony that is by definition hearsay but that falls within an exception to the prohibition on hearsay.

Exclusions

The most common type of testimony that qualifies as excluded from the hearsay rule is an out-of-court statement that is not offered for the truth of the matter asserted but for a different reason. For example, if a witness in court testifies that she "heard Mr. Jones tell the accused that he needs a license for the firearm," that sounds like hearsay. However, the analysis changes if the witness is not offering the out-of-court statement to prove the truth of the matter asserted (i.e., that the accused in fact needed a license for the firearm according to law) but simply to show that the accused was on *notice or aware* of the possible requirement to obtain a license (a fact that could be important to satisfying a *mens rea* element). In the latter case, the testimony is by definition not hearsay

113 *Mphatso Chimangeni v Republic*, Crim. App. No. 2 of 2003, MWHC 34 (28 May 2003), available at https://malawilii.org/mw/judgment/high-court-general-division/2003/34.

because the out-of-court statement is not offered to prove the truth of the matter asserted by the out-of-court declarant. In keeping with this idea, cross-examination of the witness would be just as fruitful as cross-examination of the out-of-court declarant, because the issue is whether Mr. Jones made the statement to the accused—not whether Mr. Jones was telling the truth or said something that was accurate. The difference is subtle but significant, highlighting the need for prosecutors and courts to analyse hearsay situations with care.

Malawi case-law underscores the importance of analysing the purpose for which an out-of-court statement is offered in evidence. In *Malawi Savings Bank Limited v Mkandawire t/a Malangowe Investments*, the court quoted the following language from a popular case from the former Federation of Malaya:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the objective of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.[114]

In sum, the purpose for which the out-of-court statement is used is critical to discerning the hearsay quality of the testimony.

Exceptions

The CP & EC provides a number of statutory exceptions to the general rule against hearsay evidence, including:

- Witness statements, either written or verbal, of relevant facts made by someone who is unable to give evidence for a variety of reasons, in certain circumstances as set out in section 173, including statements made: (1) as to the cause of the person's death, (2) in the ordinary course of business or in the discharge of a professional duty, (3) against the pecuniary or proprietary interest of the person making it, (4) as to the existence of any public right or custom, (5) and (6) as to the existence of any relationship by blood, marriage or adoption in some circumstances, (7) in any deed, will or similar document and (8) by a number of persons which "expressed feelings or impressions on their part";

- Written statements made in special circumstances, as set out in section 174, including: (1) entries in books of account or record kept in the course of business, (2) entries in an official public book, register or record, (3) statements of fact made in a published map or chart, (4) statements made in an Act or government published gazette, and (5) statements of foreign laws contained in government books, reports or rulings.

- Confessions by an accused under section 176;

- Written statements made by persons who are "seriously ill" under section 177; and

- Expert reports under sections 180(3) and 184(2)(a).

Note that the Criminal Procedure and Evidence (Documentary Evidence) Rules contain additional details regarding the use of written statements as an exception to the hearsay rule. Finally, Malawi courts may refer to additional exceptions developed by courts in the U.K. and other Commonwealth jurisdictions.[115] U.K. and Commonwealth case-law is rich in exceptions, and should be explored by prosecutors and magistrates alike.

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114 *Malawi Savings Bank Limited v Mkandawire* t/a Malangowe Investments (38 of 2014) [2016] MWSC 134 (04 July 2016) (revised 21 February 2019) (quoting Subramanian v. Public Prosecutor [1956] W.L.R 965 at 970) (internal quotations omitted), available at https://malawilii.org/node/7346/revisions/9389/view

110 *See,* e.g., R v A Ltd, X, Y [2017] 1 Cr App R 1 (explaining exception for statements in furtherance of a common enterprise, an important exception in conspiracy cases); Myers v The Queen (Bermuda) [2015] UKPC 40 (6 October 2015) (explaining the "body of knowledge" or "body of expertise" exception to the hearsay rule, applicable to expert testimony, a potentially important exception for experienced investigators giving evidence about how poachers and smugglers operate) ("It is well established that an expert is entitled, in giving his evidence, to draw upon the general body of knowledge and understanding in which he is expert, notwithstanding that some (or even all) of the material may have been assembled by other students of the subject.").

K. EXAMINATION OF WITNESSES

▶ Key statutory and regulatory provisions:
Sections 201, 202, 210, 214, 216, 217, 218, 219, 235, 256, 274 and 314 of the Criminal Procedure and Evidence Code

Witness testimony is, in most cases, the primary vehicle for proving, or casting doubt upon, facts relevant to an alleged crime. The Malawi CP & EC establishes the basic framework for both prosecutors and defence counsel to elicit witness testimony in court.

Section 210 provides the general rule that any person may be called as a witness, subject to very limited exceptions. As another default rule, section 212 clarifies "that no particular number of witnesses shall in any case be required for the proof of any fact," meaning that the testimony of even a single witness, if credible, may suffice to establish one or more elements of the crime in question.

Witness testimony is elicited and controlled through a familiar three-stage process: (1) examination-in-chief; (2) cross-examination; and (3) re-examination.

Examination-in-Chief

The attorney who calls a witness begins by examining the witness with a series of questions designed to elicit testimony favourable to that attorney's position. This is known as "examination-in-chief." The attorney should ask questions designed to elicit relevant testimony (i.e., testimony that, if credible, tends to establish facts that either support or undermine the charge or charges in question). However, it is important to note that the examining attorney will often need to ask background questions to establish the witness's identity and relationship to the case. Thus, the presiding magistrate or judge should be careful not to view "relevance" too narrowly. (See above for a more detailed discussion of "relevance.")

One of the most important rules of the examination-in-chief is the general prohibition on leading questions. Leading questions are defined in Section 217 as questions that "suggest[s] the answer which the person putting it wishes or expects to receive[.]" Classic examples of prohibited leading questions include the following:

- *"And then you saw the accused, didn't you?"*
- *"You identified the specimen as a hippopotamus tooth, correct?"*

The problem with leading questions is that they essentially reverse the role between examiner and witness. The witness, whose response to a leading question is usually confined to a simple "yes" or "no," only serves to confirm the key content provided by the examiner. This is not appropriate in examination-in-chief. Note, however, that the rule changes dramatically in the context of cross-examination, as explained below.

Rather than asking leading questions, the attorney in examination-in-chief should, as a matter of strategy, try to ask short, open questions. In addition to avoiding the prohibition against leading questions, such questions allow the witness to become the centre of attention. Examples of such questions include:

- *"What did you do on Monday, February 5?"*
- *"What did you see when you arrived on the scene?"*
- *"What happened next?"*

Of course, it is extremely dangerous for an examining attorney to ask questions of his/her own witness if she does not have a sense of what the answer will be. The examining attorney should never ask open-ended questions that may produce a surprise or damaging answer.

An exception to the rule against leading questions in examination-in-chief is for hostile witnesses, allowed only with leave of the court. If the court is satisfied, following an application by the attorney who called the witness, that the witness is hostile, then that party may cross-examine the witness and ask leading questions. The procedure that a court must follow for alleged hostile witnesses is set out in the decision *Magombo and Phiri vs Republic*, (1981-83) 10 MLR 1, and re-stated in *Republic vs Zgambo* ((MSCA Criminal Appeal No. 20 of 1999)) [2000] MWSC 2 (17 April 2000), as follows:

Where the prosecutor has in his possession a statement made by the prosecution

witness on an earlier occasion which is in direct contradiction to the witness's evidence in court, he must show the statement to the court and ask leave to have the witness treated as hostile. The witness must be asked if he had made the prior statement and his attention must be drawn to the occasion when the statement was made, proving circumstances so as to sufficiently designate the occasion the statement was made and giving the witness an opportunity to see the statement and identify it. Once this foundation has been laid, the court may, in its discretion, grant leave and the cross-examining of the witness, with a view to discrediting him, can proceed.[116]

Cross-examination

Cross-examination is a foundation of adversarial justice systems. It allows adverse parties to question the credibility of the witness, challenge the testimony elicited through the examination-in-chief and discover facts not in the testimony of the examination-in-chief.[117] John Henry Wigmore called cross-examination "the greatest legal engine ever invented for the discovery of truth."[118] Cross-examination is the primary way to test the believability, truthfulness, and completeness of a witness's testimony.[119] So much importance is placed on cross-examination that some have said the "complete denial of otherwise proper cross-examination . . . should lead to no less than a reversal of the conviction."[120]

Cross-examination is generally permitted by the party adverse to the witness, with some clear exceptions. One limitation is that there is no right to cross-examine a person who is only summoned to produce documents as the right only applies to a person summoned as a witness.[121] Further, when the judge or magistrate has questioned a witness called by one of the parties, the parties may only conduct cross-examination "upon any answer given in reply to any such question" (asked by the judge or magistrate) with leave of court.[122]

Because one purpose of cross-examination is to determine the truthfulness of a witness, it has different rules than the examination-in-chief. For example, leading questions may be asked without the permission of the court during cross-examination.[123] In addition, the accused may refuse to answer lawful questions asked during cross-examination, although such refusal can be commented on by the prosecutor and taken into account by the court in reaching its decision.[124]

Cross-examination is an important tool for prosecutors to use during trial. Using it effectively can be the difference between a conviction and an acquittal. Each party should consider what questions the adverse party is likely to ask during cross-examine and prepare their witnesses accordingly.

Table 5 contains further details on the rules of cross-examination and which section of the CP & EC each rule can be found in.

116 *Republic vs Zgambo* ((MSCA Criminal Appeal No. 20 of 1999)) [2000] MWSC 2 (17 April 2000).
117 13 Stanley Giffard Halsbury, Halsbury's Law of England 756 (Quintin Hogg Hailsham ed., 2nd ed. 1934).
118 3 John Henry Wigmore, Evidence in Trials at Common Law 27 (2nd ed. 1923).
119 *Davis v. Alaska*, 415 U.S. 308, 316 (1974)
120 *Delaware v. Van Arsdall*, 475 U.S. 673, 686 (1986) (Marshall, J., dissenting).
121 Criminal Procedure and Evidence Code, section 216.
122 *Ibid*. at section 238.
123 *Ibid*. at section 218.
124 *Ibid.* at sections 256, 314

Table 5 Rules of Examination

CP & EC Section Number	When Cross-examination is Allowed	Conditions
201	Prosecution and accused shall have the right to cross-examine a witness called by the court of its own motion (i.e., a witness not called by either party).	Court adjourns for as much time as it thinks is necessary to enable adequate preparation.
214	Absent an exception, the adverse party may cross-examine a witness if they so desire. Note, however, that electing to cross-examine a witness provides the party who conducted the examination-in-chief a second opportunity to examine the witness through re-examination.	Questions on cross-examination must relate to the relevant facts of the case, but need not be confined to the testimony of the examination in chief. The witness may be asked questions that: test his veracity; discover who he is and what is his position in life; shake his credit by injuring his character. This also allows for the opposing party to clarify any points raised in re-examination.
218	Circumstances in which leading questions may be asked.	● Allowed during cross-examination without permission of the court. ● Not to be asked during examination-in-chief or re-examination, except with permission of the court or by consent of the defence, intimated to the court. ● However, the court should generally allow leading questions during examination-in-chief or re-examination with respect to matters that are "introductory or undisputed" or have already been sufficiently proven.
219	A witness may be cross-examined as to previous statements either made in writing or put into writing without the writing being shown to him.	If the writing is to be used to contradict the witness, his attention must first be called to those parts of the writing which are to be used for that purpose.

