IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY
CRIMINAL CASE NO. 13 OF 2006

THE REPUBLIC

-VS-

RIGHT HON. DR. CASSIM CHILUMPHA SC.
AND
YUSSUF MATUMULA

CORAM: HON. JUSTICE NYIRENDA, J.

Kayira, Director of Public Prosecution ... for the State
Mrs Kanyuka, Chief State Advocate…..… for the State
Mr. Liabunya, State Advocate ……... for the State
Mr. Kaphale …… for the First Accused
Mr. Chokoto ……. for the First Accused
Mr. Nyimba ……. for the Second Accused
Mr. Mwakhwawa …….. for the Second Accused

RULING

HON. NYIRENDA J.

The two accused persons in this case are before this Court on charges of treason contrary to section 38 and conspiracy to murder contrary to section 227 of the Penal Code. The case has been before Court for a while before the substantive trial all because it has been characterized by numerous preliminary applications on part of the accused as well as the prosecution. It is only fair to say for the most part the applications were purposeful in the

nature of the case and also to see us though to a clear path to avoid a morass of interruptions during the substantive trial.

The present application is by the prosecution seeking a number of orders with regard to the handling of two principal witnesses and part of the trial. The application can be stated no better than citing the actual heading of the summons as follows:

> *"Summons To Have Part of The Matter Herein Conducted in Camera And To Conceal The Identity of Two Of The State's Witnesses Herein From The Public Under Section 60 Of The Courts Act, Cap 3:02 And The Inherent Jurisdiction Of The Court".*

By these Summons the prosecution seeks the following orders from the Court:

1. That the evidence of Graham Raymond Alistair Minnar and Thomas Elias Ndhlovu be heard in camera.

2. That the identity of Graham Raymond Alistair Minnar and Thomas Elias Ndhlovu in the form of face, photograph or howsoever otherwise be concealed from the public.

3. That the witnesses be hooded whenever they are coming and going out of the Court and should use private entrance to ensure that they are not seen.

4. That the Court gives any other Order it deems fit and appropriate in this matter.

The application is premised on the affidavit of The Director of Public Prosecution, Mr. Wezi Kayira which in full states as follows:

AFFIDAVIT IN SUPPORT OF THE APPLICATION BY THE STATE

I, WEZI KAYIRA, Director of Public Prosecutions in the Ministry of Justice P/Bag 333, Lilongwe 3, **MAKE OATH** and state as follows:

1. **THAT** I have conduct of this matter by virtue of my position as Director of Public Prosecutions and therefore I am duly authorized to swear this affidavit on behalf of the State.

2. **THAT** the facts set out in this affidavit are within my personal knowledge as a result of my conduct of this matter and are to the best of my knowledge and belief, true and correct.

3. **THAT** the witnesses herein, namely Graham Raymond Alistair Minnar and Thomas Elias Ndhlovu, who will testify on behalf of the prosecution allege to have been approached by Dr. Cassim Chilumpha and Mr. Yusuf Matumula to overthrow the lawfully constituted Government of the Republic of Malawi and to assassinate the President of the Republic of Malawi, His Excellency Dr. Bingu Wa Mutharika and other members of the Government.

4. **THAT** the said accused persons are now charged with offence of treason contrary to Section 38 of the Penal Code and conspiracy to murder contrary to Section 227 of the Penal Code.

5. **THAT** the charge of treason is very serious and carries a death sentence upon conviction and the charge of conspiracy to murder carries a maximum sentence of 14 years upon conviction and both are very serious offences.

6. **THAT** since these alleged offences came to the notice and attention of the Malawi Government, which fact led to the subsequent arrests and charges being brought against the accused

persons, the said witnesses, their families and close relations have been living in constant fear of reprisals and revenge actions orchestrated by the accused persons or their sympathizers.

7. **THAT** I have directed my mind to policy considerations and practice that allows the State to protect witnesses in criminal matters in certain instances and this criminal case is one such instance.

8. **THAT** it would be quite pretentious for anyone not to appreciate the sensitivity of the allegations against the two defendants.

9. **THAT** from the evidence that the State has in its possession including the recordings which the defendants have been exposed to, which evidence is to be adduced in court during trial, and considering the nature, seriousness, sensitivity and circumstances of the case before this court, I strongly believe that disclosing the identity of the witnesses herein to the public would frustrate or render impracticable the administration of justice and would thus not serve the ends of justice.

10. **THAT** it is the duty of the State to protect witnesses in any case and considering the nature, seriousness, and sensitivity of the case before this court, the State is justified to protect these witnesses from any threats and harm, actual, real or perceived.

11. **THAT** it is a further duty of the State to ensure that witnesses testify in an environment that reasonably secures their safety and protection whilst addressing their fears and concerns be they real, perceived or actual.

