REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO. 24 OF 2013

THE REPUBLIC

v

STEWART LOBO

CORAM : MWALE, J.

: Namanja, Counsel for the State

: Katundu, Counsel for Defendant

: Kaferaanthu, Court Interpreter

: Namagonya, Court Reporter

Mwale, J

Introductory

1. The accused person, No A7197 Constable Stewart Lobo, is charged with the offence of murder, contrary to section 209 of the Penal Code (Cap:7:01 of the Laws of Malawi) The particulars of the charge are that the accused on or about the 21st of July 2011, caused the death of George Thekere at Chilinde 1 Location in Lilongwe

District. Briefly, the facts of the case centre around the infamous "20th July 2011 Demonstrations" that resulted in looting and the destruction of public and public property and consequent deaths of a number of persons following police attempts to quell the disorder over a two-day period.

2. By way of background, the State sought to adduce the evidence of the said Jones Mpambiche who could not be traced at the time of trial as he had since travelled to South Africa through an application under section 173(H) as the read with section 175(1)(2) of the Criminal Procedure and Evidence Code (Cap:8:01 of the Laws of Malawi). Unfortunately, the State failed to file the Statement within the requisite time and the defence objected to it's tendering. Far from serving the document 7 days prior to the date of hearing, it was filed the day before the date of hearing giving the defence inadequate time to respond to it. As such, this Court did not allow the tendering of the statement.

ISSUES

3. A number of issues are raised by the facts of this case.

   (i) To begin with, the case at hand centres on identification evidence raising issues on the correctness of the identification and the subsequent court room identification by the only eye witness when an identification parade was not held prior to the hearing.

   (ii) Secondly, some of the evidence placing the accused person at the scene and identifying him as the shooter was provided to the witnesses in the case by persons who were never called to give evidence, as such, the issue of hearsay arises.

   (iii) Thirdly, the accused person raised the defence of alibi and the State bears the burden of disproving it.

   (iv) Lastly, in the event that the evidence points to the accused person as the shooter, as the evidence seems to suggest that the target was one Jones

Mpambiche, whether or not the accused person had the requisite mens rea for causing the death of the deceased is called to question.

EVIDENCE AND THE LAW

4. In order to satisfy the requisite standard of proof, the relevant provision is section 187(1) of the Criminal Procedure and Evidence Code which reads:

> The burden of proving any particular fact lies on the person who wishes the court or jury as the case may be to believe in its existence, unless it is provided by any written law that the proof of such fact shall lie on any particular person. Provided that subject to any express provision to the contrary in any written law the burden of proving that a person is guilty of an offence lies upon the prosecution.

There are numerous cases interpreting this provision. In one such case, ***Namonde v Rep***. [1993] 16(2) MLR 657, the Honourable Chatsika, J. as he was then, affirmed Lord Sankey's views in the case of ***Woolmington v Director of Public*** **Prosecution** [1935] AC 462, in which Lord Sankey had stated as follows:

> *"It should be remembered that subject to any exception at common law, cases of insanity and to various statutory provisions, the prosecution bears the burden of proof on every issue in a criminal case."*

In another case, ***Chauya and Another v The Republic***, Criminal Appeal No. 9 of 2007, the Honourable Chipeta J (as he was then) stressed that in,

> *"Criminal law, it should always be recalled, thrives on the noble principle that it is better to make an error in the sense of wrongly acquitting a hundred guilty men than to err by convicting and sending to an undeserved punishment one innocent soul."*

It is therefore incumbent upon the court to leave no stone unturned in scrutinizing the evidence presented in its' entirety to ensure that there is no reasonable doubt as the accused person's guilt, failure of which will lead to his acquittal.

(a) <u>Elements of Murder</u>

5. What the State must prove in this case is the charge of the offence of murder, contrary to section 209 of the Penal Code. The section provides as follows:

> Any person of malice aforethought causes the death of another person by an unlawful act or omission shall be guilty of murder.

In the case of murder, the prosecution must establish three elements;

(i) death of a person,

(ii) the death must have been caused unlawfully, and

(iii) the death must be caused by the accused.