235	Section 235 covers both the use of a writing to refresh a witness's memory and cross-examination thereupon. A witness may refresh his memory by referring to any writing (1) made by the witness "at the time of the transaction concerning which he is questioned" or shortly thereafter, or (2) made by another person if read by the witness within the same time-frame and if the witness "knew it to be correct" when he read it. Whenever a witness wishes to refresh his memory, he may, by leave of court, refer to a copy of the writing in question if the court is satisfied that the original is not necessary. In addition, expert witnesses may refresh their memories by referring to professional treaties. When a witness refreshes his memories through reference to permitted documents, he "may also testify to facts mentioned in any such documents . . . although he has no such specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the documents." The document(s) used to refresh the witnesses' memory must be produced and shown to the adverse party upon request. The adverse party may then cross-examine the witness using the document in question.	Any writing or document used by a witness to refresh his memory must be shown to the adverse party upon request.
256, 314	The accused elects to become a witness in his own defence.	Although the accused may refuse to answer any lawful question put to him by the court or in cross-examination, such refusal may be commented upon by the prosecution and taken into account by the court in reaching its decision. Note that in cases where the accused calls additional witnesses other than himself, such witnesses are to appear after the accused has appeared as a witness.
274	The accused shall be entitled to cross-examine all or any of the witnesses for the prosecution before the court finally determines the matter.	

Re-examination

The purpose of re-examination, as set out in section 214 of the CP & EC, is to allow the witness to explain and clarify matters referred to in cross-examination. As a practical matter, counsel will often use re-examination both to bolster the testimony solicited in examination-in-chief and to mitigate any perceived harm done on cross-examination. Generally, the questions asked in re-examination are limited to matters referred to in cross-examination, unless the court grants a party permission to ask questions on a new matter. In this case, and in accordance with subsection 214(6), the adverse party is allowed to further cross-examine the witness on that new matter.

L. IMPEACHING CREDIBILITY OF WITNESS

▶ Key statutory and regulatory provisions:
Sections 181. 215 and 231 of the Criminal Procedure and Evidence Code

"Impeaching" a witness means calling into question their credibility or truthfulness. As an initial matter, it is important to distinguish impeachment from most cross-examination tactics. At some level, almost all questions on cross-examination are designed to undermine a witness's testimony (e.g., by demonstrating inaccuracies, conflicting facts, possible mistake, etc.). However, impeachment is intended to discredit the witness—and not just his/her testimony—as a reliable source.

As a general rule, a party cannot impeach its own witness unless there are special circumstances, such as with a hostile witness.

Section 231 of the CP & EC sets out ways in which a party may impeach the credibility of a witness, some of which require leave from the court:

a) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

b) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

c) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Under the common law, evidence relevant only to the credibility of a witness is inadmissible unless it is also relevant to a fact in issue in the case. This rule extends to questions asked of a witness under examination. However, in Malawi this rule has been amended to allow for certain questions to be put to a witness relating to his or her credibility which are not otherwise relevant to a fact in issue in the case, with leave of the court in certain circumstances.

Section 215 of the CP & EC provides that the court shall decide whether or not a witness shall be compelled to answer such a question relating to his or her credibility, having regard to the following considerations:

a) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court or jury, as the case may be, as to the credibility of the witness on the matter to which he testifies;

b) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court or jury, as the case may be, as to the credibility of the witness on the matter to which he testifies;

c) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence and;

d) The court or jury, as the case may be, may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Another way to challenge the credibility of a witness is to adduce evidence of their prior criminal history. Evidence of a witness's prior criminal history is another statutory exception to the general relevance rule, provided for under

section 181 of the CP & EC. Section 181 sets out (subject to section 192) how a previous conviction may be proved, through producing a record or extract of such conviction, in a certain form.

M. JUDICIAL NOTICE

▶ Key statutory and regulatory provisions: Section 182 of the Criminal Procedure and Evidence Code

Judicial notice is an exception to the general rule that a party must offer evidence to establish a factual proposition. Judicial notice refers to facts that the court (or jury) can accept without requiring evidence to prove that fact, on the basis that it is common knowledge within the jurisdiction or capable of verification by reference to a document the authority of which cannot reasonably be questioned. A common example used is the phases of the moon and the time for the rising and setting of the moon to be considered in a case where a witness claims to have seen something "in the bright moonlight."[125] In Malawi, a Court of law can take judicial notice of events, happenings in other courts and not need them to be proven but overall it is the facts and law that guide decision.[126]

Section 182(2) of the CP & EC codifies certain facts that can be taken on judicial notice, although this list is not exhaustive. Importantly, it includes:

- Laws and subsidiary legislation of Malawi and of the U.K.;
- Public holidays;
- The territories of the commonwealth; and
- The divisions of time and the geographical divisions of the world.

Subsection 182(3) allows the court or jury to reference books or documents to aid their understanding of matters taken on judicial notice, including matters of public history, literature, science or art. Subsection 182(4) further allows the court or jury to refuse to take judicial notice when called up to do so until the requesting party provides documents it may consider necessary as a reference.

Some other examples of judicial notice could include:

- The location of a national park or reserve, and cities or towns, as well as the distances and minimum driving times between them (these facts could help determine where and when an animal or species was taken);
- Extreme weather events, such as extensive rain (see examples of this in *Siku Transport v Mwitiya*[127] and *Mkwamba v Republic*[128]); and
- Whether an animal is a "wild animal" (see *Chilinda v Securicor (Malawi) Limited*).[129]

125 This is an actual example from a murder trial in the U.S. in 1857 where then lawyer Abraham Lincoln caused the court to take judicial notice of the phase and rising time of the moon to call into question the witness' ability to see by moonlight. The court agreed that the phase and rising time of the moon could not reasonably be questioned, which left the question of if a quarter moon low in the sky gave enough light for the witness to see as a question of fact to be determined by the jury; see https://timesmachine.nytimes.com/timesmachine/1899/05/14/100443367.pdf

126 Harry –v- Republic Criminal Case Number 269 of 2016 [2017] MWHC 16 (4th January 2017) (unreported), per Justice Kamwambe.

127 *Siku Transport v Mwitiya* (3041 of 2006) (3041 of 2006) [2007] MWHC 14 (22 March 2007).

128 *Mkwamba v Republic* (Criminal Appeal No. 1 of 1996) (1 of 1996) [1996] MWHC 13 (30 March 1996).

129 *Chilinda v Securicor (Malawi) Limited* (1243 of 2004) ((Malawi)) [2006] MWHC 16 (18 December 2006).

III. OTHER TRIAL ISSUES

A. FORFEITURE OF PROPERTY USED TO COMMIT A CRIME

▶ Key statutory and regulatory provisions: Sections 24A, 25, 116 and 149 of the Criminal Procedure and Evidence Code; Section 113 of the National Parks and Wildlife Act; Section 74 of the Forestry Act and Section 49, 74 and 75 of the Financial Crimes Act.

A police officer has the power to search and seize a vehicle (or aircraft, or boat) suspected of being used in the commission of an offence, or in which anything stolen or unlawfully obtained is suspected to be found, under sections 24A and 25 of the CP & EC. A warrant is not always required for such search and seizure. Further, under section 116, any property seized and brought before a court may be detained until the conclusion of the case or the investigation, with reasonable care being taken for its preservation.

What happens, however, at the conclusion of the case? For example, if the police seize a car suspected of being used in connection with illegally trafficking an endangered species, can the car be forfeited to the State, with the owner losing title permanently? The answer is "yes."

As a general proposition, section 149 of the CP & EC allows a court, at any time during or after an inquiry or trial, to make orders for the disposal of property "used for the commission of any offence" by destruction, forfeiture, confiscation, delivery to another person or in any other manner. Further, forfeiture to the government is specified as an additional penalty that can be imposed under both the National Parks and Wildlife Act and the Forestry Act.

- Section 113 of the NPWA authorizes forfeiture following a conviction of any offence under that Act. The forfeiture penalty set out in section 113 extends to "any specimen, domestic animal or any firearm or other weapon, trap, net, poison, material or any motor vehicle, aircraft, boat, or any other article taken by or used in connection with the commission of the offence."
- Section 74 of the Forestry Act provides that upon conviction of a person of an offence under the Act, the court may, in addition to any other penalty, order forfeiture of any forest produce which was used in the commission of the offence and/or the seizure of any carrier or vehicle which was used in the commission of the offence.

Reading section 149 of the CP & EC together with section 113 of the NPWA and section 74 of the Forestry Act, it appears clear that a forfeiture order can be made for a vehicle used in connection with a wildlife or forestry offence.

The trickier scenario is when the vehicle in question is not owned by the accused, but by a third party. In that situation, is it necessary for the State to prove that the owner knew or consented to the vehicle's use in the commission of the crime? Although the above provisions do not provide any specific guidance on this issue, practices in the financial-crimes context may offer some guidance by analogy.

Under section 49 of the Financial Crimes Act, courts are to order that specified "tainted property" be confiscated, including property used in or in connection with the commission of an offence. Under section 74 of that Act, a court must make an order of forfeiture where it finds on the balance of probabilities that property has been used or is intended for use in the commission of an offence under the Act. Subsection 74(3) then provides that the absence of a person whose interest in the property may be affected by a forfeiture order does not prevent the court from making the order.

In *Republic v Lutepo*, a decision considering the confiscation of property under the Money Laundering Act (now repealed and replaced by the Financial Crimes Act), the Malawi High Court cited a case from the Seychelles that held "historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied."[130] Yet, while this makes sense with respect to contraband or other outright prohibited items, the logic is questionable with respect to items (like vehicles) that may be put

130 *Republic v Lutepo (Order)* (Criminal Cause No. 02 of 2014) [2015] MWHC 492 (03 August 2015) at [48] citing *Hackl v Financial Intelligence Unit (FIU) & Anor* (SCA 10 of 2011) [2012] SCCA 17 (31 August 2012).

to lawful use. Recognizing as much, Malawi has adopted new statutory provisions—at least in the context of the Financial Crimes Act—that provide protections to innocent owners.