12. **THAT** the said witnesses have said that they would only testify if it is demonstrated that the state has taken positive steps to conceal their identities in the form of photographs, face or howsoever otherwise from the public to ensure their safety.

13. **THAT** the said witnesses have indicated that they have firm belief and fear that revealing their identities to the public would greatly compromise their security and safety as that would only increase the chances of them being subjected to

reprisals or revenge actions orchestrated by sympathizers of the accused persons.

14. **THAT** the interest of justice would require that the identities of the said witnesses be concealed from the public to ensure that they make themselves available for trial and testify in an environment that recognizes their fears and ensures that their concerns are addressed.

15. **THAT** protecting the identity of the witnesses herein from the public shall not occasion any injustice to the defendants as they will have the opportunity to see and cross examine them.

16. **THAT** further the accused persons have already been exposed to the recorded material by listening and reading the transcribed material and the State has already made disclosures of their evidence in the form of witness statements.

17. **THAT** further the accused persons will have all the opportunity to cross examine the witnesses during trial and thus test the credibility of their evidence.

18. **THAT** the public will be able to listen to the testimony of the said witnesses through the public address system which shall be used.

WHEREFORE I pray that:

(i) The evidence and testimony of Graham Raymond Alistair Minnar and Thomas Elias Ndhlovu be heard in camera.

(ii) The identity of Graham Raymond Alistair Minnar and Thomas Elias Ndhlovu in the form of face, photograph or howsoever otherwise be concealed from the public.

(iii) The witnesses be hooded whenever they are coming and going out of the court and should use the private entrance to ensure that they are not seen.

(iv) The court makes any further order it deems fit, just and appropriate in this case.

Both accused oppose the application and have each on his part filed an affidavit in opposition. To start with the affidavit of the first accused is as follows in full:

AFFIDAVIT BY FIRST ACCUSED IN OPPOSITION TO APPLICATION BY THE STATE TO HAVE PART OF THE MATTER CONDUCTED IN CAMERA AND TO CONCEAL THE IDENTITY OF TWO OF THE STATE'S WITNESSES FROM THE PUBLIC.

I, DR CASSIM CHILUMPHA, VICE PRESIDENT OF THE REPUBLIC OF MALAWI of P.O. Box 30399, Capital City, Lilongwe 3, make oath and say as follows:

1. I am of full age.

2. I am the first accused person in the abovementioned criminal case and I have due authority to swear this affidavit.

3. The Statements of fact that I depose to herein are from personal knowledge unless otherwise stated.

4. This affidavit is being sworn in opposition to the application by the State for an order that:

(a) the evidence and testimony of Graham Raymond Alistair Minnar ("GM") and Thomas Elias Ndhlovu ("TEN") be heard in camera.

(b) The identity of GM and TEN in the form of face, photograph or howsoever otherwise be concealed from the public.

(c) The witnesses (GM and TEN?) be hooded whenever they are coming and going out of the court and should use the private entrance to ensure that they are not seen.

5. I have been shown the affidavit in support of the application sworn by Mr. Wezi Kayira the current Director of Public Prosecutions for the Government of the Republic of Malawi.

6. I observe that the application by the State is premised on the assertions by Mr. Kayira that

(a) The charges are serious and sensitive. (paragraphs 5, 8 and 9 of the affidavit of Mr. Kayira,

(b) The witnesses, their families and close relations have been living in fear of reprisals

and revenge actions orchestrated by me or my sympathizers. (paragraphs 6 and 13 of the affidavit of Mr. Kayira)

(c) Disclosing the identity of the witnesses to the public would frustrate or render impracticable the administration of justice and would not serve the ends of justice (paragraph 9 of Mr. Kayira's affidavit)

(d) It is the duty of the State to protect witnesses from any threats actual, real or perceived. (paragraph 10 of the affidavit of Mr. Kayira)

(e) The witnesses have said that they would only testify if it is demonstrated that the State has taken active steps to conceal their identities in the form of photographs, face or howsoever otherwise from the public to ensure their safety (paragraph 12)

7. I oppose the application by the State on all the 3 orders sought by the State in the summons.

8. I have already pleaded not guilty to the charges against me.

9. I am the incumbent Vice President of the Republic of Malawi. I do not have any criminal record and I am not a violent person and have never been convicted of any offences involving violence, harassment, intimidation or obstructing the course of justice. I am an academic of quite some standing in the legal profession in Malawi and a muslim by faith.

10. I have never met the said witnesses to whom the application relates and do not know them; neither do I know where they stay either in Malawi or elsewhere in the world.

11. I have never intended to threaten, intimidate, molest or cause any harm, whether physical or psychological to the witnesses whether by myself or through any other person.

12. Further, I have never threatened, intimidated, molested or caused any harm; whether physical or psychological to the witnesses neither do I intend to do so now or forever.