Death of the deceased was proved by PW6, Senior Clinical Officer at Kamuzu Central Hospital who prepared the postmortem report on the deceased on 22 July 2011. He testified that the deceased had a deep wound from the maxilla to the base of the skull and bone fragments from that wound. In his opinion, the deceased died of severe brain injury due to a gunshot wound. There having been no defence of self-defence or other lawful killing raised in the evidence, there is no doubt that the killing was unlawful. All that remains to be proved is whether the death was in fact caused by the accused person with the requisite mens rea.

6. Evidence placing the accused person at the scene of the crime was provided by a number of witnesses. **PW1** was the deceased person's cousin **Emmanuel Stanford Chilema**. He testified that on the fateful day, July 21st 2011, he received a phone call around 10 O'clock in the morning that his cousin had been shot. When he arrived at the scene of the crime, a police car passed him and he saw the blood spot where the body had been removed. He was told by the crowd that had gathered there that the deceased had been shot by a policeman from Kawale Police Post, known as Lobo. PW1 immediately went to Kawale Police Post where he met the Officer in Charge who denied that no police officer was in Chilinde. When PW1 said he had seen Lobo in Chilinde the Officer in Charge said nothing and merely asked him to have his statement taken. Upon cross examination he insisted that he confronted the Officer in

Charge about Lobo's presence and he took his initial silence as acceptance that Lobo had indeed been there.

7. **PW2** was **Suzgo Kwelepeta**, the deceased's employer. He was engaged in a conversation with the deceased immediately before he was shot. While he was talking to the deceased, the deceased fell to the ground, having been shot at the mouth. He saw the shooter, he was wearing police uniform. He could not however identify the shooter and failed to identify the accused person in Court. In cross examination, all he could remember was that the uniform was the PMF uniform that the police were wearing on that day and that the shooter left the premises by climbing over a brick wall and getting into a police car.

8. **PW3** was **Stellia Mphote**. On the material day, she was at home, next door to the crime scene. She heard a great noise and saw people running so she run into her house. A boy entered her house behind her using another door. A policeman was chasing after him and this policeman knocked on her door three times shouting that if the boy didn't come out, he would burn the house down. Fearing for her children, PW3 shouted out to the boy to get out. The boy obliged and she saw the policeman through a window with no glass panes beat him three times before he loaded his gun and fired a shot. The boy was not killed but she later heard that another person was hurt next door. She testified that between her home and the next door premises was a short brick wall just a little shorter than herself. She was not able to recognize anyone and failed to identify the accused person in the dock. She saw him for the first time in her life in court that morning.

9. **PW4** was **Sharon Msowoya**, PW2's tenant. She ran inside her house on the landlord's premises when she heard sounds like fireworks and was warned that the previous day's fracas was continuing. The deceased however went back outside and stood at the septic tank, talking to the landlord and he also warned PW4 to stay inside as the sounds they heard were actually gunshots. Soon thereafter she saw a policeman coming into their yard from next door through a gap in the wall. She demonstrated to the court that the policeman jumped into the yard pointing his gun poised ready to

shoot. She knew the policeman by face since he worked at Kawale Police Station but at that time, she did not know his name. The policeman pointed his gun at the deceased and the next thing she heard was the deceased utter, "Aaaah", before she heard a gunshot and the deceased fell to the ground slowly with his legs in the air. She collected her chitenje and run back inside. Her behavior over the next few minutes was erratic. She picked up another chitenge from the house and crawled back outside to try and stop the bleeding, at that point she could see that his teeth and jaw bone had been shot off and there was a pool of blood on the ground. She ran back into the house to get a Bible which she tried to read but failed because she was too distressed. She went back outside and the deceased breathed his last. She covered him with her chitenje. At this pointed the landlord had fled into the house and she called him back out. After a while people came into the compound to assist and named the shooter as Lobo. The police arrived ten minutes later and when they asked the landlord's wife what happened, she said it was the police who did this. They said no more and asked for a mat to wrap the body in but nobody obliged them, telling them to sort out their own mess. The police pulled out a plastic sheet from the car, wrapped the body and drove off, in fear of the crowd that was fast gathering. PW4 was able to identify the accused person in the dock as the shooter. When confronted with her witness statement in which she had earlier said that the police officer was chasing a boy when he jumped over the fence, she explained that she had forgotten this detail. She also said the police officer was wearing a grey uniform and confirmed that she only knew the police officer's name after the people who had gathered outside mentioned it. When questioned by the court she revealed that her house was roughly 10-15 metres away from where the deceased fell and that the shooter was 30-35 metres away. She also revealed that there was no obstruction in her path. She was never given an opportunity for a pre-courtroom identification of the accused person for various reasons. On her first visit to the police station she was told he was not in uniform that day so she merely had her statement recorded. The second time she was told he was off work sick and the third time the identification also failed to happen.