Under section 75 of the Financial Crimes Act, a third party who claims interest in the property that may be subject to a future forfeiture order, or for which a forfeiture order has been made no earlier than 12 months prior, can apply to the court to preserve their interest in the property and order that the property be returned to them. The Financial Crimes Act also contains notice rules to alert persons to the forfeiture action. In order for the court to grant relief in favour of a third party claiming an ownership interest, the court must be satisfied that the person was not in any way involved in the commission of the offence. Section 83 of the Act provides further protections to third parties who claim interest in property subject to a confiscation order of the court, which again only applies if the court is satisfied that the person was not in any way involved in the commission of the offence.

The provisions in the Financial Crimes Act follow the approach taken in other Anglo-American jurisdictions—most notably the U.S.—which show significant concern for the plight of potentially innocent owners. For example, in the U.S., the Lacey Act authorizes forfeiture of vehicles and other criminal instruments associated with a wide variety of wildlife trafficking offences.[131] However, forfeiture is only permitted where "the owner of such vessel, vehicle, aircraft or equipment was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of due care should have known that such vessel, vehicle, aircraft, or equipment would be used in a criminal violation of this chapter[.]"[132] Although the government has the burden of establishing whether an item can be forfeited, by a preponderance of evidence, third-party owners are afforded an opportunity to block forfeiture through the so-called "innocent owner" defence. Specifically, after the government provides public notice of the civil forfeiture action, an owner may prevent forfeiture by proving that they "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."[133]

Where there is proof that chattels used in the commission of the crime were found on the person of the accused or in their possession, the Court can order forfeiture and disposal through auction with proceeds going towards protection of the environment. In the case of *Jose Manuel and 34 others v Republic*[134], on appeal against an order of forfeiture of two tractors, a Toyota Hilux, Volvo truck, fork lift and bull dozer valued at USD 500,000. In an inter-agency coordinated investigation and prosecution, the accused persons (1 Portuguese, 2 Chinese and 34 Mozambicans) having been found harvesting the protected mopane trees in Lengwe National Park in the middle of the night, were jointly charged with multiple counts including illegal entry contrary to the Immigration Act, tax charges contrary to Customs and Exercise Act, and NPWA.

Although both the Forestry Act and the NPWA are silent as to protections for "innocent owners" of vehicles and other items used in the commission of crimes under those Acts. In the case of *Republic v Patrick and Chancy Kaunda*[135], on appeal by the State against an imposition of a fine and release of a vehicle used in the commission of the crime of transporting over 600 pieces of ivory, the Supreme Court held that it is not possible to automatically forfeit a chattel used in the commission of a crime where there is no evidence that the third party owner knew that the chattel or vehicle was to be used in the commission the crime. Therefore, the safer view is that prosecutors and judges ought to proceed with some care for such individuals. This may be accomplished by either (a) requiring the State to prove that the owner consented to the criminal use, or knew

131 16 U.S.C. § 3374(a)(2).
132 *Id.*
133 18 U.S.C. § 983(d).
134 Jose Manuel & 34 others Criminal Appeal 17 of 2017 (unreported), per Nyakaunda Kamanga, J.
135 Republic –v- Patrick Kaunda and Chancy Kaunda, Supreme Court of Appeal Number 1 of 2015 (unreported)

or should have known that the vehicle or other item would be used to commit a crime, or (b) alternatively, as seen in the Financial Crimes Act, requiring notice of the forfeiture and allowing a third-party owner the opportunity to block or revers a forfeiture action by establishing lack of consent or knowledge. Either way, an innocent owner is protected from arbitrary deprivation of property. The only difference is which party bears the burden of proof.

B. INFORMANTS AND WHISTLEBLOWERS

▶ Key statutory and regulatory provisions: Section 51A of the Corrupt Practices Act; Section 71 of the Criminal Procedure and Evidence Code; Section 60 of the Courts Act

Corruption in the form of illegal bribes and money laundering are key themes in the illegal wildlife trade, in particular the trade in ivory, rhino horn and other high-value specimens.[136] Corruption can occur at any level of the supply chain, including sourcing, transit and export, and it can involve multiple players such as police officers, park rangers and customs officials. Whistleblowers and informants are a critical part of exposing this corruption and bringing wildlife crimes to light, which might otherwise be masqueraded as legitimate activities.

While the terms whistleblower and informant are often used interchangeably, they typically refer to two distinct categories of witnesses:

- A ***whistleblower*** is an employee or official who reports unlawful activities being carried out within their organization to authorities. An example in the wildlife crime context could be a customs officer who, observing one of his colleagues accepting a bribe from a wildlife trader to forge an export permit, reports that activity to the police.

- An ***informant*** is typically a private person who, being involved in or exposed to unlawful activities being carried out by private third parties, comes forward and reports those activities to authorities. A sub-set of informants are those belonging to the Covert Human Intelligence Source, individuals cultivated and retained by law enforcement agencies to gather and report information about criminal activities by third parties.

Whistleblowers and informants need special protections because of the potential repercussions they may face in coming forward. For whistleblowers, this can include discrimination or disciplinary action being taken against them by their employer or supervisor. Both whistleblowers and informants can face serious threats to their safety and even their lives. Further, they may themselves be a victim of a crime, in which cases their status as a victim should be recognised.

To encourage whistleblowers and informants to come forward, many jurisdictions offer rewards for information that advances an investigation or leads to prosecution. Reward programs should be approached with caution, however, as they often raise questions of inducement and or improper motivation of the witness, leading to possible allegations of false or exaggerated testimony. It is important to note that any reward paid to a witness will trigger an obligation of disclosure to the accused in accordance with the prosecutor's duty of disclosure (discussed in section C below). In the absence of a reward program, most jurisdictions have some mechanism to protect the individual's identity—both during the investigation phase and in court if they choose to give evidence against an accused.

The following discussion focuses on how prosecutors and judicial officers in Malawi can work to ensure that a whistleblower or informant's identity is concealed from either the general public and/or the accused during a trial.

Statutory Protections

There are no clear guidelines under Malawi law for the protection of whistleblowers and informants who help to expose corruption within the illegal wildlife trade as such. However, general protections to whistleblowers and informants are provided under section 51A of the Corrupt Practices Act.

Under section 51A(1) and (2), where someone comes forward to the police or the Anti-Corruption Bureau to report an alleged or suspected corrupt practice or other offence connected with an institution, organisation, office, community, association or society, no information relating to that person shall be admitted in evidence in any civil or criminal

136 UNODC, *World Wildlife Crime Report 2020: Trafficking in Protected Species* (New York, 2020) (accessed at https://www.unodc.org/documents/data-and-analysis/wildlife/2020/World_Wildlife_Report_2020_9July.pdf).

proceeding, and no witness shall be obliged or permitted to disclose their name or address or state any matter which might lead to their discovery. Section 51A(3) then provides that "if any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding contain any entry in which the whistleblower or other informer is named or described or which might lead to his discovery, the court before which the proceeding is heard shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the whistleblower or other informer from discovery, but no further".

However, under section 51A(4), if it becomes clear that the whistleblower or informant "wilfully provided information which he knew or believed to be false, or did not believe to be true, in material particular, or if in any other proceeding the court is of the opinion that justice cannot be fully done between the parties thereto without the discovery of the whistleblower or other informer, the court may permit inquiry and require full disclosure concerning the whistleblower or other informer, and, if the information was provided in writing, require the production of the original thereof".

While the substantive scope of the protections provided under the Corrupt Practices Act are relatively narrow—being limited to cases involving corrupt practices and other enumerated offences—they may nevertheless be important in those wildlife cases that involve whistleblowing around corruption.

Witness Protection in the Courtroom

Both section 60 of the Courts Act,[137] and section 71 of the CP & EC require all court proceedings to be carried on in an open court, with an exception for the court to hear proceedings or part thereof in a closed court and in the absence of certain persons if satisfied that it is "expedient in the interest of justice or propriety or for other sufficient reason so to do". Prosecutors may rely on the latter language, (together with section 51A of the Corrupt Practices Act, if applicable), to bring an application to conceal the identity of a whistleblower or informant witness. Such an application will be strengthened where there are legitimate safety concerns should the witness's identity be revealed either to an accused or to the general public. In an application for witness protection by the State, it has been held that the general rule is that criminal trials must be held in open court, open to the public and that the principle should be departed from in exceptional circumstances. Protective measures can be accorded to witnesses as a form of witness protection such as pseudonym names, the witnesses particulars redacted from record and any other identifying information, the media gagged from reporting.[138]

Concerns over the safety of whistleblower or informant witnesses need to be balanced with the accused's right to a fair trial under the Constitution, as well as the public interest in ensuring open justice. In the high profile case of *Republic v Chilumpha,* the prosecution relied on section 60 of the Courts Act, as well as the "inherent jurisdiction of the court" in making an application to conceal the identity of two principal witnesses.[139] The High Court dismissed this application, after a lengthy consideration of the law both internationally and in Malawi, holding that the prosecution had failed to provide grounds upon which the witnesses held a belief and fear that revealing their identities to the public would greatly compromise their security and safety. In cases with a lower profile, a court may not require thorough evidence as to security risks faced by whistleblower witnesses. However, as a best practice, prosecutors should have this evidence prepared in making any such application.

Finally, prosecutors must be conscious that all activities and records connected with a whistleblower or informant witness may come under scrutiny as regards fair trial rights by the defence and present disclosure issues. Although there is a limited exception to disclosure in cases known as "public interest immunity" (see below, section C), evidence relied upon by the prosecutor in making an application to conceal the identity of a witness will likely subject to disclosure, possibly in a redacted form.

C. DUTY OF DISCLOSURE AND COMMUNICATING WITH THE INVESTIGATORS

137 Courts Act (Cap. 3:02).
138 *Republic –v- Aubrey Sumbuleta* Criminal Case Number 11 of 2021 (unreported) (ruling of 14th October, 2021), paras 46, 49, 59-60, per Justice Kapindu (case involving sexual harassment and protection of witnesses).
139 *Right Hon. Dr. Cassim Chilumpha SC v Matumula* (Criminal Case No. 13 of 2006) (13 of 2006) [2008] MWHC 6 (25 January 2008).

A prosecutor who does not know all of the facts surrounding an investigation is ill-equipped to handle the case in a competent, ethical and lawful manner. Although police investigators ought to proactively share all relevant information with their prosecutor counterparts, prosecutors should not assume that this will occur in every case. Accordingly, prosecutors should, as a matter of standard operating procedure and to the extent permitted by law, ask investigators to disclose all material facts regarding the investigation, sources of information and the acquisition of evidence. With this information in hand, prosecutors are in a much better position to discern whether the investigation is (a) tainted with irregularities, or (b) otherwise susceptible to attacks by defence counsel designed to undermine the credibility or persuasiveness of the government's case. This is essentially consistent with the Code of Conduct for Prosecutors in Malawi. Clause 3.7 of that document states that all prosecutors shall "consider all relevant circumstances of a case, and ensure that reasonable enquiries are made to obtain evidence, even though the enquiries may be to the benefit or even the disadvantage of the accused person".