13. I am not aware of any incident where any person claiming or purporting to be my sympathizer or

agent has threatened, intimidated, molested or caused any harm, whether physical or psychological, to the witnesses and I do not think that would happen now, during or after trial.

14. As far as I know, the need for concealment of the identity of the witnesses does not arise by reason or real, actual or perceived threats of harm or any reasonable apprehension of such, but it is as a result of an agreement or deal struck between the said witnesses and the Government of the Republic of Malawi on 2nd May, 2006, less than a week after my arrest and whilst I was still in prison.

15. I exhibit hereto and mark CC1 a copy of the Memorandum of Understanding ("MOU") between the Government of the Republic of Malawi and GM and TEN. Paragraph 4 on pages 3 and 4 of the said MOU is pertinent. The said MOU was already exhibited to the affidavit of one of my counsel, Mr. Innocent Kalua, sworn in this very same matter on 21st February, 2007. That affidavit explains how I came into possession of the said exhibit.

16. As far as I know, this is not the first treason case in Malawi both pre and post 1994 and it is obviously not the only one involving capital punishment that our courts are to deal with or are currently dealing with. All the previous treason cases and murder or armed robbery cases have been held in open court before the public and all the witnesses who testified were not hooded or screened and yet they have been people living in the same country and community with the accused, unlike in this case where the said witnesses do not reside in Malawi and have had the assurance or governmental protection. There is therefore nothing very exceptional or unique about this case to justify the orders sought. If anything, in view of CC1 and the fact that the witnesses reside abroad and are secured during and after trial, this is arguably the case where the witnesses least deserve any additional protection from the court.

17. Moreover, from the pre trial discoveries and from exhibit CC1, it is clear that GM and TEN are not resident in Malawi and that the State has already taken steps to relocate them and safeguard their safety, both before, during and after trial. The distance between Malawi and South Africa and the

safeguards for the safety of the witnesses taken by the State render it less likely that any harm would come their way.

18. One of the most important areas of my defence will be to attack the credibility and antecedent conduct and history of both GM and TEN so as to prove my innocence and create reasonable doubt in the minds of the jury as to the veracity of the story narrated by them against me.

19. I have learnt from the pre trial discoveries that both GM and TEN were security operatives in South Africa (although the truth of this is yet to be established) and that GM has been involved in covert activities in the southern African region including in an unnamed neighbouring country. I exhibit hereto and mark CC2 transcript of an alleged conversation between GM and the second accused person.

20. Having learnt of this and of the names of GM and TEN, I have been trying to dig deeper into knowing exactly the kind of persons GM and TEN are. My efforts to find this information, both in South Africa and in the region have proved futile because I do

not have the photographs of GM and TEN so that I can circulate them to my contacts for identification purposes. Photographs are necessary in view of the fact that GM and TEN always use aliases (see purported transcript of conversation between GM and second accused (exhibit CC2 and Statement of Mr. Jacobus Van schallkwyk exhibited hereto as CC3.

21. Hence the applications for concealing their identities will severely prejudice me in my defence.

22. Further, if the court is not open to the public, and the public does not see the faces of GM and TEN, it will be impossible for members of the public to identify GM and TEN and pass on to me any information about them that may be helpful to me in my defence.

23. Furthermore, when GM and TEN are photographed by the press, the wider public, both in Malawi and outside Malawi is likely to have access to the photographs and they may pass on information to the defence team about the antecedent conduct, history and credibility of GM and TEN. Indeed, I

intend to conduct a region-wide inquiry on GM and TEN using the photographic evidence.

24. This quest is made necessary by reason of the fact that the State has not furnished me any evidence of GM and TEN and has not given me any information on their creditworthiness and antecedent conduct.

25. Actually, when I was released on bail, I personally received information from one gentle man that used to work at the Malawi Embassy in South Africa to the effect that during the Muluzi era, one white South African male had approached him with information that he (the white South African male) knew of a plot by two named prominent leaders of the opposition to kill Dr. Muluzi and that he wanted to be assisted so he could meet Dr. Muluzi to narrate the information. (see coincidence or similarity of this story with the story in exhibit CC3). This gentleman is eager to see GM or his photograph and judge whether it is the very same person that had approached him at the Malawi Embassy at that time or not. The gentleman's access to GM's photograph or to see GM in person

will assist me in my defence case as such evidence will surely affect GM's credibility.