10. **PW5** was the investigating officer, **Assistant Superintendent L. Mdala** based at Karonga Police Station. He was assigned to investigate July 20th and 21st shootings by the Inspector General. He visited the crime scene and interviewed witnesses included

the now at large Jones Mpambiche. Despite having made several attempts to question the suspect who was identified by PW4, the accused eluded him three times and only availed himself after the Inspector General intervened. Even the officer in charge of distributing weapons failed to give a record of weapons issued and who they were issued to. He recorded a caution statement and evidence of arrest from the accused person which were marked as exhibits PW5A and PW5B. When asked why he didn't hold an identification parade in cross examination he stated that where a suspect is known, such practice is considered bad.

(b) <u>Hearsay Evidence</u>

11. From the evidence, it is clear that the name Lobo was mentioned by various people as the shooter but only PW4 Sharon Msowoya actually saw and identified Lobo as the shooter. The evidence of the other witnesses must be disregarded pursuant to section 184 of the Criminal Procedure and Evidence Code which renders hearsay evidence inadmissible.

<u>(c) Reliability of Identification Evidence</u>

12. Two issues arise in connection with the evidence of PW4, the only eye witness. As it is identification evidence, any court must be very careful to act on it, especially in cases where the court room identification is not preceded by an identification parade. Beginning with the issue of identification evidence, it is incumbent upon every trial court dealing with identification to first acknowledge that it is dealing with identification evidence, which should lead it to direct itself in accordance with the ***Turnbull*** guidelines (***Regina vs. Turnbull & Another*** (1977), QB 224) to warn itself about the dangers of convicting on such evidence, before arriving at a decision.

13. The ***Turnbull*** guidelines have been crystalized in Malawi law and as the case of ***Republic v Banda and Another*** (1995) 1 MLR 219 shows, the factors that a trial court must warn itself when considering such evidence are:
    1. *How long did the witness have the accused under identification?*
    2. *At what distance?*

3. *In what light?*
4. *Was the identification impeded in any way, as for example, by passing traffic or a press of people?*
5. *Had the witness ever seen the accused before?*
6. *How often?*
7. *If only occasionally, had he any special reason for remembering the accused?*
8. *How long elapsed between the original observation and the subsequent identification to the police?*
9. *Was there any material discrepancy between the description of the accused given to the police and the witness when first seen by them and their actual appearance?*
10. *Recognition is more reliable than identification of a stranger but the trial court should still direct itself that mistakes in recognition of family members and close friends are sometimes made.*

14. In the absence of supporting evidence, the failure of the trial court to give itself a Turnbull warning would render the conviction unsafe. This position is confirmed by the Honourable Mwaungulu J. (as he was then) in the above cited case of ***Gandawako and two others v The Republic,*** Criminal No. 25 of 2002. where he stated that:

> Clearly, the lower court, although it considered the evidence pertaining to the appellant's identity, never considered the R v Turnbull directions. In those circumstances, the verdict is unsafe. The direction ensures that there is no mistake as to the identity of the assailants and avoid miscarriages of justice. The R v Turnbull directions impose on a court at first instances to bear the warning and expose to itself the weaknesses and dangers of identification evidence generally and in the specific case (R v Keane (1977) 65 Cr. App.R. 247. The Privy Council in R v Beckford and Others (1993) 97 Cr.App.R 409 at 415 has held that failure to give a Turnbull warning "will nearly always by itself be enough to invalidate a conviction which is substantially based on identification evidence." Although not bound by the decision, it is strongly persuasive and, in my judgment, represents good law.

