IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO. 73 OF 2008

BETWEEN

THE REPUBLIC

-VS-

JOSHUA CHEUKA ……………………………………………………………………………………… 1ST ACCUSED
NICHOLASI SAIDI ……………………………………………………………………………………. 2ND ACCUSED
JAMES MUHONJO …………………………………………………………………………………. 3RD ACCUSED
JONATHAN MLOTHA ……………………………………………………………………………. 4TH ACCUSED

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Thabo Chakaka Nyirenda, Counsel for the Applicant(s) State
: Mr. Wapona Kita, Counsel for the Respondent/Accused
: Mrs. Kabaghe 00000000– Court Reporter
: Mr. Kafotokoza – Court Interpreter

JUDGMENT

In this court four police officers namely, Joshua Cheuka, Nicholasi Saidi, James Muhonjo and Jonathan Mlotha, were charged on three counts with Manslaughter contrary to Section 208 of the Penal Code in respect of the deaths of Yusuf Abudullah, Emmanuel Philemoni Waziri and Patricia Motinti. Plea was taken on 26th January, 2009 during which all four accused persons pleaded not guilty. Then the prosecution offered no evidence against Jonathan Mlotha, the fourth accused person and this court proceeded to acquit him on all three counts. Trial

proceeded in respect of Joshua Cheuka, Nicholasi Saidi and James Muhongo, the first, second and third accused persons respectively.

The case for the prosecution opened with the evidence of PW1, Pearson Chelewani. He was an assistant to the driver of Fuso Lorry Registration No. BN 8444. The driver of that lorry was Yusufu Abudullah, the deceased in respect of count 1 of the charges. His evidence in-chief was that on 12th August, 2008 he and the driver on the lorry were at Area 36 Market in the City of Lilongwe off loading charchoal when the police in their 997 Rapid Response vehicle arrived at the scene. The police asked PW1 where the driver of the lorry was. When he told them that the driver had left, they told him to go and call him. He went looking for the driver and returned only to ask the police why they were looking for the driver. The told him that they wanted K3,000 each. He told them that there was no money. The police then threatened him and stopped him from offloading the charcoal. He then went to inform the driver who was behind a second vehicle. The driver came and discussed with them but they did not agree. Another person, a driver called Shehee, went into the lorry to start the vehicle to take it to the home of Yusufu, whereupon one of the policemen told him to step out or he would die over matters that did not concern him. Shehee dropped from the vehicle. Then Yusufu came to the vehicle and entered it. He started the vehicle and drove off. PW1 ran after the lorry. The lorry stopped and he got in. After travelling a short distance Yusufu stopped the lorry again and asked him to get off and go and ask for money from someone else. The lorry then left. Later he heard the sound of gun shot. He returned to the market. He then got a phone call. As regards the demand for money he said that the policemen told him that when they impound a vehicle with charcoal the Forestry Department gives them lots of money and they too had to do likewise.

During cross-examination he said that he worked for his employer, Mr. Chinyama, owner of the lorry, for 4 years and that he was in his fifth year. When pressed that this differed from what he told the police when his statement was recorded, as he had said six years, he said that he was confused on the day he gave evidence. He said that he was not involved in the actual off

loading of the charcoal as this was done by four pieceworkers, one of whom was Nenenje. He said that the policemen on the 997 vehicle were four in number and at the time they approached he stood 10 metres away from the vehicle. The time was around 8.00 am and the place being a market place was busy with many people. The police were close behind the vehicle. He then said when the police asked him where the driver was, he said behind. The driver came to the vehicle because the police had now stopped the off loading. He then said *"It is their conduct always when 997 arrive they demand money. I am not always with 997 on their Patrol. These are always demanding money. The driver came with a view to discuss with them."*

He said that he did not know what they discussed and could not say whether they discussed money. When the driver left he told him. To go home and look for money and that if the police followed him, the driver, he would give them at home. He knew the driver was going home at Mchesi. He could not say what happened between Phwetekere Area 36 Market and Mchesi. As he was in Area 36 he heard gun shots in Mchesi. While he knows it is illegal to deal in charcoal without licence he was of the view that the police are not concerned about charcoal. He knew that the police take anyone found in possession of charcoal to the Forestry Office. He could not tell who among the policemen fired the gun and he could not tell the firing range.