26. If this does not happen, my trial will be most unfair and it will be a mere charade or a phantom trial.

27. Actually, from the witness statement by Mr. Van schallkwyk (exhibit CC3) it is stated that GM was introduced to Mr. Van Schallkwyk by Dr. Nel Marais. I have had the occasion to search on the internet for Dr. Nel Marais and have come across information from a document exhibited hereto as CC4 that he attended a conference in south Africa on 18th November 2003 titled *"African Peace and Conflict: Defence and Security Business Opportunities Conference"* where he presented a paper. With GM's links to Dr Marais, I am anxious to know whether, and to what extent GM is in the defence and security business in Africa and whether he does honest defence and security business or he is a trickster who operates in the dishonest and brutal underworld. (CC1, whose terms seem extortionist, raises my fears in this regard). This information can only come out once GM's photographic identity is known as he is most likely operating using aliases.

28. On basis of the aforegoing, it is my prayer that the application by the State be dismissed in its entirety.

The affidavit of the second accused is as follows also in full:

AFFIDAVIT IN OPPOSITION TO THE APPLICATION TO CONCEAL THE IDENTITY OF THE PRINCIPAL WITNESS

1. **I, YUSUF MATUMULA,** of Ntaja Village, Traditional Authority Kawinga in Machinga District and of P.O. Box 5938, Limbe in the Republic of Malawi make **OATH** and **SAY** as follows:

2. I am of full age.

3. I am the 2nd accused person in this matter and I have authority to swear this affidavit.

4. The matters of fact referred to in this affidavit are from my personal knowledge and others from my information and belief and I verily believe the same to be true.

5. I have read what purports to be the affidavit of Wezi Kayira.

6. I oppose the application by the State in its entirety.

7. I have never intimidated or threantened violence against the witnesses in this case and has no intention of doing so at any stage of the proceedings or after the trial because I believe in my innocence.

8. I have no knowledge of any person and I know of no person who has intimidated or threatened violence against the State's witnesses either as my sympathizer or in any other capacity arising from the present case.

9. I am patiently waiting for my trial which I have always been willing to attend.

10. I would like the public to attend my trial and see my accusers in the hope that I will have a fair trial with public scrutiny of every process including public scrutiny of the identity of the witnesses and their demeanor in court.

11. It is only through disclosure of the identities and photographs of the witnesses that the public, within

and outside Malawi, could help with information on the creditworthiness and history of the State's witnesses that will in turn help the Court in dispensing justice in this case.

WHEREFORE I humbly pray to this Honourable Court to dismiss the application by the State in its entirety.

In Open Court it has indeed been a privilege to receive from all the parties wealth of submission and material to work with. I commend all Counsel for the depth of research and profound thought that now guides the court in this ruling.

I should however explain the Court's approach to this application. Initially I was inclined to address virtually every aspect of concern discussed and addressed by all the parties. While doing so it soon occurred to me that I was running the danger of treading on or causing impressions which are far too inappropriate at this stage of the case. Certainly I should avoid causing any impression on the caliber, integrity capacity or standing of any of the witnesses or the accused persons except that which is borne out by the affidavits before me. For this reason I should, this early in this ruling and with due respect, state that I will not be guided by the observations of Honourable Justice Mkandawire quoted as a preamble to the submissions on behalf of the first accused. The relevant passage reads in part:

"... The would-be assassin is described by the Minister's press release as a former operative of the South African Security

Services. This white man should be a well trained security person. I do not therefore think that he is the type of witness who can easily be influenced or intimidated by the applicants. Actually, he is capable of intimidating the applicants himself. He is not an ordinary witness. He should be such a sophisticated and clandestine individual for him to have accepted such a covert assignment. I do not think that ordinary individuals like the 2nd and 3rd applicants, with no any background in security services can easily influence and intimidate this top class assassin".

The observations I will make in this ruling will be based purely on the information made available to me in the course of this application and only to that extent. I am not prepared to go as far as the Honourable Judge did in describing the two witnesses and the two accused persons. I believe it is unsafe for me to go that far at this stage of the case.

Learned Director of Public Prosecution (DPP) and his team submit very briefly but strongly that in the nature of this case the two principal witnesses need the protection he seeks for them to feel safe and be able to testify. Learned DPP draws the Court's attention to section 60 of the Courts Act Cap 3:02 as the basis of the application. The section states:

"In the exercise of its jurisdiction, powers and authorities the proceedings of every court shall, except as otherwise provided by any other law for the time being in force, be carried on in an open court to which the public generally may have access.

Provided that any court may have power to hear any matter or proceeding or any part thereof in camera, if in the opinion of the presiding Judge, or presiding magistrate, it is expedient in the interest of justice or propriety or for other sufficient reason so to do".

This provision applies to proceedings in Court generally. The Criminal Procedure and Evidence Code has a similar provision for purposes of criminal proceeding. Section 71 thereof provides as follows:

All proceedings under this Code shall, except as otherwise expressly provided by any law for the time being in force, be carried on in an open court to which the public generally may have access.