One area in which prosecutors must be especially vigilant is the use of informants. While informants frequently provide critical information leading to prosecutions of persons for wildlife crimes, they also raise unique issues. First, where an informant is involved in crime—and thus in a position to offer "insider" information regarding the case in question—credibility issues may arise as a result of the informant's criminal history (or, in some cases, involvement in the precise crime under investigation). Second, even if the informant is not a so-called "criminal informant," there may be other reasons to doubt the informant's credibility. The prosecutor should thus know if the informant (a) has a financial motivation, (b) has served as an informant in other cases (and to what result), (c) has a personal relationship with the accused or (d) has any other motive to offer less than reliable information.

With the foregoing in mind, prosecutors should ask police investigators to provide the following information as soon as possible in every case:

- Whether an informant has been used in the course of the investigation;
- Whether this informant is operating under condition of confidentiality/ anonymity;
- What information was supplied by the informant;
- How the informant came to possess such information;
- Whether the informant has a pre-existing relationship with the accused;
- Whether the informant has a criminal history;
- Whether the informant has been offered money or another reward for information (which, though not objectionable on its face if conducted under a lawful program, may have a bearing on credibility);
- Whether the informant has served as an informant in other cases, and whether those cases led to successful prosecution; and
- Any other facts going to the reliability of the informant.[140]

Depending upon what the prosecutor learns, another issue may arise: the prosecutor's duty to disclose, to the accused or his defence counsel, any material exculpatory information or other information favourable to the accused. There is no clear case-law or statutory provisions in Malawi on the issue,[141] the Code of Conduct for Prosecutors in Malawi contains two clauses setting out the scope of this duty. In addition, the

140 In the United States, the Brady rule, discussed below, requires prosecutors to conduct due diligence to ferret out evidence that may be favourable to the accused. See *Anderson v. City of Rockford*, 932 F.3d 494, 504 (7th Cir. 2019) ("Because Brady material also encompasses evidence known only to police investigators and not to the prosecutor, prosecutors have an affirmative duty to learn of any favourable evidence known to the others acting on the government's behalf in [a] case, including the police.") (quoting Strickler v. Greene, 527 U.S. 263, 280–81 (1999)) (internal quotations omitted).

141 Section 223(2) of the Criminal and Evidence and Procedure Code appears to protect the identity of an informant from disclosure—either before trial or during cross-examination. Specifically, section 223(3) reads as follows: "No magistrate or police officer shall be compelled to disclose the source or origin from which he received any information as to the commission of any offence, and no revenue officer shall be compelled to disclose the source or origin from which he received any information as to the commission of any offence against the public revenues." While this provision clearly suggests that there is no obligation to disclose the name of an informant, it does not appear to address the obligation to disclose material exculpatory information (including information that could undermine the credibility or reliability of the informant). Absent judicial clarification, the best reading of section 223(3) may be to interpret the provision as shielding from disclosure only the informant's name or other identifying information. This balances the need to protect the informant from potential reprisals while allowing defence access to material exculpatory information uncovered by the government.

approaches of other common-law jurisdictions are instructive.

First, in the Code of Conduct, clause 1.5 provides that prosecutors must "always protect the right of an accused person to a fair trial and, in particular ensure that evidence favourable to the accused person is disclosed to defence counsel or the court in accordance with the law, and the requirements of a fair trial". Although this clause only refers to "defence counsel," it arguably also applies to disclosure directly to an accused who is unrepresented. This is highlighted by the duty set out in clause 4.8 to "safeguard the right of the accused person [to a fair trial] in so far as it is possible, especially where the accused is unrepresented".

Second, Clause 4.9 also provides that a prosecutor must "as soon as reasonably possible, disclose to the accused person evidential and beneficial information for his or her defence".

(i) Approaches to Disclosure in Other Jurisdictions

In the U.S., the Federal Rules of Criminal Procedure require prosecuting authorities to disclose certain materials to defence counsel upon request.[142] In addition, however, case-law developed by the U.S. Supreme Court requires automatic, proactive disclosure of certain materials without waiting for defence counsel to make a request. Specifically, *Brady v. Maryland* and associated jurisprudence obligate the government to disclose evidence in its possession that is both (a) favourable to the defendant, and (b) material to guilt or punishment, within time for effective use at trial.[143] Although the test is not always precise at the margins, its outlines are clear: if the government possesses information that is materially favourable to the accused, it has an obligation to disclose that information to defence counsel in a timely fashion.

Examples of required disclosures under *Brady* include:

- The prosecution erred when it failed to disclose an accomplice's statement admitting to being the principal actor, even though the statement also implicated the defendant as an accessory.[144]
- The prosecution should have disclosed tips, leads and witness statements relating to other individuals who had been investigated for the murder of a child, as this material provided an alternative narrative to the prosecution's theory of the case against the accused.[145]
- The prosecution should have disclosed a detective's statement identifying another potential suspect.[146]
- The prosecution erred by failing to disclose material suggesting that someone who looked like the defendant had motive, opportunity and ability to commit the crime in question.[147]
- The prosecution should have disclosed information that could have been used to impeach a supposed eye-witness for the State. The information consisted of recorded phone calls in which the witness stated that he was not present when the victim was shot, was threatened by the police and was coached as to how to testify. The court held that this should have been disclosed to defence counsel for impeachment purposes, even if the recordings may not have been admissible to prove the truth of the matter asserted.[148]

It has been held that the prosecutor has a duty to disclose all details including evidence relating to a trial to both the Court and the accused persons.[149] Therefore, the whole trial is dependent on proper and organised conduct of the prosecution towards the Court and the accused person.

In the U.K., the prosecutor's duty of disclosure developed under the common law as a component of the accused's right to a fair trial, requiring the prosecutor to disclose all material that either strengthens or weakens the prosecution's case, or assists the defence's case, whether or not that material is requested requested by the accused. In the case *R v H*, the Court described the duty as follows:

142 *See* Federal Rules of Criminal Procedure, Rule 16 (requiring upon request disclosure of any statements made by the defendant while under arrest, records of the defendant's criminal history and a summary of any expert testimony that the government plans to use in its case-in-chief; requiring upon request the government to make available for inspection any documents and objects that the government plans to use, that may be material to the defence, or that belonged to the defendant; and more).
143 *Brady v. Maryland*, 373 U.S. 83 (1963).
144 *Ibid.*
145 *Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2014).
146 *Bloodsworth v. State*, 307 Md. 164, 512 A.2d 1056 (1986).
147 *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986).
148 *Anderson v. City of Rockford*, 932 F.3d 494 (7th Cir. 2019).
149 *Republic –v- Dr. Cassim Chilumpha and Yussuf Matumula* Criminal Case Number 13 of 2006 (unreported), per Nyirenda J. (ruling of 26 October,2007).

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.[150]

The duty to disclose is continuous, which means that if at any time before the accused has been acquitted or convicted of the alleged offence, the prosecutor either comes into possession of, or inspects material that might undermine their case or assist the accused, that material must be disclosed to the accused as soon as is reasonably practicable.[151] The duty also continues into sentencing. Thus, during the sentencing phase, the prosecutor must disclose material relevant to the appropriate sentence or punishment (e.g., information that might mitigate the seriousness of the offence).[152]

The disclosure rule in the U.K. is now laid out in section 3 of the Criminal Procedure and Investigations Act 1996 (UK). This section provides that a prosecutor must "disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused." Under subsection 3(2) this includes both material in the prosecutor's possession as well as material which the prosecutor has inspected in connection with the case against the accused. There is an exception in subsection 3(6) for material which the court, on an application by the prosecutor, concludes is not in the public interest to disclose.

As in many jurisdictions, the scope of the duty in the U.K. is set out in prosecutorial or government guidelines such as the Attorney General's Guidelines on Disclosure 2013 ("Attorney General's Guidelines").[153] The Attorney General's Guidelines provides the following examples of the type of material that falls within the prosecutor's duty to disclose:

- Material casting doubt upon the accuracy of any prosecution evidence, such as previous drafts of prosecution witness statements or expert reports that contain substantial differences to the final versions relied upon by the prosecution;
- Material casting doubt upon the reliability of a confession (e.g., evidence that the confession was obtained improperly such as through threats of violence);

- Material that might affect the credibility of a prosecution witness, such as information relating to their criminal history, or whether they received payments from police to provide evidence;
- Material that might support a defence that is either raised by the accused or reasonably apparent from the facts (e.g., in the wildlife crime context, any material relevant to a license that the accused may have held authorizing the conduct in question); and
- Material which might have a bearing on the admissibility of any prosecution evidence, such as information that evidence was obtained in an improper manner or in contravention of another law.

There is no actual provision on disclosures in the subordinate court. However, pursuant to fair trial, the High Court practice on disclosures has permeated to the subordinate courts. This is especially where it concerns the conduct of criminal trials and particularly where the accused is defended. It has been held that in preparation for trial and before plea is entered section 303(4) of the CP and EC must be satisfied. Such satisfaction includes disclosure element,

150 *R v H* [2004] UKHL 3; [2004] 2 Cr. App. R. 10, House of Lords at [14].
151 *See R v Ward* [1993] 1 WLR 619, 674 and R v Keane [1994] 1 WLR 746, 752, cited in R v H [2004] UKHL 3.
152 *See* paragraph 71 of the Attorney General's guidelines on disclosure 2013, accessed at: https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2013.
153 *Ibid.*

order and pagination of any papers, order of witnesses.[154]

On balance, following the Code of Conduct for Prosecutors in Malawi, supported by the approach taken to disclosure under the common law from other jurisdictions, Malawian prosecutors ought to disclose material exculpatory information to defence counsel as soon as possible, so as to ensure a fair trial. While this may not yet be a binding legal obligation in Malawi, the weight of the Code of Conduct, international jurisprudence and basic notions of due process point in favour of the practice.

(ii) Public Interest Immunity

There is one key exception to the prosecutor's duty of disclosure: public interest immunity. Public interest immunity can be claimed by the prosecutor when the defence calls for a particular document containing sensitive information the disclosure of which would risk "serious prejudice to an important public interest."[155] When a prosecutor makes a claim of public interest immunity, the court may allow the prosecutor to withhold the relevant information from the defence where it finds that it is in the public interest to do so. The court will apply a balancing exercise, weighing (a) the interests of the accused in receiving all relevant information to the case with (b) the interest of the State in protecting sensitive information.

In order to claim public interest immunity over part or the whole of a document, the prosecution must establish that it relates to a matter of the State, and that the public interest in disclosure of that information is outweighed by the public interest in preserving the secrecy of that information. Some examples of information that could fall within the public interest immunity exception are where the information could:

- Prejudice the prevention, investigation or prosecution of an offence, for example, where a document describes investigation techniques used by law enforcement officers;
- Disclose, or enable the disclosure the identity of confidential sources of information relating to the enforcement or administration of laws, for example disclosing the name of an undercover agent who is currently involved in an investigation, where disclosing their identity would jeopardise that investigation; or
- Prejudice national security or defence, such as information relating to the military.

