IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL CASE NO. 208 OF 2003

THE REPUBLIC

Vs

ALICE JOYCE GWAZANTINI

CORAM: **HON. JUSTICE A.C. CHIPETA**

Kasambala, of Counsel for the State

Chalamanda, of Counsel for the State

Gustave Kaliwo, of Counsel for the Accused

Kauka, of Counsel for the Accused

V. Jere, of Counsel for the Accused

Mdala, Official Interpreter

Ngwale, Recording Officer

Katemana (Mrs), Court Reporter

RULING

The Accused, Alice Joyce Gwazantini, appears before this Court charged with the offence of Murder contrary to Section 209 of the Penal Code. On 15th March 2004 when this charge was read over to her she pleaded Not Guilty to it. The particulars of the offence aver that on or about 17th August 2001 at Namiwawa in the City of Blantyre, with malice aforethought, the said Alice Joyce Gwazantini, cause the death of Tchayi

Jackson.

I should like, at the outset, to observe that Criminal Cases, whether major or minor, are dealt with and disposed of in the Courts under fixed and uniform rules of both procedure and evidence. Thus whether a person is charged with theft of a cob of maize or with treason, or indeed as in this case, with Murder, these rules remain constant and unfluctuating. Courts of Law are enjoined to apply them indiscriminately and without wavering in all such cases as come before them, regardless of the type of charge brought in any given matter. The rules being specifically in place for the sake of attainment of justice, the said justice is measured by a uniform and common standard. Hence a Court of Law should not be any more relaxed when trying a person on an allegation of theft of a chicken than when it is trying someone facing a more serious charge. In either case justice demands that trial is conducted on exactly the same rules and terms as are in place for all criminal cases, and the same degree of care and attention is therefore called for. I am bound by my oath of office to do justice to all manner of people according to law. Thus in my handling of this case I am obliged to stick to this uniform application of the governing principles of Procedure and evidence, which I will do, if I am not to depart from the norm the law has set down for all Criminal Cases without distinction.

The premise we start from in matters criminal is that he/she who makes an allegation must prove it. The presumption at law is that every person who is accused of a crime is innocent and that he/she remains so until proven guilty. Since more often than not criminal allegations come from the State, as is the case here, the burden of proof in such cases necessarily throughout lies on the State. The age-old authority of DPP vs Woolmington [1935]A.C. 462 is I am sure, the locus classicus case in the mind of every criminal case lawyer in this respect in the Common Law system as ours is. The degree of proof expected to be discharged by the State at the end of every such case is quite a heavy and onerous one. For a Court of Law to, convict an accused it needs to be satisfied beyond reasonable doubt about the guilt of the Accused. Any proof falling short of that standard is supposed to end up in an acquittal.

While this is so, mention must be made that there is in existence provision, well before a Criminal Case advances to the stage just depicted (where it must finally and conclusively be determined with a conviction or an acquittal), for the Court to carry out a mid-way assessment. In a normal High Court first instance trial, which trial takes place before a judge sitting with a jury, per Sections 294 to 321J of the Criminal Procedure and Evidence Code, this mid-case assessment is not available. However in a trial, like the present one, where by virtue of the Minister's exercise of the powers under Section 294(2) of the Criminal Procedure and Evidence Code, the trial is by a Judge alone sitting without a jury, the law requires that the Court should abandon the procedure covered under Part X of the Code in favour of use of, and with necessary modifications, the

procedure applicable to Subordinate Courts in Part VII of the same Code.

Section 254 of the Criminal Procedure and Evidence Code is the authority for this mid-assessment exercise in Criminal Cases. It requires that once the prosecution case has been closed the Court should take stock of the case so far presented before it. The provision mandates the Court to do one of two things depending on the opinion it forms after so assessing or evaluating the case. If, on the evidence so far on record, the Court be of the view that no case has been made out against the Accused sufficiently to require him/her to make a defence, it should outright acquit the accused. See: S 254(1) of Criminal Procedure and Evidence Code. If, however, the Court be otherwise of the mind that a case has been made out against the accused sufficiently to require him/her to make a defence in respect of the offence charged, it should proceed to put the Accused on his/her defence. S 254(2) of the Criminal Procedure and Evidence Code, makes this quite clear.