Provided that any court shall have power to hear any inquiry or trial, or any part thereof, in closed court and to exclude any particular person from the court, if, in the opinion of the presiding Judge or magistrate, it is expedient in the interest of justice or propriety or for other sufficient reason so to do.

It is argued by the DPP that while the general rule is that criminal proceedings should be held in open court apparently, from the above provision, at common law and from decided cases, some proceedings are hidden from the public. Such was the exposition by Lord Diplock in *A.G. v*

Leveller Magazine Limited [1979] AC 440 from which the DPP quotes at some length from page 449 in this way:

> *"As a general rule the English system of administering justice does require that it be done in public:* ***Scott v. Scott [1913] A.C. 417.*** *If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintaining the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court, the principle requires that nothing should be done to discourage this".*
>
> *However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature and circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from Statutory*

exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs, in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.

Supported by this authority, the state submits that a reading of the affidavit filed in support of the application shows that it would be expedient, in the interest of justice, for the court to exercise its discretion in favour of imposing the restrictions sought. It is submitted that the fears and concerns of the two witnesses as highlighted in the affidavit are sufficient reason to persuade the court exercise its discretion in support of the restrictions.

In any case, according to the DPP, the restrictions sought would not substantially prejudice the accused persons. It is reminded that the court should balance between the need for protection, including the extent of the necessary protection, against unfairness or the appearance of unfairness in the particular case. Such was the view in *Taylor and Crabb [1995] Crim. L.R. 253; AL – Fawwaz v. Govenor of Brixton Prison and Another [2001] 1 WLR 1234 DC.* The contention is that in making this application the State has taken into account the accused person's rights hence the effort to minimize the ambit of the restrictions. That in the nature of the orders sought the accused, his lawyers, the Judge and the jury will be able to see the two witnesses and therefore nothing will be lost.

Further counsel on behalf of the accused will cross examine the two witnesses and therefore be able to test their credibility before the jury. It is further submitted that all the testimony of the two witnesses will be made public through a public address system that will be set up. The position of the State is that the measures sought are not far reaching such that the disadvantages arising from witness anonymity are readily ameliorated by counsel being able to pursue a proper cross examination of the witnesses. See the *R v Ellis, Gregory, Simms and Martin, The Times June 1, 2006.*

In his final submission the DPP reminded that it is not the public that will determine this case but the jury and the court. Finally, from the DPP himself there are no concerns and the State is not worried about the safety of the rest of the witnesses who are within Malawi. The application is strictly in respect of the two foreign witnesses who are the principal witnesses in the case for the State.

In submitting for the first accused, Learned Counsel Kaphale starts by referring to the Constitutional basis for a public trial under section 42(2)(f)(i) which states:

> *"Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to a public trial, before an independent and impartial court of law within a reasonable time after having been charged".*

Counsel acknowledges that the above provision is amenable to limitation but however that the limitation must be prescribed by law, is reasonable, is recognized by international human rights standards, is necessary in an open and democratic society, and does not negate the essential content of the right, (section 44(2) and 44(3) of the constitution). It is further acknowledged that section 60 of the Courts Act and Section 71 of the Criminal Procedure and Evidence Code provide for limitations on the right to a publice trial. While so submitting counsel nonetheless accentuated a number of critical considerations. To begin with Counsel emphasized the importance of the right to a public trial which was defended in the case of *Attorney General v. Lever Magazine [1979] AC 440,* at *440* to *450* as follows:

> *"Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity, whether in the courts, the press or both, is a powerful deterrent to abuse of power and improper behaviour".*

The court has also been referred to the case of *R. v. Legal Aid Board, exparte Kain Todner (Afirm) [1998] 3 W.L.R. 925* where *Lord Woolf* advocated four major reasons for open justice in this was (i) it deters inappropriate behaviour on part of the court. (ii) it maintains public confidence in the administration of justice, and enables the public to know that justice is being administered fairly (iii) it may result in new evidence being available and (iv) it makes uniformed and inaccurate comment about court proceedings less likely. Also relied upon is the case of *Canadian*

Broadcasting Corporation v Attorney General for New Brunswick and others [1996] 3 S.C.R. 480 where it is stated:

> *The Open Court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice.*

Counsel subsequently and at some considerable length addressed the parameters of the exercise of judicial discretion in making orders for trials in camera and other restrictions on public trials.

In doing so, Counsel has analysed cases on the subject from a number of jurisdictions. I do not intend to mention all the jurisdictions and all the cases that have been referred to. The English case of *Scot v. Scot [1913] A.C. 417* keeps on coming up from all parties and here counsel draws the courts attention to this proposition by Viscount Haldane at 437:

> *"In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the courts in this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions such as those to which I have referred. But the exceptions are themselves the outcome of yet a more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. --- It may often be necessary, in order to attain its primary object, that the court should exclude the public.*

The broad principle which ordinarily governs it therefore yields to the paramount duty.--- As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be suspended by this paramount consideration. The question is by no means one which, consistently by the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning not on convenience, but on necessity.-- But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between the parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it to the standard which the underlying principle requires.--- In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done".