In most cases, the prosecution must at least give notice to defence that an application for public interest immunity is being made, and generally disclose to the defence the category of material that they hold.[156]

D. ENTRAPMENT

Another issue that highlights the importance of prosecutors knowing all of the circumstances surrounding investigation is the possibility of the accused raising a claim of entrapment. Generally speaking, entrapment occurs when a government agent lures, incites or induces a person into committing a crime. This issue could arise through the use of an informant—whether or not that person is a formal government employee—if their actions incite the accused to commit an offence.

Significantly, entrapment is often linked to the issue of disclosure. If there is evidence of entrapment in the police investigation, the prosecutor should disclose that evidence to the accused, as it is almost certainly material exculpatory information (i.e., information capable of both undermining the prosecution's case and assisting the case for the accused).

Instead of waiting for the police to divulge information relating to entrapment, prosecutors should seek out this information from investigators before commencing a prosecution. This is particularly important where the prosecutor is aware that an informant or undercover officer was used in the investigation. Proactive requests to police are important to ensure prosecutors comply with their ethical duties, which include confirming that there is sufficient admissible evidence prior to commencing a prosecution (noting that evidence obtained through entrapment is often inadmissible).

154 *Republic –v- Aubrey Sumbuleta* Criminal Case Number 11 of 2021 (unreported) (ruling of 1st October, 2021), per Kapindu, J.
155 *See R v H* [2004] UKHL 3; [2004] 2 Cr. App. R. 10, House of Lords at [18]-[20].
156 *See R v Davis* [1993] 1 WLR 613.

Once a prosecutor becomes aware that an informant or undercover officer was used, the prosecutor should ask the following questions to discern whether entrapment may be a problem:

- If the informant or undercover officer was not present, is it likely that the accused would have committed, or would have been willing to commit, the offence?
- Did the informant or undercover officer do more than "present the accused with an unexceptional opportunity to commit a crime"?
- Did the informant or undercover officer themselves engage in any criminal conduct?
- Were there any other witnesses present who can corroborate the account given by the informant or the undercover officer?
- Was the conversation recorded by the undercover agent, so that the recording could be relied upon to corroborate the witness's evidence?

As with the duty of disclosure, there is no recognition from case law or statutory provisions in Malawi which specifically address entrapment. Nevertheless, the approaches of other common-law jurisdictions such as the U.S. and the U.K., as well as other African nations, are instructive.

As a starting point, in the U.S., entrapment can be a complete defence to a criminal charge.[157] As a result of its power to extinguish criminal proceedings, the entrapment defence in the U.S. is relatively narrow, requiring the defendant to prove the following two elements:[158]

(1) Government inducement of the crime, which must be more than "mere solicitation" [159]; and

(2) The accused's lack of predisposition to engage in the criminal conduct.

The test for entrapment in the U.S. requires that the behaviour of the government agent create a "substantial risk that an offence would be committed by a person other than the one ready to commit it."[160] Essentially, the defendant must prove that he was caught in a trap for the "unwary innocent."[161]

In the U.K., and other common law jurisdictions, entrapment is not an outright defence to a crime. Instead, a defendant may raise entrapment as an abuse of the process of the court, for which the court may order a permanent stay of the proceedings, or simply exclude evidence relating to the entrapment.[162] That said, such relief may often lead to the same practical result as a "defence" under U.S. law.

The leading authority in the U.K. on entrapment is *R v Loosely*,[163] which summarises both the U.K. and overseas commonwealth case-law on entrapment. This decision considered the line between entrapment and permissible undercover police operations, describing how a court can determine whether the methods used by authorities are permissible. Among other points, the court distinguished the U.K. position from its U.S. counterpart with respect to the importance of a criminal predisposition or lack thereof. In contrast to the U.S. approach, which requires the defendant claiming entrapment to show that he did not have a predisposition to commit the crime,[164] the court explained that in the U.K. entrapment is possible even if the accused had a predisposition to commit a crime. [165] The court summarized the U.K. position as tending to focus on the police's conduct, as opposed to the accused's state of mind:

157 *Jacobson v. United States*, 503 U.S. 540, 548 (1992).
158 *See Mathews v. United States*, 485 U.S. 58, 63 (1988).
159 *Sorrells v. United States*, 287 U.S. 435, 451 (1932).
160 *United States v. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989)
161 *Mathews v. United States*, 485 U.S. 58, 485 (1988).
162 *R v Loosely* [2001] UKHL 53 at [16].
163 *R v Loosely* [2001] UKHL 53.
164 *Ibid.* at [22] citing Hampton v United States (1976) 425 US 484, 489 – 490.
165 *Ibid.* at [22] citing R v Mack (1988) 44 CCC (3d) 513, 551.

[T]he existence or absence of predisposition in the individual is not the criterion by which the acceptability of police conduct is to be decided. Predisposition does not make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies. Predisposition does not negate misuse of state power.

Building on *R v Sang,*[166] *the court in R v Loosely* confirmed that entrapment is not a defence, as such, under U.K. law. The Court in *R v Loosely* also held that the requirements of due process do not require that an undercover police officer act in an entirely passive manner, holding "it would be absurd to expect the test purchaser to wait silently for an offer . . . a certain degree of persistence may be necessary to achieve the objective".

In Uganda, the position on entrapment mirrors that of the U.K. In *Uganda v Kisembo [2019] UGHCCRD 7*., the court first noted that it is generally acceptable for the police to use deception to try to catch persons committing crimes, citing sting operations as a key example, where police use either undercover officers, detectives or cooperative members of the public to observe criminal activity and gather evidence of a crime. Yet the court went on to distinguish permissible police operations from entrapment by asking whether the government authorities exerted influence on a suspect to incite the commission of an offence that the suspect would not have otherwise committed. The test applied is "whether or not the police did more than present the accused with an unexceptional opportunity to commit a crime". The remedies embraced by the Uganda court include (1) the exclusion of evidence obtained through entrapment,[167] and (2) the discontinuance or permanent stay of the proceeding in those cases where the conduct of the government agent was "so seriously improper that the administration of justice was brought into disrepute."[168]

The U.K. position, as applied in Uganda, has been followed in Malawi. Wherein evidence, regardless of entrapment issues, raises overwhelming features of a commission of a crime, the prosecutor's focus should dwell on the evidence and how it is presented in court. In an appeal against a conviction and sentence on robbery charges raising entrapment defence relating to evidence of PW3, the High Court while dismissing the ground of appeal held that the evidence on record overwhelmingly pointed to a commission of a crime regardless. He had championed the armed robbery, hired a car at a taxi rank and later, joined by other friends, spent time negotiating the taxi fares, collected a gun, continuously communicated with PW 3 and handed over stolen car keys to PW3.[169] In a recent wildlife case in Malawi, *Republic v Li Hao Yun and Others*,[170] the defendants raised entrapment as a possible defence. In that case, counsel for the defendants submitted:

[F]rom the totality of the evidence, the whole scheme was [a] set up, the owner of the ivory was already known to the investigating authorities, but they then embarked on a scheme to 'find' and 'trap' a prospective buyer. This is supported by the fact that according to B (the owner of the ivory) he had intended to sell his ivory in Mchinji but he was made to travel all the way to Lilongwe and according to B the trip to Lilongwe was fully funded by the Department of National Parks and Wildlife, even the vehicle that was used for the trip was hired by the same Department.

Further, the owner of the ivory B, had no contact with any of the accused persons, in other words there was no arrangement between the accused persons and B. It was the investigating authorities who acted

166 *R v Sang* [1980] AC 402.
167 *R v Foulder* [1973] Crim LR 45; R v Burnett [1973] Crim LR 748; R v Shannon [2001] 1 WLR 51.
168 *R v Loosely* [2001] UKHL 53; Attorney-General's Reference (No.3 of 2000) [2001] All ER (D) 356.
169 Geoffrey Gift Kachimanga –v- Republic Criminal Appeal Number 180 of 2005 (unreported), per Chombo, J.
170 *Republic v Li Hao Yun, Qing, Mangwe & Samson,* Republic of Malawi in the Principal Resident
Republic v Li Hao Yun, Zhang Hua Qing, Paul Mangwe & Tsogolani Samson, Republic of Malawi in the Principal Resident Magistrates' Court sitting at Lilongwe, Criminal Case No. 1647 of 2017 (Prosecutors should be mindful that this is not authoritative but for guidance purposes only as this is not a Court of record)..

[as] the middle person. This explains the unknown persons that were heavily concealed and masked by the prosecuting witnesses throughout the trial.

The court disagreed that the circumstances of the case amounted to an incitement, but instead held that it created a "passive provision of an opportunity for B and his colleague to commit an offence, as they had already planned to sell the ivory". The court considered a decision of the High Court of Malawi, *Bwanali v Republic*,[171] which held that there is no prohibition for an investigating authority to act as an "agent provocateur", however a line is drawn between "merely providing an opportunity for the commission of an offence" and "an agent provocateur inciting the commission of an offence". Further, from that case, even an agent provocateur who incites an offence does not necessarily void the entire prosecution, but may result in the court reducing the offence to a mere attempt to commit the offence based on the circumstances. The totality of the evidence will guide the prosecutor on stressing an act of agent provocateur.[172]

E. ABSENCE OF AN ACCUSED PERSON DURING TRIAL: HOW TO PROCEED

▶ Key statutory and regulatory provisions:
Sections 50, 93, 203 and 248 of the Criminal Procedure and Evidence Code

Where permitted, "trial in absentia" allows a criminal proceeding to move forward in the absence of the defendant. In some jurisdictions, a court may permit trial in absentia when the defendant has disappeared or refuses to appear as a means to avoid conviction or the court's jurisdiction,[173] unless the defendant has a lawful excuse not to appear, including impairments to physical or mental health.[174]

In Malawi, the court has limited, but nevertheless meaningful, discretion to conduct proceedings in the absence of the defendant. Under section 248 of the CP & EC, if the defendant was duly summoned and did not appear, the court may proceed with the hearing or further hearing as if the accused were present, provided that no sentence of imprisonment shall be imposed.[175] This means that although a court can proceed in the absence of a defendant, a court cannot sentence the defendant to imprisonment in his or her absence; instead, the court can only impose a fine. Under subsection 248(2), if the court convicts the defendant in his or her absence, the court can later set aside the conviction if it finds the defendant's absence was due to causes out of the defendant's control and the defendant had a probable defence on the merits.[176]

Under subsection 248(3), if the defendant has been charged with a felony (such that imprisonment is the only available sentence) or if the court has chosen not to move forward with the trial in the defendant's absence, the court must issue a warrant for the apprehension of the defendant to bring him before the court.[177]

Example

If a defendant is facing charges for the illegal possession of ivory, but leaves town when out on bail, the court can exercise its discretion to proceed with the trial in the defendant's absence. In that case, however, the court will only be able to impose a fine should the court convict the defendant of the offence and proceed to sentence. The court could also issue a fine for the defendant's failure to appear, but could not impose a prison sentence in his absence.