In the instant case we have now reached this middle stage of trial and it is thus open for the case to end now with the immediate acquittal of the Accused or alternatively to proceed to the presentation of defence testimony, depending on how I view the case as so far presented. It is, I think, important at this stage to emphasise that there is a test the law has settled for use at this stage of the case, which is clearly different from the one Courts of law have to employ when pronouncing their final judgment in any criminal matter. I am obliged by the law to apply the correct test at the correct time and so at this stage I am not required to check whether or not the prosecution have proved their case beyond a reasonable doubt as would be the case if the case were at a more advanced stage. Authorities including the case of Rep vs Dzaipa [1975-77]8 MLR 307 frown upon a Court of law mixing up the tests and employing the final test at this early stage of the trial. The dictum of Hon. Skinner, CJ at P 312 ll 22-32 is very illuminating on this point.

It will be recalled that the Accused having pleaded Not Guilty to the charge herein, the State, all in all, called seven witnesses. Of these, it will also be recalled that two witnesses were, under Section 230 of the Criminal Procedure and Evidence Code, declared hostile. Therefore as correctly observed by learned Counsel for both sides of this case, the evidence from the two hostile witnesses is not evidence at all in this case. I find myself in full agreement with the decision pronounced by Hon. Acting Justice Banda (as he then was) in Magombo and Phiri vs Republic [1981-83]10 MLR 1 and I therefore treat the two witnesses as if they had never even come to Court. Thus, in order to decide whether to end the case here and now or to cross the bridge into defence I only have the evidence presented by the five remaining witnesses to assess the prosecution case on.

On 19th March 2004 all learned Counsel from both sides of the case addressed me at great length on the subject now at hand. This was in keeping with Section 258(2) of the Criminal Procedure and Evidence Code. With great passion, citation of multiple authorities, and detailed analysis of the available evidence, the lawyers representing the

accused person submitted that on the case so far presented by the State, there is no case made out for the accused to answer. Their prayer thus was that there is no reason for this Court to call upon the Accused to enter on her defence and that she ought, therefore, at this stage, to be acquitted of the Murder she has been charged with. In opposition to this with equal passion, citation of numerous authorities, and likewise detailed analysis of the evidence at hand, the lawyers for the State claimed that on their part they have sufficiently made out a case for the Accused to be put on her defence in this case. Their prayer, in turn was that the Accused cannot, in the circumstances, be acquitted of the Charge of Murder herein, but that she should instead be required to enter on her defence.

I must express my gratitude and indebtedness to both teams of learned Counsel in this case for the lucid and able arguments they presented before me, arising, no doubt, from wide and deep research on the applicable law at this stage of a criminal trial. Their input through the expositions of law they candidly made has proved most valuable to me in my visitation of the case in the light of the governing criteria of assessment at this stage of the case.

I should mention that I have taken time to re-read all the submissions all learned Counsel made in the case and also at the same time to expose myself to all the cited authorities I could lay my hands on. I have in addition taken ample time to go through the evidence of the five material witnesses herein once again, despite the fact that, having heard it only a few days ago, it is still vivid and clear in my mind. In assessing this evidence my recollections of the demeanours the various witnesses displayed before me have played a vital role. I have while doing this throughout duly borne in mind all the tenets of a fair and just trial, including the omnipresent presumption of innocence in favour of the Accused, and the requisite acknowledgment I hold that at no point does the Accused ever bear the duty to prove her innocence, which as I have clearly said is presumed.

In addition I am and have equally been throughout poignantly aware that I should not and ought not to call upon the Accused to enter on her defence on the chance that she might augment the prosecution case and thereby implicate herself. The late Hon. Justice Chatsika correctly and clearly denounced the possibility of such error in Namonde vs Rep [1993]16(2) MLR 657 and I fully concur with his learned observations. I am thus in this case as ready to acquit the Accused of the charge herein as I am also ready to put her on her defence. It all solely depends on whether or not on the evidence legally before me I am or I am not of the opinion that a case to answer has been made out by the State.

To seek to recount all the learned Counsel argued in their submissions in this case, both for and against a finding of no case to answer, would be overly ambitious. Those submissions lasted the whole day and I sincerely believe that all I need to do is to dwell on the essence of the submissions. In sum total, in my view, all the submissions I

received from the two sides of this case revolve around the question what a case to answer is. It is agreed and conceded by all that for an accused person to be said to have a case to answer, the prosecution ought to raise what is known as a prima facie case. Failure to raise such a case ought to result into the immediate acquittal of the Accused, while success in raising such a case ought to lead to the Accused being put on her defence.