Therefore in warning itself of the identification, this Court has duly noted that the witness in this particular case knew the accused person by face as an officer at

Kawale Police Post. She did not know him by name, but he was a person with whom she was familiar. Issue has been raised that she was only able to put a name to the face after a person who had not been in the compound at the time of the shooting subsequently came in and identified the shooter as Lobo. The witness however identified the accused person in the dock as the same person she had seen shooting the deceased and the issue of name was not the determining factor for her visual identification. It should be noted that these events occurred in the morning, before 10 o'clock in the morning, when the sun was up and visibility clear. The witness herself was firm in that there was nothing obstructing her line of vision and the distance between her house where she observed the happenings and the spot the deceased was shot was very short, approximately 30-35 metres. The accused person in his defence testified that he had been stationed at Kawale Police Post since 2004, he was obviously known to the residents there and PW4 was firm in her recognition of a face she knew. Her demeanor throughout her testimony was very confident and she particularly struck the Court as a reliable witness. Because she was the only eyewitness who was able to identify the shooter she had originally been scared to give evidence and had to be compelled. An indication that the fact that the shooter was a police officer made her fear and she would be highly unlikely to concoct such a detailed account especially with the fear of retaliation.

15. PW4 did forget during her testimony and only remembered after refreshing her memory that the shooter was chasing a young boy when he ran over the fence. Considering that she testified on 20th May 2015 over events that took place on 21st July 2011, it is hardly surprising that certain details might be forgotten. There is a difference between remembering a sequence of events from remembering that an event took place or the identity of a person sometime back. Events and faces stick to mind but over times, minor details may elude the mind and that is why the law allows for refreshing of memory during testimony. All in all, I find no reason to doubt the identification evidence of PW4.

(c) Failure to hold an Identification Parade

16. In ***Phiri and others v Republic [1998] MLR 307 (HC)*** court stated that there are problems with letting a witness identify the defendant at a police station or in the dock

without an identification parade. While such evidence is acceptable, it is usually deprecated. Dock identifications are not looked at favorably by the Court. Further, in ***Chapingasa v Republic [1978-80] 9 MLR 414*** Court approved of the principles in English law laid in ***R v Williams (1912) 8 Cr App R 84, R v Chapman (1911) 7 Cr App R 53***, and ***R v Cartwright (1914) 10 Cr App R 219***. This is precisely for the reasons found in Cross on Evidence (4ed) at 49 (1974):

> "It might be thought that in criminal cases there could not be better identification of the accused than that of a witness who goes into the box and swears that the man in the dock is the one he saw coming out of the house at a particular time, or the man whom assaulted him. Nevertheless, such evidence is suspect where there has been no previous identification of the accused by the witness, and this is because its weight is reduced by the reflection that, if there is any degree of resemblance between the man in the dock and the person previously seen by the witness, the witness may very well think to himself that the police must have got hold of the right person, particularly if he has already described the latter to them, with the result that he will be inclined to swear positively to a fact of which he is by no means certain. It has therefore been held to be undesirable for the police to do nothing about the question of identification until the accused is brought before the magistrates, and then ask a witness for the prosecution some such question as 'Is that the man?' The correct procedure is for the police to hold an identification parade..."

17. Although the practice of not holding an identity parade has been condemned by the Malawi Supreme Court of Appeal in the case of ***Kilitasi Chimwala v The Republic***, MSCA Criminal Appeal No.5 of 2000 (unreported), it did not go ahead to order the reversal of a conviction on that ground alone.

> "Pausing here, it is to be observed that although dock identification in which a witness makes his or her identification of an accused for the first time only in court is legally admissible, it is generally considered to be a most unsatisfactory method of proof. Indeed, the whole question of visual identification of suspects by witnesses has for many years been acknowledged as problematic and potentially unreliable, considering, among other things,

which visual memory may fade with passage of time, and the possibility of a genuine mistake: see **Bentley (1991), Crim LR 620**."

In this case the Supreme Court, albeit condemning the practice of not holding an identity parade held the identification evidence to be legally admissible but unsatisfactory. The test as to whether a conviction is quashed or not as a result of the failure to hold an identification parade rests in whether there is other evidence in the case to sustain a conviction, and in the above case of ***Kilitasi Chimwala,*** the court found there to be no other evidence.