The second prosecution witness, PW2, was Austin Chingwalu. On 12th August 2008 he was walking to his place of work in Mchesi Township in the City of Lilongwe when he heard one gun shot followed by a crashing sound. He ran to see what had happened. He saw a 997 vehicle coming from the same direction as the lorry that had crashed and stopped at a road junction. The lorry had collided with a passenger minibus. He got to the lorry only to find his longtime friend Yusuf Abudullah lying in the passenger's seat and pressed by the steering wheel. He called for help to take Yusufu Abudullah out of the lorry. He also checked the vehicle for cash and cellphones but instead he discovered a bullet cartilage below the driver's seat. He said Yusufu Abudulla was rushed to hospital where he was pronounced dead. The lorry had crashed into a minibus and had later crashed into a nearby building. He just learnt that some

passengers in the minibus died. The road is usually busy but on that particular morning it was free.

During cross-examination he said that he saw the lorry as it came from Kawale direction. It was cruising. He conceded that he did tell the police that a bullet hit the rear of the minibus but that was in his imagination. He was about 50 metres from the scene of incident. He also conceded that he did tell the police that he heard several gun shots but that he in fact heard only one gun shot. He said that he gave the bullet cartilage that he found in the lorry to the owner of the lorry. He said that there was one place at the back of the lorry through which a bullet went.

The third prosecution witness was John Mame, also known as UDF. He is a resident of Area 36 in the City of Lilongwe. On 11th August 2008 he went on the ill-fated lorry to Salima to collect charcoal. He went on invitation as a pieceworker to load charcoal. On the morning of 12th August, 2008 he and three others began offloading the charcoal at Area 36, Phwetekere market. As they off-loaded they were stopped by 997 policemen who were four in number saying *"tisawanyengerera"* referring to Yusufu Abudullah. That time the police were standing 10 Kilometres away from him although later he gave an estimated distance of four metres. He said the police demanded K12,000.00. The assistant to the driver was present. The assistant to the driver then went to the driver to collect money but he did not bring. The driver then said he would collect the money from his home. These discussions lasted for 2 hours. The policemen said if they called Forestry they would each be given K12,000.00. Then the driver started his vehicle. The police vehicle failed to start and it had to be pushed.

In cross-examination he said that he was called UDF as a nickname because he would always wear yellow clothes. He was cross-examined on the two different home addresses he gave about himself and he said the one he gave in court was the correct one. He said that there were four policemen who demanded K12,000.00 for them to share at K3,000.00 each. He conceded that he did tell the police when he gave a statement that the four policemen said they

would share K4,000.00 each. He said that he told the police what the accused themselves said and he did not know whether K12,000 would be shared K4,000.00 each among four people. He also did indicate that he found it difficult to speak in court. He only knew Pearson Chelewani as "*Tall*". "*Tall*" dropped off the lorry at some distance from Phwetekere market although he himself was not there when "*Tall*" was dropped. During re-examination PW3 said that he mixed up his home particulars because the police had been fast when recording his statement. Again he was not concerned whether four K4,000.00's amount to K12,000.00 or not. He stated what the accused themselves said that they wanted K12,000.00 which the four of them would share K4,000.00 each.

The fourth prosecution witness, PW4, Assistant Superintendent, Dacosta James Jailosi is the Officer-in-charge of the Murder Section of the Malawi Police Service and is based at the Police Headquarters. He stated that on 12th August, 2008 PW1, Pearson Chelewani, Assistant driver C/O Awana Investments in Mchesi made a report at Lilongwe Police Station that a motor vehicle BN 8444 Fuso Lorry driven by late Yusufu Abudullah was involved into a road accident after colliding with an oncoming minibus. According to the witness PW1 stated that the vehicle was being chased by 997 Police vehicle Registration No. MP 1864 from Area 36 Location Via Biwi up to Mchesi Location where it was involved in the road accident. The report further stated that the 997 police officers were firing at the vehicle BN 8444 Fuso Lorry. When PW4 received the report he and some CID personnel as well as Traffic Personnel led by the Officer-in-charge of Lilongwe Police Station, Deputy Commissioner, D. Mwapasa went to the scene and cordoned it. They made a thorough inspection of the scene. He observed a bullet hole at the back of the cabin of the vehicle Reg. No. BN 8444 and then three holes at the back of the driver's seat and on the body of the driver who was driving the lorry. Two people in the minibus died. They were Emmanuel Philemoni Waziri, a male, and Patricia Motinti, a female. They had head injuries. The witness took all three dead bodies to Kamuzu Central Hospital pending postmortem. Before postmortem a commotion erupted between relatives of the deceased persons and the police. The relatives took the bodies for burial. The body of Yusufu Abudullah however was brought back to Kamuzu Central Hospital Mortuary after the relatives realized that he had bullet