What happens, however, if the accused does not come before the court before the matter is set down for trial? Under section 203 of the CP & EC, if the prosecutor can prove that the accused has absconded, and that there is no immediate prospect of arresting him, the court

171 *Bwanali v Republic* 1964-66 ALR Mal. 329 at 333.
172 See Kachimanga Case.
173 Mohammad Hadi Zakerhossein & Anne-Marie De Brouwer, *Diverse Approaches to Total and Partial in Absentia Trials by International Criminal Tribunals, 26 Crim. L. F. 181, (2015).*
174 *R v Ealing* Magistrates' Court, Ex Parte Burgess, [2001] 165 J.P. 82 (explaining that the defendant is entitled to a fair, but not unlimited, opportunity to be present).
175 Criminal Procedure and Evidence Code, 8:01 section 248(1) (2010). If duly summoned, any defendant who fails to appear, without lawful excuse, can be fined by court order for K50,000. *Ibid.* section 86.
176 *Ibid.* section 248(2).
177 *Ibid.* section 248(3).

competent to try him or commit him for trial for the offence charged may, in the accused's absence, proceed to examine the witnesses produced on behalf of the prosecution and record their depositions.

Finally, the CP & EC provides for certain situations where the court can dispense with the personal attendance of the accused. First, under section 50, a magistrate may dispense with the requirement for personal attendance of a person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and instead he may appear by his legal practitioner. Legal practitioners have been allowed to represent accused persons who are absent and let trial proceedings continue.[178] Second, under section 93, for certain low-level offences subject to maximum penalties of a fine or less than three-months imprisonment, the court may dispense with the personal attendance of the accused, provided that the accused pleads guilty in writing or appears by legal practitioner.

F. PLEA BARGAINING AND SENTENCING FOLLOWING A GUILTY PLEA

▶ Key statutory and regulatory provisions:
Section 252A of the Criminal Procedure and Evidence Code; Guidelines issued by the Director of Public Prosecutions, e.g., Plea Discussions in Cases of Serious or Complex Fraud and the Prosecutor's Role in Sentencing; Sentencing Guidelines for Wildlife Crimes in Malawi Courts

Plea bargaining is defined in section 252A(2) the CP & EC to mean:

The process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval and it includes: (a) the defendant pleading guilty to a lesser offence; or (b) the defendant pleading guilty to only one or more counts of a charge.

Despite this statutory definition, plea bargaining in Malawi remains a work in progress.[179] First, the Chief Justice is authorized to make rules to allow plea bargaining where appropriate.[180] In addition, the Director of Public Prosecutions has published guidelines on plea bargaining in cases of serious or complex fraud.[181] These guidelines acknowledge the benefits of early guilty pleas, for efficiency and effectiveness in the criminal justice system, as well as the need for greater transparency and accountability in plea bargaining particularly for serious and complex fraud cases. Although directed specifically towards serious and complex fraud cases, the principles set out in these guidelines could be adapted to wildlife cases. The principles include, among others:

- "The prosecutor must always act fairly and in the interests of justice. This means that any plea agreement has to reflect the seriousness and extent of the offending and enables the court, the public and the victims of crime to have confidence in the process. The prosecutor must evaluate the impact of a proposed plea or basis of plea on the community and the victim and on the prospects of successfully prosecuting

178 *Republic –v- Paul Mphwiyo* and 18 others Criminal Case Number 35 of 2014 (unreported), per Justice Chombo.
179 *Republic of Malawi v. Leonard Karonga* (2014), Criminal Case No. 68 High Court (Malawi).
180 Criminal Procedure and Evidence Code, 8:01 section 252A (2010).
181 Guidelines issued by the Director of Public Prosecutions, *Plea Discussions in Cases of Serious or Complex Fraud and the Prosecutor's Role in Sentencing* (effective from 1 May 2015).

any other person implicated in the offending".

- "Prosecutors should only accept a defendant's plea if sure that the court is able, on an appropriate charge, to pass a sentence corresponding to the gravity of the offending and any aggravating features".

- "Prosecutors must never accept a guilty plea just because it is convenient".

- "When pleas are offered, prosecutors must also bear in mind the fact that ancillary orders can be made with some offences but not others".[182]

Related to, but distinct from, the concept of plea-bargaining lies the question of sentencing leniency following a guilty plea. In Malawi, an accused who pleads guilty (as with an accused who is convicted) is given the opportunity to offer reasons why the judge should not pass sentence according to law.[183] A guilty plea is also considered a mitigating circumstance. For example, in the wildlife context, the Sentencing Guidelines provide that a plea of guilty (together with evidence of remorse) is a mitigating factor for offences under sections 108-111 of the NPWA.[184]

182 *Ibid.* at p. 5.

183 Criminal Procedure and Evidence Code, 8:01 at section 321H.

184 The Honourable Justice AKC Nyirenda, Sentencing Guidelines for Wildlife Crimes in Malawi Courts 84 (2017); National Parks and Wildlife Act 2018, Sentencing Guidelines for Wildlife Crimes in Malawi Courts, Appendix 4(a)-(f) (starting on page 198 of the sentencing guidelines document).

APPENDIX A – EXPERT EVIDENCE – A GUIDE FOR PROSECUTORS

▶ Question 1: Do I need an expert witness for my case? Does the person I have in mind qualify?

Section 190 of the Malawi CP & EC provides that expert testimony is permitted in Malawi when the court or jury has to form an "opinion upon a point of foreign law, or of science, or art, or as to the identity of handwriting or fingerprints[.]" [185] Consistent with this provision, section 180 authorizes the submission of a written expert report as evidence when any relevant fact or opinion depends upon an examination or process that requires skill, experience or knowledge. [186] Although these two provisions employ slightly different language, courts should interpret them harmoniously; there should be no situation where expert testimony is valid under section 190 but not under section 180 (and vice-versa).

The Essentials: Use expert testimony when specialized skill, experience, or knowledge is necessary to prove:

- a point of foreign law,
- a point of science,
- a point of art,
- handwriting or fingerprints, or
- any other conclusion that depends upon specialized knowledge, examination or process.

Wildlife Case Example:

Imagine that the government has charged a man with unlawfully poaching and exporting ivory from Malawi to China. The evidence against the accused is overwhelming, but in the hope of receiving a lesser sentence, defence counsel argues that the ivory is not worth very much money. In this situation, the prosecutor might offer expert testimony to show that (a) China has outlawed domestic ivory markets (a point of foreign law), and (b) the black-market price in China is $X per kilogram (a conclusion that depends upon specialized knowledge).

After deciding that expert testimony is necessary for the case, a prosecutor must demonstrate that the expert has the requisite skills, experience or knowledge such that the judge and/or jury can rest assured that the witness is qualified to address the topic at hand. To meet the threshold of admissibility in this regard, the witness must be skilled in the relevant area of expertise, although this skill need not be based in formal education. Rather, the Code provides that such skill may derive from "knowledge or experience sufficiently organized or recognized as a reliable body of knowledge or experience[.]"[187] In general, this language suggests a liberal approach to expert qualifications. Accordingly, Malawi courts should welcome testimony offered by individuals who have developed know-how through hands-on experience, even if lacking a formal degree or other traditional qualification.[188]

185 Criminal Procedure and Evidence Code, section190(1).
186 *Ibid.* at section180(1).
187 *Ibid.* at section190(1); *see also Ibid.* at section180(1) (expert report admissible when authored by person having the relevant "skill").
188 *See*, e.g., *City of Evanston v. Northern Illinois Gas Company*, 381 F.Supp.3d 941, 949 (N.D. Ill. 2019) (allowing witness to offer expert testimony on gas migration and isotopic analysis of gas even though witness had "no formal education or training in molecular biology or microbiology, and no graduate education in organic chemistry").

Practice Pointer:
When describing an expert's qualifications and experience, whether in a written report or through oral testimony, it is important to ensure that all relevant qualifications and experience are described. Prosecutors should ensure that experts include all education, including courses and workshops that did not lead to a degree, and work experience. The expert should describe his or her qualifications in specific terms to demonstrate that the expert is qualified to conduct the particular analysis at issue in the case.

Wildlife Case Example:
A DNPW officer presented as an expert on identification of hippo teeth might point to the following experience and qualifications:

- Years of experience on the job and relevant job responsibilities, highlighting anti-poaching and anti-trafficking work in general and work related to hippos and hippo specimens in particular.
- Experience in enforcement operations assistance provided to police and/or prosecutors in cases requiring identification of suspected hippo teeth (whether or not this assistance led to formal participation as an expert witness).
- Expert testimony in other cases dealing with specimen identification.
- Familiarity with the identification method used in the expert report and/or reliance on established ID guides or methodologies.
- Participation in relevant course-work, seminars, workshops, trainings, etc.

How Courts Address the Reliability of Expert Testimony:
Assuming a reasonable demonstration of the expert's qualifications, the Code appears to encourage filtering of unconvincing testimony through cross-examination and the submission of rival evidence, as opposed to outright exclusion.

This is consistent with other international systems, wherein courts are cautioned not to be overzealous in screening out "junk science." In the U.S., "the factual basis of an expert opinion goes to the credibility of the testimony, not its admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002). Accordingly, federal courts in the U.S. only exclude expert testimony if it is "so fundamentally unsupported that it can offer no assistance to the [factfinder.]" *Ibid.*

In the U.K., the gatekeeping function of courts is even more relaxed. "Legal scholars assessing the standard for review of expert admission agree that the reliability review of expert testimony in England . . . is minimal."[189] The Code generally suggests a similar approach. Especially where a jury is not involved—and the risk of the factfinder being blinded by the title of "expert" is accordingly low—outright exclusion should be reserved for extreme cases.

▶Question 2: What happens if my expert resides in a foreign country? Must the expert appear in Malawi for court proceedings?
The Code authorizes, in certain circumstances, the presentation of a written expert report as evidence without the need for corresponding oral testimony. Given that many qualified experts may reside outside of Malawi and travel expenses are not affordable in most cases, the option of presenting a written report without oral testimony makes participation by foreign experts more feasible. Even if a local expert is available, a foreign expert can enhance the prosecution effort by complementing local knowledge.