18. In the absence of the evidence of PW4, there is overwhelming circumstantial evidence the only logical inference from which it can be proved that the accused was the person who shot the deceased. PWs 2 and 3, even though they did not identify the accused person as the shooter gave evidence that the shooter was wearing police uniform. According to PW5 accused person was very evasive during investigations and did not avail himself for investigation. Although this was disputed by DWs 2 and 4 who generally place the blame on the witnesses inavailability, PW4 gave precise details of the occasions she actually availed her for the purpose of identifying the accused. If she was too afraid, how was it possible that she made a statement identifying the accused? PW4 testified that she availed herself three times to the police for the identity parade, but each time there was an excuse why the accused person was not available. The excuses do not sound convincing and neither do the reasons given by the defence witnesses who had every opportunity to conduct the parade when the statement was taken. PW5 had a different reason as to why the identification parade did not take place which also conflicts with the reasons given by PW4 and the defence witnesses. This reason being legally unsound will be ignored. The identity parade therefore failed to take place not for any want on the witness' part but by a calculated move to thwart the interests of justice and it would be unfortunate to declare the identification invalid on the basis of such a calculated move. The accused person also gave the defence of alibi which if successful would have impeached the identification evidence. However, as I shall reason below, the defence cannot succeed.

(d) Defence of Alibi

19. In ***Bonzo v Rep [1997] 1 MLR 110 (HC)*** the Court held that once an accused raises the defence of alibi, it is for the State to disprove it and not for the accused to prove it. The standard of proof is a balance of probabilities. The defendant testified himself and called 2 witnesses. During his testimony he stated that on the particular day, he was at the Police station and not at the crime scene at the time in question. He went on to add that he was wearing a khaki uniform and those from mobile police were putting on camouflage. Between 5 a.m. and 7 a.m. he admits being at Biwi in a PMF vehicle and all they did was dispense tear gas. Only the police officers in the PMF carried guns. He stated that the distance between the police station and the scene of the incident was almost 3km. He stated that after returning from recovering property stolen from shops by looters, he did not leave with the group that had left for Biwi around 8 O'Clock in the morning. Just after 10 O'Clock in the morning a vehicle came with a dead body that was said to be found at Chilinde. He also stated that he gave his statement when he was asked to, and when he had showed up for an identification parade, this did not happen, but he was still accused of the murder of George Thekere, whom he does not know. He concluded in re-examination by stating that he did not bring the occurrence book that officers sign when they carry guns and the book showing whether he was stationed elsewhere or at the office because it is not his duty to bring those items before court as it is not his duty to prove his innocence.

20. **DW2, Richard Luhanga, Senior Deputy Commissioner of Police**, currently Director of Training at Area 30. When the July 20/21st incidents were happening, he was away on peace keeping mission in Sudan but was posted as Officer in-Charge of Lilongwe Police station when the investigations for the shootings were instituted. He further stated that the accused came for the identification parade but the witness in particular Sharon Nyasulu (PW4) refused to show up stating that she feared for her life. This happened 3 times and he concluded by stating that the witness did not show up whilst the accused was cooperative.

21. **DW3,Assistant Superentendent Harry Chimombo** currently based at State House, was the operations officer at Kawale Police station during the period of the incident and he was in charge of deploying junior officers and supervising them and gun

distribution. It was his testimony that the accused was deployed to Biwi around six in the morning in a 997 vehicle which carried three guns According to him the accused did not carry a gun. He was not in the vehicle with this crew and he could not say which officer carried the gun without recourse to a roster. The vehicle later dropped the accused to secure the station , whilst he proceeded with other officers to patrol Biwi triangle. During the above mentioned patrol, he received a message that someone had been shot in Chilinde. He stated that he later found the accused still at the police station with some Army officers.

22. **DW4, Dan Sauteni,** Senior Superintendent currently at the National Police Headquarters O/C Peace Support Operations Desk. He testified on the accused person's cooperation and availability during investigations. According to his testimony, when a serving police officer is sought for investigations, it must be done following procedure, through the officer in charge. The officer in charge was never notified. He revealed in cross examination that although the accused was supposed to be at the station on the material day, his deployment outside was abrupt and anybody deployed at the station can be called out at any time to respond to an emergency.