What, therefore, is a prima facie case? Over the years in various Courts attempts have been made to define this concept or expression. In terms of English Law, from which our criminal law and practice has developed, to achieve uniformity in practice and to reduce blunders in the understanding of this expression, the Lord Chief Justice had to create and circulate a Practice Direction. This commendable effort of Lord Parker is reported in [1962]1 All E.R. 448, among other Law reports. It has been welcomed into Malawian Law by this Court in various local cases, including Rep vs Dzaipa [1975-77]8 MLR 307 decided by the then Chief Justice Skinner and even earlier by the celebrated late Hon. Justice Chatsika (as he then was) in DDP vs Chimphonda [1973-74]7 MLR 94.

It will be necessary, I think, to capture the practice Direction in question for a clearer understanding of the same. It goes as follows:

"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. (my emphasis).

Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer." (my emphasis).

The law on this question, therefore, happily appears to be well settled in Malawi by now.

I have in the Practice Direction just quoted deliberately underlined the words "could" in the first part of the Direction and "would" in the second part of the Direction. For those of us to whom English is a foreign language it might well not be easy to detect the difference between the use of those two words, but from my reading of the Practice Direction I have always gained the impression that Lord Chief Justice Parker used those

two words advisedly and that they each carry their own distinct meaning in the Direction. There is certainly a difference in my view between what a Court "could" do and what it "would" do when a Court must evaluate evidence gathered by the close of the State's case.

My overall understanding of the Practice Direction herein is that it is sufficient in a Criminal Case for the Court to put the Accused on his/her defence if, on the evidence, a reasonable tribunal could, as opposed to, would, convict on it. Thus for a prima facie case to be said to have been established in any given case, the evidence need not be such as would cause a reasonable tribunal to convict, as was partly argued in this case. It is sufficient if it is merely such as could achieve such a result. The distinction may be fine but in my understanding "would" carries with it an element of more certainty than "could", which appears to connote mere possibility, does and, according to the accepted test for discovering whether or not in any given case a prima facie case has been made out, it is the "could" and not the "would" degree of evaluation that must be applied, per this Practice Direction.

As a matter of fact I find myself confirmed in this view by a number of earlier case authorities. Beginning with the case of Republic vs Dzipa (earlier cited) the Hon. Skinner, CJ at p. 312 agreed in full with the Practice Direction, earlier quoted, as worded and as being of guidance to the Courts on this country. As earlier also noted Hon. Chatsika, J had already four years earlier applied the Practice Direction in question in DDP vs Chimphonda (supra). It will next be noted that Hon. Justice Mead, who rather than referring to the Practice Direction, employed an authority from the East African Court of Appeal on the same subject in Chidzero vs Rep [1975-77]8 MLR 229 also reached exactly the same conclusion. Said he "A prima facie case must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the accused." at p. 231 (my emphasis).

I do apprehend that the use of the word "could" in all these cases was not accidental, but deliberate. I find it significant that even many years later, specifically twenty years later, the late Hon. Justice Chatsika in Namonde vs Rep [1993]16(2) MLR 657 at p. 662, when once again discussing the subject of no case to answer, did not shift from his original 1973 stance by still using the word "could" and not the word "would" in depicting the material test. I am, of course, aware that in the recent and not yet complete case of the Republic vs Shabir Suleman and Aslam Osman Criminal Case No. 144 of 2003, Hon. Justice Mwaungulu has employed in his test of whether or not there was a prima facie case made out therein, the test whether "a reasonable tribunal of fact would convict." It strikes me that if this was not just a slip of the pen or the tongue, and that if the Hon. Judge really meant to use this test, then I must conclude that in reality he used a standard slightly higher than the accepted Practice Direction allows for.

In my assessment, which incidentally follows in the footsteps of the other three judges

earlier referred to, I stand by the point that to find a prima facie case in a criminal trial, it is sufficient if, on the evidence available, a reasonable tribunal could, as opposed to, would, convict if he did not hear any explanation in defence of the charge. It is therefore this test as is well depicted in the Practice Direction above-referred, which has in addition been consistently followed by this Court in several other cases as shown above, and not the test Hon. Justice Mwaungulu employed in the recent case, that I will apply in this case. Let me also put it on record, for the avoidance of doubt, that in terms of the doctrine of precedents all cases cited above as having a bearing on this point, being decisions of the High Court, none of them has any binding effect on me, and for the reasons I have given above, I am as free to go along with the earlier authorities as I have done and as I am to part company with the latest authority on the subject, as I have also just done.