Another important consideration highlighted is that trials in camera can only be ordered in exceptional circumstances. In a way this point has been made already from the preceding authorities. But the case that brings out this point most strongly is *Reg v. Malvern JJ exparte Evance [1988] 1 QB 540* at *552* where Watkins L.J said referring to earlier cases:

--- the right of justices to sit in camera was not doubted. But it was emphasized in both of them that do so is a very exceptional step to take and should be avoided if there is any other way of serving the interests of justice. I respectfully agree with that. --- In doing so, I would, however, wish it to be plainly understood from what I have said in my judgment that it is undesirable that, save where statute otherwise provides, any part of proceedings in a magistrates' court should be heard in camera unless there are compelling reasons, the existence of which I imagine to be rare, why this should be done.

It is further submitted that for a trial to be in camera there must be evidence of real grounds for fear. Several cases have been relied upon. In *R v Atkins [2000] N2CA9* the point was discussed in this way by Their Lordships.

Mr. Calver submitted that the correct test to be applied is whether the applicant for the order has proved safety endangerment on the balance of probabilities. We do not agree. In its context the word "likely" bears a common meaning – real risk that the event may happen – a distinct or significant possibility. --- To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate ---. It is the existence, in a real sense, of danger to safety (serious damage)

which can, not will, give rise to an order. --- The weight to be given to any particular assertion will depend on many differing factors, including source, reliability and the existence or absence of supporting material."

Section 486(1) of the Criminal Code of Canada provides as follows:

Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any member of the public from the court room for all or part of the proceedings, he may so order.

In interpreting this provision in the case of *Canadian Broadcasting Corporation v. New Brunswick (Attorney General) [1996] 3 SCR 480* the Court provided the following guidance on the procedure to be undertaken upon an application for a section 486(1) order:

The burden of displacing the general rule of openness lies on the party making the application. ---The applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is limited as possible; and that the salutary effects of the Order are proportionate to its deleterious effects. In

relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.

There must be sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision. Discretion is an important element of our law. But it can only be exercised judicially when all the facts are known.

Upon these considerations and authorities the first accused makes the following submissions among others which can only be properly put by quoting from the written submissions themselves where it is said:

The State has not given any evidence justifying the alleged fear in the minds of the witnesses so as to justify the orders sought. There is no evidence suggesting that the first accused is a particularly violent person or that any of his sympathizers have any such inclinations.

The State has not given the reasons for the fear, or any circumstance or incident that has triggered the feeling of fear of violence on the part of the witnesses.

The fact that a witness is refusing to testify is not good enough as a reason to order a trial in camera.

It is not in every treason case or every capital offence that there will be witness intimidation. Witness intimidation cannot be assumed. The court cannot take judicial notice that there will be witness intimidation or harassment in this case.

A trial in camera is an abridgment of a Constitutional right and must be founded on good evidence. That we have had a few treason cases and trials in Malawi none of which necessitated the kind of order the State is seeking.

Finally it is submitted that it is important that the first accused and the general public should get to know the witness in order to establish the character, antecedent and credibility of the witnesses.

In all it is submitted that the application has no merit and should be dismissed entirely.

As for the second accused his submissions have been very brief. He virtually followed the path of the first accused. He submits for himself that he does not have any information about where the witnesses stay and is therefore not a threat to any one of them. In any event the State is already protecting the witnesses and there is no suggestion that there has been any development that has prompted the State to make this application.

As I have said in the introduction to this ruling it would not be proper for me at this stage of the case to dwell on much of what has been submitted except that which is necessary for the determination of the question before me. Even in that context not every submission that has been made needs to be touched upon.

The starting point in this matter as I see it is our own Constitution. Section 42(2)(f)(1) which for its ease of reference here I will cite again:

> *"Every person arrested for or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right – as an accused person, to a fair trial, which shall include the right – to public trial before an independent and impartial court of law within a reasonable time after having been charged".*

Admittedly this provision is one that can be limited and therefore exceptions permissible. Nonetheless and in accordance with the Constitutions, by section 44, the limitations must be prescribed by law, which are reasonable, recognized by international human rights standards and are necessary in an open and democratic society. It is further provided that the restrictions or limitations shall not negate the essential content of the right and shall be of general application.