23. In assessing the defence case, the test as set out in the case of the ***Republic v Msosa*** (1993) 16(2) MLR 734, in circumstances such as these, the only question for the court to ask itself is,

> "Is the accused's story true or might it reasonably be true?"- with the result that if the answer is that the appellant might be reasonably be telling the truth, the prosecution would not have in that case discharged the burden of proof beyond reasonable doubt imposed upon it by law.

24. The picture painted by the defence evidence is that far from hindering the investigations, the accused was cooperative and it was the witness PW4, who was uncooperative and refused to come to come to identify the accused for fear of her life. The accused also testified that on that day he was wearing a Khaki uniform, whereas the witness PW4 said he was wearing a grey uniform. The witnesses also place the

accused at the police post before and after the shooting but not at the time of the shooting.

25. From the defence witnesses' testimony it would appear that the standard procedure may not have been followed by the investigating officers which ruffled feathers among the police officers on how serving officers should be arrested and investigated. I believe that while procedures may have been flouted, there was a degree of protectionism which is not surprising in any profession but the overall weight in the evidence does goes against the defence case. Both DW2 and DW3 were very emotive in their testimony and failed to convince the Court of the veracity of their statements. As such, it was highly unlikely that their account could be defined as materially true. However even if the accused was available during investigations and it was PW4 who was unavailable, the turning point in this evidence is that even the witnesses who say the accused was not at the scene of the crime, cannot say for certain that he was at the police station the whole time.

26. I have also considered whether the inconsistency in what uniform was worn on the day makes the accused more credible than PW4 as all inconsistencies must be exercised in favour of the accused. The issue however is not one of inconsistency but whether this was such a serious memory lapse as to taint the rest of PW4's testimony considering the traumatic nature of the event and the lapse of time. The identification it should be recalled was of a person she knew and recognized, that is the decisive factor. In fact the other eye witnesses were also not on point with the uniform and yet they also saw the shooting which is an undisputed fact. In conclusion, even though it is not the duty of the accused to prove his alibi, it is crucial to note that none of the witnesses testified or where capable of testifying of the exact whereabouts of the accused person at the exact time of the shooting.

(d) Transferred Malice

27. It is safe to conclude that state proved its case beyond reasonable doubt and the accused was indeed responsible for the shooting of the late George Thekere on the 21st of July 2011. Having decided that the accused was the shooter it is now incumbent on this Court to ascertain whether he possessed the requisite mens rea. PW3 testified that the shooter was chasing a boy named Jones Mpambiche who is currently at large. The shooter pointed his gun at this boy and it was his intention to shoot Jones Mpambiche but he missed and consequently, the gunshot hit the deceased and killed. While the accused may have had the mens rea to kill Jones Mpambiche, in the absence of the legal doctrine of transferred malice, he lacks the mens rea for killing the deceased.

28. In the English case of **R v Latimer (1886)** 17 QBD 359, the defendant was a soldier who got into a fight, he had been attacked by another individual and retaliated by hitting back. The soldier used his belt to hit the other person but the belt rebounded off the original victim and hit a woman causing facial injuries. The defendant was found liable for the injuries suffered by the woman and was convicted even though he had not intended to harm the woman. The mens rea of the original attack was transferred to the second and no 'further' or 'secondary' mens rea was required. Following this doctrine, the accused person in this particular case also possessed the requisite mens rea for the murder of George Thekere even though he was aiming at Jones Mpambiche because the offence that was eventually committed is of the same genus.

29. For all I have argued above, I find the accused person No. A7197 Constable Stewart Lobo guilty of the offence of murder contrary to section 209 of the offence of the murder of George Thekere on 21st July 2011 and accordingly convict him of the offence. Bail is to be revoked forthwith and he is to be remanded in custody forthwith. Counsel are to agree on a date for the presentencing hearing and the matter is adjourned to a date to be fixed for the sentencing hearing.

Made in open court in Lilongwe this 4th day of October 2016.

Fiona Atupele Mwale
Judge