Reverting to the charge and to the evidence so far proferred, it is significant to observe that it is conceded by the defence side that most of the elements of the Murder charge have been established by the evidence. The only area on which there is contest is on the point whether or not any evidence has been led to suggest a link between the Accused person and the causation of the death of the deceased. The defence team of lawyers has vehemently argued before me that there is no evidence presented in this case to cater for this element of linkage between the accused and the crime. They have dismissed for several reasons both oral and written evidence presented by the State in this regard through PWV D/Sub-Inspector Ngonga as being so discredited by their cross-examination or as being so manifestly unrealiable as not to constitute a foundation for calling on the accused to defend herself. On the other hand the State lawyers have equally forcefully argued that the oral and written evidence they have presented, especially through the same PW V D/Sub-Inspector Ngonga, does cover this linkage element and that, at the very minimum, it suffices to necessitate the calling of the accused person on her defence in this case.

Considering Section 254 of the Criminal Procedure and Evidence Code side by side with the material Practice Direction on the matter, it is clear beyond per adventure to me, that if indeed I find that either an element of the offence charged has not been covered in evidence, or that even if I observe that all elements of the offence charged have been covered by the evidence I at the same time consider the said evidence as being so discredited by cross-examination or as being so manifestly unreliable, I have no choice but to acquit the accused. Conversely it is equally my very clear understanding of the law that if I otherwise find all the elements of the offence charged covered by the evidence proferred by the prosecution and if at the same time I find that the said evidence has neither been so discredited nor been shown to be otherwise so manifestly unreliable, I ought to put the Accused on her defence.

After duly going through and evaluating all the legally available evidence from the five material witnesses herein with meticulous care, which evidence includes that which suggests that the Accused had a hand in the scalding of the deceased that eventually led to her death, I am of the view that there is on record evidence that covers the link the Defence have so far argued to be missing. I am quite alive to the fact that my assessment of the evidence of necessity entails an element of assessing the credibility of witnesses, but as was well pointed out in the case of DDP vs Chimphonda (supra), I would be missing the point if in this assessment I bore in mind the standard proof beyond reasonable doubt as the applicable standard. All that is essential for me to do is to assess whether the level of credibility to be attached to this legally admitted evidence is or is not enough to raise a prima facie case.

Using this test I am of the considered opinion that the evidence tending to link the accused to the crime charged has not been so discredited by cross-examination or been otherwise shown to be so manifestly unreliable as to have been reduced to a shambles. It is evidence, to my mind, which I cannot just dismiss out of hand at this stage of trial and sticking out as it does like a sole finger, it makes me anxious to hear what the Accused has to say in defence against it.

Looking at the evidence, in toto, as presented by the State vis-à-vis the charge and stringently applying the provisions of Section 254 of the Criminal Procedure and Evidence Code and the applicable prima facie case test herein, I take the view that a reasonable tribunal, properly directing his mind to the law and the evidence in this case, could, as distinct from, would, convict the Accused if no explanation was received in defence. Thus, per Lord Parker's Practice Direction, all I am saying is that on the evidence available conviction by a reasonable tribunal is a possibility, not that, if compelled such tribunal would convict.

The material test at the stage of the case we have reached being thus satisfied it is my ruling in this case that the Accused person, Alice Joyce Gwazantini, has a case to answer on the charge of Murder she is facing. As such I am calling upon her, in terms of Section 254(2) of the Criminal Procedure and Evidence Code, to enter on her defence. I must, however, hasten to add that, as her lawyers will no doubt fully explain to her, the current Constitutional Order, through Section 42(2)(f)(iii) of the 1994 Republic Constitution, does not make it mandatory for her to testify even after I have so ruled. I shall thus await, as regards the next step to be taken in the matter, the choice of the Accused on the options the law leaves at her disposal in these circumstances. I order accordingly.

Pronounced in open Court this 25th day of March 2004 at Blantyre.

A.C. Chipeta

JUDGE