Apart from the Constitution and as part of the law applicable in Malawi by virtue of sections 211(1) and (2) of the Constitution is the United

Nations Covenant on Civil and Political Rights (1 CCPR). Article 14 of the Covenant Provides as follows:

> *"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*
>
> *The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ---"*

Two points immediately come to bear. The first one is that trial in public is a protected right Constitutionally and by virtue of our commitment to international legal order. The second point is that the limitations in such provisions as sections 60 of the Courts Act and 71 of the Criminal Procedure and Evidence Code are envisaged and permissible subject to considerations in section 44 of the Constitution. The only real question I have to determine is whether the State has made out a case to warrant taking away the present case from the public eye to the extent prayed for.

Earlier in this ruling I referred to four reasons given by *Lord Woolf* in the case of *R v Legal Aid Board* underscoring the justification for a public trial. There will be no harm in repeating those reasons here. A public trial deters inappropriate behaviour on part of the court, it maintains public confidence in the administration of justice and enables the public to know that justice is being administered fairly, it may result in new evidence being available and it makes uninformed and inaccurate comment about proceedings less likely. The case that has championed open justice and explained it convincingly is that of *Scot v Scot* cited earlier. Lord Shaw commenting on the proceedings which were heard in camera in the court below had this to say:

> *"What has happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the crown, and most certainly must be denied to the judge of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.*
>
> *It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice". "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity.*

It keeps the judge himself while trying under trial. The security of securities is publicity. --- The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary – and they appear to me still to demand of it – a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under the cover of rules of procedure and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as --- to impair the open administration of justice.

These are fundamental considerations which clearly speak for caution towards any attempt to conscript open justice. It is no doubt for these considerations that the weight of authority as referred to by both the State and the accused persons warn against taking away court proceedings from the full glare of public eye and scrutiny. The consensus is that trials in closed courts should only be in rare and exceptional circumstances. The International Covenant on Civil and Political Rights attempts to guide on such circumstances although no doubt the actual factual basis for a trial in camera will vary from case to case; which leads me to yet another important consideration. For the court to exercise the discretion whether to impose restrictions or not in a trial surely there must be factual circumstances to work with either appertaining to the parties or the Court itself.

As a matter of fact in applications of the present nature it is the factual basis that would determine the actual measures and extent of the restrictions. Like it has been submitted a court could never merely take judicial notice of the seriousness of the offence and on that basis alone impose restrictions on a trial. Of the cases that have been cited where restrictions were imposed on a public trial of the likes of *R vWatfordMagistrate's Court, ex-parte Lenman [1993] Crim L.R. 388, Doorson v. The Netherlands 22 EHRR 330,* in each case the court was introduced to actual violent events against persons who gave evidence.

This however is not to say in order to impose restrictions on a public trial the court must wait until a witness is actually harassed or threatened or harmed or indeed killed. If a tacit factual event has not yet happened a court will contend with a strong circumstantial disclosure. Supposing there is reasonable evidence of some preparations to attack a witness surely a court should not wait until the onslaught. It is in this regard that the court in *R . v Atkin* cited earlier said in this context the word "likely" bears a common meaning – a real risk that the event may happen – a distinct or significant possibility. That to require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real or substantial risk to a protected interest, a risk that might well eventuate. In the *Watford Magistrate's* case the approach was that:

> *"If a Magistrate(Judge) is satisfied that there is a real risk to the administration of justice, because a witness on reasonable grounds feared for his safety, it was entirely within the powers of the Magistrate(Judge) to take reasonable steps to protect*

and reassure the witness so that the witness was not deterred from coming forward to give evidence".

I should now be drawing close to my final thoughts and say this. While we have all gone around the world in search for an answer to the matter before us, the real answer is in our own case, *Rep. v. Allen, (1966-68) ALR Mal 549* where at *page 549* Bolt, J States:

"Summarizing, the general principles in Malawi relating to hearings in camera or closed court are as follows:

(i) In cases involving adults, the proceedings must normally be in open court.

(ii) This principle should be departed from only in exceptional circumstances.

(iii) The party who wishes a case to be heard in camera must make out the ground of his application strictly. The application itself must be made in open court so that the general public can hear the reasons which are advanced in support of it and the court's decision thereon.

(iv) The fact, per se, that the parties, i.e. including the public prosecutor and the defendant or his counsel in a criminal case, are agreed that the proceedings should be in camera or closed court, is not a good ground for making an order to this effect; though the presiding judge or magistrate is entitled to take this into account together with any other reasons advanced.

(v) It is not a question of mere convenience. The paramount consideration is that justice should be done and if a hearing which is open to the public will defeat this object, then it is permissible to hear the case in camera or closed court.

(vi) A hearing in camera or closed court may be ordered when it is expedient in the interests of justice or propriety or when any other sufficient reason is apparent. In deciding whether any or all of these conditions are satisfied, the presiding judge or magistrate must treat the matter as basically one of principle; in so doing, however, it is recognized that an element of discretion also will not infrequently be involved.