Section 180(3) enumerates two circumstances under which a written expert report is admissible as evidence:

a) The other parties to the proceeding consent; or
b) The party offering the report serves on the other parties a copy and notice of intent to

189 Andrew W. Jurs, Balancing Legal Process with Scientific Expertise, 95 MARQUETTE LAW REVIEW 1329, 1378 (2012).

enter the report into evidence, and none of the other parties objects to the report within seven days. [190]

If one of the above circumstances is satisfied, then the report is admissible and not subject to exclusion as hearsay.[190]

However, admission of an expert report under section 180 does not necessarily mean that the expert will not be called to testify in court or otherwise asked to provide additional evidence. First, following admission of the report, the submitting party retains the right to present live testimony from the expert.[191] Second, if the expert is present in Malawi, the court may summon the expert to testify on its own initiative or in response to a request from the accused.[192] Finally, if the expert is not in Malawi, the court may order written interrogatories that the expert must answer, with those interrogatories and replies ordinarily constituting supplementary evidence.[193] However, even then, an expert's failure to appear in court or to respond to court-ordered interrogatories may be excused by the court when the expert is "absent from Malawi" or "unable to attend without unreasonable delay or expense."[194]

When analysing whether it makes sense to attempt to provide an expert report without oral testimony, prosecutors should consider the following advantages and disadvantages in light of the specific case:

Practice Pointer:

Advantages	Disadvantages
Makes it much easier to secure participation by a foreign expert, as travel is unnecessary.	Due to above, requires even more work to make sure the report is absolutely credible.
Reduces time needed to prepare witness for direct testimony and cross-examination.	May cause some magistrates or judges to assign less weight to the report, even though the law does not suggest this should occur.
Avoids the possibility of expert's oral testimony contradicting the report (whether on direct or cross-examination).	Deprives expert of an opportunity to provide more details and to answer questions to resolve any doubts held by the judge and/or jury.

The ability to present written reports without corresponding live testimony makes participation by foreign experts more feasible. Even if the accused requests that the court order oral testimony under section 180(4)(a), a prosecutor can argue that this is inappropriate because the expert is absent from Malawi.

Note, however, that the court may still issue written interrogatories that the foreign expert should answer. Although Section 180(5) provides that failure to answer interrogatories should not affect the admissibility of a report when the expert is absent from Malawi, the best practice is to provide answers, as this will boost the overall credibility of the witness.

190 Criminal Procedure and Evidence Code, section180(3).
191 *Chimangeni v Republic*, Crim. App. No. 2 of 2003, MWHC 34 (28 May 2003), *available at* https://malawilii.org/mw/judgment/high-court-general-division/2003/34; *see also Republic v. Zobvuta*, MWHC 1006, 1994 MLR 317, 321 (14 November 1994) ("[Regarding] the alternative in subsection (3)(b), once the other party has been served with a copy it is the duty of the recipient to notify the serving party of objection to production of the report . . . [and i]f no notice of objection is served by the party objecting, the report may be admitted.").
192 Criminal Procedure and Evidence Code, section 180(4)(a).
193 *Ibid.* at section 180(4)(b)(i).
194 *Ibid.* at section 180(4)(b)(ii).
195 *Ibid.* at section 180(5).

▶ Question 3: What are the key contents of an expert report?

Admission of a report into evidence is only the first step; the report must also be convincing if it is to serve its ultimate purpose of establishing facts and conclusions to support a conviction. In addition to describing the expert's qualifications, it is absolutely critical that the expert describe the process and rationale leading to his or her conclusions. In *Sanjan M. Vachan v. State*, a case involving a man found in possession of 11 pieces of processed ivory, the High Court of Malawi chided the prosecution for the expert's failure to explain his methodology and reasoning for concluding that the specimens were genuine rather than fake ivory.[195] After stating his experience in the field, the expert recited his belief that the specimens were genuine ivory, without pausing to explain his process and reasoning in the case at hand.[196] The court responded as follows: "What is expected is for the witness to demonstrate how he arrived at the conclusion that the specimen is or is not ivory. This must be scientifically proved by stating the method used."[197] The court's point is well-taken, it is important to show how the expert arrived at the result, not only the result itself.

Key Contents of an Expert Report: a Checklist

- Description of purpose of expert report: What is the report trying to establish, and why does it matter to the case?
- Description of the expert's qualifications: Why is this expert suited to answer the key question(s)?
- Expert's methodology, process, and/or reasoning: What methodology or process did the expert employ? Did the expert make any inferences that require explanation?
- Expert's conclusion: What is the expert's ultimate conclusion? Example: "The specimens are, in fact, hippo teeth."

Practice Pointer:

In many ways, the description of the expert's methodology and reasoning is more important than the conclusions. At a minimum, the expert report should include a description of:
(1) The methodology;
(2) The methodology's acceptance within the relevant discipline; and
(3) Steps taken to eliminate sources of error.

Wildlife Case Example:

In a case involving an expert report offered to prove that a specimen is genuine elephant ivory, the following content could be used:
Methodology Used: Example: Analysis of Schreger angles.
Methodology's Acceptance: Example: Espinoza & Mann, Identification Guide for Ivory and Ivory Substitutes (1999) (published in cooperation with Traffic, WWF, and the CITES Secretariat).
Measures to Eliminate Errors: Examples: chain of custody measures; double-measurement of Schreger angles and double-calculation of the angle average.

195 *Sanjan M. Vachan v. State*, Criminal Appeal Case No. 37 of 2018, High Court of Malawi (July 2019).
196 *Ibid.*
197 *Ibid.*

▶ Question 4: In what ways might the defence counsel challenge my expert and/or their testimony? How can I prepare my expert to respond to those challenges?

In cases where the expert witness testifies in court, competent defence counsel will almost always wish to conduct a vigorous cross-examination of the expert. The Code allows as much.[198] In a wildlife case where the government has produced an expert report analysing, for instance, the identity or value of a particular specimen, the expert witness should be prepared for challenges on the following fronts:

- The expert's qualifications;
- Adherence to the procedures or methods articulated in the report;
- Consistency with international best practices; and
- Possible sources of error.

In addition to attacks on the merits of the report, experts should be prepared for cross-examination and other evidence designed to question the expert's credibility. Section 231 of the Code authorizes impeachment of a witness in three different ways. First, the adverse party can call its own witness to testify, based on personal knowledge, that the target witness is untrustworthy[199]. Second, the adverse party may attempt to impeach the witness's credibility by proof of bribery or other corrupt action.[200] Finally, the adverse party may impeach the witness through inconsistent former statements.[201] In wildlife cases, impeachment of expert witnesses is most likely through this final avenue. For example, defence counsel may attempt to highlight inconsistent statements or positions, whether made in court or not, relating to methodologies for identifying and valuing specimens. Prosecutors should work with expert witnesses to anticipate such attacks.

Practice Pointer:

Before finalizing the written report, prosecutors should subject the expert to a mock cross-examination. This will (1) prepare the expert for cross-examination and (2) expose weaknesses in the report, which can then be corrected with additional information prior to submission.

198 Criminal Procedure and Evidence Code, sections 180(4)(b)(i), 214.
199 *Ibid.* at section 231(a).
200 *Ibid.* at section 231(b).
201 *Ibid.* at section 231(c).

APPENDIX B – USE OF CHIS IN INVESTIGATIONS – A GUIDE FOR PROSECUTORS

The public expect law enforcement agencies (LEAs) to use all available powers and tactics to prevent and detect crime. There are a number of covert tactics available to law enforcement. When applied correctly, and supported by appropriate training, they are proportionate, lawful and ethical tactics which provide effective means of obtaining evidence and intelligence.

For a further discussion on entrapment refer to pages 50 to 53 of this booklet. The case law referred to in this guidance has been summarised by way of a brief extract and does not replace complete versions of the case authorities.

Note that in the U.K. this area of the law is well regulated by an Act of Parliament, namely, the **Regulation of Investigatory Powers Act 2000** which is the primary legislation which encompasses the law on the activities of all Covert Human Intelligence Sources (CHIS). Malawi does not currently have similar legislation.

▶ Informant

An informant is typically a private person who, being involved in or exposed to unlawful activities being carried out by private third parties, comes forward and reports those activities to authorities. A sub-set of informants are those belonging to the Covert Human Intelligence Source, individuals cultivated and retained by law enforcement agencies to gather and report information about criminal activities by third parties.

▶ Agent Provocateur

The report of the U.K.'s Royal Commission on Police Powers and Procedure (1929) states that an agent provocateur is: *A person who entices another to commit an express breach of the law which he would not otherwise have committed, and then proceeds or informs against him in respect of such offence.*

Another simple definition of agent provocateur: *To incite an act which would not have been committed.*

The following cases show how the English law has handled the issue of informants/agent provocateur:

R v Sang [1979] 2ALL ER 1222; [1980] AC 402

The defendant applied to the court to consider whether the involvement of the defendant in the offence charged arose out of the activities of an agent provocateur. He hoped to establish that he had been induced to commit the offence by an informer acting on the instructions of the police and that but for such persuasion, he would not have committed the offence. The defendant hoped to persuade the judge to rule, in the exercise of his discretion, that the Crown should not be allowed to lead any evidence of the commission of the offence thus incited, and to direct that a verdict of not guilty be returned. Without hearing the evidence, the judge ruled that he had no discretion to exclude the evidence. On appeal to the House of Lords, the appeal failed. There is no defence of entrapment in English law. All evidence which is relevant is prima facie admissible in a criminal trial, although the trial judge has a discretion to exclude evidence which, though admissible, has been obtained by unfair means from the accused after commission of the offence.

Teixeira de Castro v Portugal [1998] 28 EHRR 101

The defendant, who had no previous criminal record and was unknown to the police, was introduced to two undercover officers by a third party. The officers instigated a connection with a fixer in order to reach a drug supplier. The defendant purchased 20g of heroin on their behalf and sold it to the undercover officers at a profit.

The European Court of Human Rights held that there had been a violation of article 6(1). The use of undercover officers had to be restricted and safeguards put in place, even in cases concerning the fight against drugs. The right to a fair trial under article 6 could not be sacrificed for the sake of expediency and the public interest could not justify the use of evidence obtained as a result of police incitement.

There was no evidence that Teixeira was predisposed to crime, and this offence was incited and would not have been committed without the police intervention. The defendant was denied a fair trial. The Court attached significant weight to the fact that Teixeira was not suspected to be involved in drug trafficking, was not known to the authorities and there was no evidence that he was predisposed towards crime. He was incited to commit the offence.

Nottingham City Council v Amin [2000] 2 ALL ER 946 / [2000] 1 WLR 1071

Amin, a taxi driver who was not licensed to ply for hire, accepted two undercover officers as fare paying customers. A stipendiary magistrate ruled that the evidence of the officers should be excluded under section 78 Police and Criminal Evidence Act (PACE) 1984.

The Divisional Court, allowing the appeal, was of the view that the defendant had not been 'prevailed upon or overborne or persuaded or pressured or instigated or incited to commit the offence'.

The House of Lords approved the decision, Lord Nicholls stating that the undercover officers had behaved as any member of the public might have done.

The greater the inducement held out, and the more forceful and persistent the police action, the more readily a court might conclude that the police had acted in an unacceptable manner.