The affidavit of the Learned DPP contends that the two witnesses, their families and close relatives have been living in constant fear of reprisals and revenge actions orchestrated by the accused persons or their sympathizers. It is further said the witnesses have indicated that they have a firm belief and fear that revealing their identities to the public would greatly compromise their security and safety as that would only increase the chances of them being subjected to reprisals or revenge orchestrated by sympathizers of the accused persons. So far, all the Learned DPP has said is that the two witnesses are living in fear. There is no factual basis mentioned for that fear or the apprehension of it. I have not been referred to any events leading to the fear or apprehension of it. There are virtually no grounds to explain the fear or insecurity.

Perhaps realizing that no tangible grounds had been advanced to support the application the DPP referred to paragraphs 23, 24, 25, 26 and 27 in the first accused affidavit and suggested that the first accused might be looking for the witnesses with an ill motive. I am afraid this is grasping at straws. Surely, an accused person is entitled to know who his accusers are. This is part and parcel of what an accused will normally do in the preparation of the defence.

It would appear to me that the State is asking the court to take judicial notice of the seriousness of the charges against the accused and that on that basis alone there ought to be restrictive orders made. In paragraph 9 the DPP says considering the nature, seriousness, sensitivity and circumstances of the case before this Court, he strongly believes that disclosing the identity of the witnesses herein to the public would frustrate or render impracticable the administration of justice. In paragraph 10 he says it is the duty of the State in any case to protect witnesses from any threats and harm, actual, real or perceived in a case as serious as the one before us. I will not go far myself and merely say our courts have never and could never be expected to engulf such a submission. That would be suicidal for our criminal justice system. *Rep v. Allen* is good and sufficient guide for us. The party who wishes a case to be in camera must make out the ground for his application strictly. What is interesting to me is that the Allen case was decided on 30th May 1968, almost fourty years ago when constitutional and democratic values were not so much on our national agenda. With the strides that we have made over the years

culminating into the new Constitutional order, we can not afford to subtract from Rep v. Allen. We should be improving on it.

There is a lot at stake in the case before us. On the one hand there are allegations that the life of the Head of State of this country was to be terminated and if that were to happen obviously with it the possibility of chaos and public disorder in the entire nation. On the other hand if the allegations were to be substantiated the consequence is a matter of life or death on the accused persons. From every perspective therefore this is an extremely important case for both the State and the accused persons. It is a case that should be subjected to the ultimate measure of transparency, only to be curtailed if indeed it is necessary and imperative that we do so. In fact the entire nation is watching, just as the relatives of the accused persons are watching every stage of these proceedings. Blackouts in the trial is the least event that anyone expects unless justified on facts and reasons given.

This reminds me as many others will be reminded, that the distant past of this country was characterized by serious criminal trials, including treason trials, that still haunt us. For the most part it is because the trials were fraught with extreme procedural compromises. We are still haunted by the anomalies of those trials. We should be scared and wary of slipping back into that den.

It is acknowledged that the public will not assist rendering the decision and verdict in the case. But in the nature of the case, as in every serious criminal trial, public endorsement of the course of the

trial would vindicate the outcome. In that way the matter will be put at rest once and for all.

This appears to me to be all that can be said about this matter. I must say again that I am greatly indebted to all counsel for the careful and helpful manner in which they argued their respective cases. In my final opinion and for all that I have discussed no ground has been shown that would entitle the Court to make any of the orders sought by the Director of Public Prosecutions. The application is therefore dismissed in its entirety.

Finally, I would wish to give some directions on the further conduct of the matter. This hopefully was the last in a series of interlocutory applications that flooded the case and that the date of commencement of trial can now be set. At an earlier application the accused were asking for beyond six months to finalize their defence. The DPP thought three months would be acceptable. That application was a while ago. I am sure each of the parties have benefited from and taken advantage of the time it has taken to come up with this ruling and have been doing some preparations. I will allow for three months for final preparations for all the parties. The case will be set for a date in May this year for trial. The specific date will be discussed with all Counsel in Chambers.

The other direction I wish to make is that owing to the limited space in our court room, the Registrar should discuss with all parties on how many people can comfortably be allowed in the court to avoid

congestion and disorder during proceedings. When the number is determined it should then be apportioned among the parties, the press and some neutral observers.

The final direction is with regard to cameras and cellphones. Photographing any part of Court proceedings is not allowed. It is common knowledge that most modern cellphones will have cameras in them. It is only proper and to avoid any disruptions during proceedings that cameras and cellphones should not be allowed into the courtroom. Everyone including counsel, attending the proceedings inside the courtroom shall ensure that they do not have these items on them. It might be necessary that the Registrar determines now this direction shall be complied with.

PRONOUNCED in Open Court at Blantyre this 25th day of January, 2008.

A.K.C. Nyirenda

J U D G E