DPP v Marshall [1988] 3 ALL ER 683

Police officers in plain clothes purchased four cans of lager and a bottle of wine from the respondents' shop. The respondents were licensed to sell liquor by the case but not to sell individual cans or bottles of liquor. The respondents were charged with having sold the lager and the wine without having the requisite justices' licence, contrary to secction 160 of the Licensing Act 1964. At the hearing before the magistrates the respondents contended that the police officers' evidence should be excluded under section 78(1)a of the PACE as having 'an adverse effect on the fairness of the proceedings' since it had been unfairly obtained because the officers had not at the time of the purchase revealed the fact that they were police officers. The magistrate court accepted that contention and the prosecution was unable to proceed. The Director of Public Prosecutions appealed against the magistrates' decision to exclude the police officers' evidence.

It was held that the evidence of the police officers had been wrongly excluded by the magistrates, since it had not been shown that the evidence of police officers who made test purchases in plain clothes would have an adverse effect on the fairness of the proceedings. The appeal would therefore be allowed and the case remitted to the magistrates with a direction to proceed with the hearing of the evidence.

R v Loosely [2001] UK HC 53; [2001] 1 WLR 2060

The case against Loosely was that he had supplied heroin to an undercover police officer. In 1999, the police mounted an undercover operation due to concern about the trade of Class A drugs. The House of Lords considered in some detail the conduct of undercover officers and when such conduct might cross the line into unacceptable behaviour. A key test identified by the House was whether the police simply presented the defendant with an **unexceptional opportunity to commit a crime,** such as might have been offered by others.

However, even then, other factors such as how intrusive the methods were must be taken into account. The House was clear that the police must act in good faith and wholesale 'virtue testing' without good reason is not acceptable conduct. Reasonable suspicion of an individual or a particular place may indicate good faith. The House of Lords in Loosely were of the opinion that action by the police is permissible to target a specific problem.

At trial, it was submitted that either the indictment should be stayed as an abuse of process or, alternatively, the evidence of the undercover police should be excluded at the Judge's discretion under section 78 of PACE.

Following *a voir dire*, the judge, referring to both English authorities and the judgment of the European Court of Human Rights in *Teixeira de Castro v Portugal*, declined either to stay proceedings as an abuse of process or to exercise his discretion under section 78.

After considering the relevant authorities, he concluded that the guiding principle was that "… *the commission of offences should come about without the prompting of undercover officers in the sense that they provoke or incite the commission of offences which would otherwise not have occurred without their intervention…*".

In this case, he felt that the undercover police officer had done no more than present himself as an ideal customer and that, considering all the circumstances, his actions did not amount to incitement.

The House in Loosely also gave their approval to 'test purchases' and recognised that some undercover operations will inevitably involve active rather than purely passive behaviour by the police and that such activity may be necessary to effectively detect certain types of crime.
Lord Hoffman said at paragraph 69;

'In cases in which the offence involves a purchase of goods or services, like liquor or videotapes or a taxi ride, it would be absurd to expect the test purchaser to wait silently for an offer. He will do what an ordinary purchaser would do. Drug dealers can be expected to show some wariness about dealing with a stranger who might be a policeman or informer and therefore some protective colour in dress or manner as well as a certain degree of persistence may be necessary to achieve the objective. And it is been said that undercover officers who infiltrate conspiracies to murder, rob or commit terrorist offences could hardly remain concealed unless they showed some enthusiasm for the enterprise. A good deal of active behaviour in the course of an authorised operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing an opportunity for the defendant to commit it.'

R v Birtles [1969] 2 ALL ER 1131

This case related to the arrest and conviction of Birtles and another for burglary and carrying an imitation firearm.

On appeal, it was held that there was a real possibility that Birtles had been encouraged by an informant and a police officer to commit the offences.

Lord Parker drew the helpful distinction between police "making use of information concerning an offence which is already laid on" and so acting to mitigate its consequences, and using an informer to encourage an offence, or an offence of a more serious character.

R v McEvilly & Lee [1973] 60 Cr App R 150

The defendants in this case were concerned in an offence of conspiracy to steal by means of entering a warehouse and taking a lorry and its load of alcohol. They, through an informant, met an undercover police officer prior to the theft and asked him if he was interested in purchasing the stolen alcohol after the offence. He agreed to this course of action and the theft then took place.

The offence revolved around the act of agent provocateur i.e. the offence was completed after the agreement between the undercover officer and the appellants. This case clarifies the position of where an agreement has been reached and the offence is 'laid on' and as such where the police are entitled to continue with involvement.

Lord Justice Roskill said "in a case where, as here, the police evidence shows that an offence has been 'laid on' and a plan for carrying it out was already clearly contemplated, the mere fact that there was a possibility the offence as it was ultimately committed might not have taken place but for the intervention of police, is not in itself a ground for the trial judge to exercise his discretion to exclude the evidence"

The court was satisfied that the officer had not acted as agent provocateur.

R v Smurthwaite [1994] 1 All ER 898; R v Gill 1994

It was put to the court that police officers incited the accused to organise the murder of his wife, and that they had acted as agent provocateurs. They argued that the undercover officers were agent's provocateur because if they had not come on the scene the defendants would not have sought to have had their spouses killed. Further, by posing as contract killers, the undercover officers had obtained the recordings by entrapment or by means of a trick.

However, recordings of the conversations were allowed as admissible in court, and the police were cleared of entrapment. The recorded conversations gave an indication that the defendant was inclined to carry out the enlisting of a hitman, regardless of whether the CHIS's subsequently coerced him into doing so.

Within the Smurthwaite case, the judge delivered six points on which discretion with regards to entrapment, and a conclusion on admissibility, should be based upon:

a. Whether the undercover officer was acting as an agent provocateur in the sense that he was enticing the accused to commit an offence he would not otherwise have committed;
b. The nature of any entrapment;
c. Whether the evidence consists of admissions to a completed offence or relates to the actual commission of an offence;
d. How active or passive the officers role was in obtaining the evidence;
e. Whether there is an unassailable record of what occurred or whether it is strongly corroborated;
f. Whether the officer abused his (undercover) role to ask questions which ought properly to have been asked as a police officer in accordance with the PACE Codes.

Malawi Case Law in Relation to the Issue of Informants/Agent Provocateur:

Bwanali v Republic 1964-66 ALR Mal. 329 at page 333.

In this case, it was observed that there is no prohibition for an investigating authority to act as an agent provocateur. However, a line is drawn between **an agent provocateur merely providing an opportunity for the commission of an offence and an agent provocateur inciting the commission of an offence**. There is nothing illegal about the former scenario. And indeed, in the second instance, the court would not necessarily deem the inciting illegal, but may decide to reduce the offence to a mere attempt to commit the offence based on the circumstances.

Coming back to the issue of entrapment, we observed that B and his middleman needed transport for their errand of selling ivory. X proceeded to provide the transport. This to us cannot be incitement. **It is passive provision of an opportunity for B and his colleague to commit an offence as they had already planned to sell the ivory.**

The Republic v Youssef Nassour, Kashif Gilbert and Abbas Nasser, Criminal Appeal Case No. 18 of 2019 (Being Criminal Case No. 325 of 2019, FGM, Blantyre Magistrate's Court) (Ruling by nyaKaunda Kamanga, J., delivered on March 4, 2020)

This case revolved around an allegation of entrapment in the context of charges under the Corrupt Practices Act. At the trial court, The Respondents had pleaded not guilty to the charges and, before the trial could commence, they applied for a permanent stay of the proceedings on grounds of entrapment. The trial court granted the application, effectively ending the prosecution.

On appeal, the High Court discussed the character of entrapment and its legal consequences in Malawi. The court explained that "entrapment arises when a person is encouraged by someone in some official capacity to commit a crime." If entrapment is established, the court observed, the consequence is either exclusion of "some prosecution evidence . . . as unfair, or the proceedings may be discontinued altogether . . . " Consistent with the common law position, the court noted that entrapment does not go to the question of guilt or innocence per se, but instead to the legitimacy of a prosecution flowing from official misconduct. "In other words," the court wrote, "the plea of entrapment can also be understood as a form of estoppel (precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination)." Because entrapment may act as a threshold bar to prosecution, the court noted that "the question of whether the proceedings should be stayed on the grounds of entrapment is logically decided before the proceedings have begun . . ."

APPENDIX C—CHECKLIST FOR PRE-TRIAL MEETING

Questions to be Asked	Special Considerations	Relevant Provision	Guide Page
Is the available evidence capable of establishing every element of the offence (or offences) under consideration?	Consider the full variety of available evidence, including physical evidence (wildlife specimens, weapons, money, etc.) demonstrative evidence (graphs, maps, etc.) and documentary evidence (letters, receipts, images, videos, audio & data records, etc.). Keep in mind that both direct and circumstantial evidence are valid.	Sections 142, 254 and 270 of the CP & EC	8
Can the mental element of the offence be proved? Can the suspect be considered criminally responsible for the act or omission?	If the mental element can be proved, consider the degree (e.g premeditation versus intent versus knowledge). Statutory silence does not necessarily mean that no *mens rea* is required. For example, criminal possession generally requires *knowing* possession of the item in question, even if the statute is silent as to the element of knowledge.	Section 9 of the Penal Code	8, 9
Has all evidence been legally obtained?	Prosecutors should generally refrain from using illegally obtained evidence; courts have discretion as to whether to admit or exclude such evidence.	No applicable law	31, 32
Is the evidence relevant to the facts at issue in the case?	Consider exceptions …	Sections 171 through 194, 240 and 260 of the CP & EC	28-30
Do I have reliable and credible fact witnesses?	Consider whether the witness might have a motive to be less than truthful. Also consider whether the witness would be testifying from personal knowledge as opposed to speculation or hearsay. For key disputed facts, consider whether multiple witnesses are available to corroborate the assertion.	Sections 215 and 231 CP & EC	39, 40
Do I need an expert witness? If so, can I obtain one?	Recall that an expert witness can offer an admissible opinion on a matter that requires or benefits from specialized knowledge, training or skill.	Sections 180 and 190 of the CP & EC	28 Page See also Appendix A to this Guide.

Will the prosecution of that particular person for that particular charge serve the public interest? Is there another person who might be a better target of criminal prosecution?	Consider seriousness and harmfulness of the offence; the offence's prevalence in the community; the accused's age, health condition, socio-economic background; and criminal history; the accused's role in the crime; the accused's motivation; the role of any other persons; and the need for deterrence.	Clause 2.2 of the Code of Conduct for Prosecutors in Malawi; Clause 4.11 of the Code of Conduct.	7, 8
Has the investigative team disclosed to the prosecution all material facts, sources of information, and the means by which evidence was acquired?	The prosecutor should satisfy him/herself that there were no major irregularities in the investigation (including illegally or improperly obtained evidence). If an informant or undercover agent was used, the prosecutor should ask questions to ensure full knowledge of the role played by the informant/agent. Special consideration should be given to concerns of entrapment/agent provocateur.		45, 46 Also consider pages 49-52 on Entrapment

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