wounds. They however did not have a chance to put it back in the mortuary. Instead they took the body to Likuni Mission Hospital Mortuary. Dr. Charles Dzamalala was summoned to conduct postmortem examination on the said body. During full postmortem the fatal bullet was found at the back, not very deep. Yet another was found on the back below the skin. The witness took these three pellets, as exhibits in the case. Pictures of the bullet holes had been taken both on the body of the deceased and of the ill-fated Fuso Lorry. It was after these processes that he arrested Joshua Cheuka, Nicholasi Saidi, James Muhonjo and Jonathan Mlotha. When he interviewed them, they admitted to have chased the vehicle BN 8444 Fuso Lorry from Area 36 Phwetekere Market till it collided with a minibus at Mchesi Location, but they denied to have opened fire at the vehicle they were chasing. After intensive interviewing Constable Nicolasi Saidi, the 2nd accused told him that he was going for duties at that particular time and he met his friends at Area 36 and further stated that as they were chasing the vehicle BN 8444 Fuso Lorry on arrival at Biwi Filling Station Constable Muhonjo fired at the vehicle after snatching the riffle of Constable Joshua Cheuka. He did that because the rifle he was possessing failed to open fire, may be due to technical fault. He said *"This now means that NO B 1172 Constable Cheuka was in possession of a rifle which contained seventeen rounds and NO BO 113 Constable James Muhonjo had also a rifle in his possession."*

The two rifles were examined by a ballistic officer whose report was that a specific rifle had been used to fire bullets which caused death. Thereafter he cautioned the suspects with the offence of murder. Caution statements were recorded from the owners. He charged Constable Joshua Cheuka and Constable James Muhonjo with murder.

Regarding the situation at Mchesi Location he said the mood of the people was hostile. Police personnel who resided in the Location had their houses vandalized and they left for safe places and policemen who were known in the area were not going there. The people were furious. After few days order was restored in Mchesi Location. During cross-examination he said that Pearson Chelewani told him that he was the assistant driver for the ill-fated lorry but that he jumped off before reaching Biwi Filling Station, and that he was not present during the accident.

He said he received the report from Pearson Chelewani around 8.00 O'clock in the morning hours, although he later said he got the report around 9.00 am after the incident. He said that it was him who received the report from Pearson Chelewani after 9.00 am. He detailed someone to record his statement. At first it was reported as a motor accident but it turned into murder after driver had bullet wounds at the back. He said when he got to the scene he found the body of the lorry driver still on the driver's seat. He said that Austin Chingwalu was among the first people to get to the scene and they removed the body together. He said that the hood and the body of the lorry BN 8444 were separated by metal barrier. In fact the picture tendered in evidence shows a large and tall sheet of metal as separating the two parts of the vehicle. He said that half way the driver could be seen from behind because there were holes. The metal sheet had one bullet hole through it and he suggested that three bullets went through that one hole. Three holes appeared on the back of the driver's seat and on the body of the driver. The incident took place on 12th August 2008 and the pictures were taken on 15th August 2008. This delay was due to the fact of commotion that ensued following the accident which did not allow for access to the vehicle. Although anything could have happened to the vehicle in between the time of the incident and the taking of pictures, he did not think anything did happen to the vehicle. He said that he did not find or see any empty cartilages in the vehicle. He said that it would be amazing to find such a cartilage in the vehicle. In between the Cabin and the body of the lorry there was some empty space such that a bullet from the back of the lorry had two barriers being the metal sheet and the back of the Cabin. Only three pellets were found in the body of the deceased and not bullets. The pellets were fragments of a bullet. At the time of the incident second accused was going to work using the same 997 Rapid Response vehicle as he was to report for duties on the morning of 12th August. He established this and for that reason he just took a caution statement from him but did not charge him with causing the death of the deceased person. He only charged first accused and third accused persons with causing the death of the deceased. He said that the second accused book advantage of the fact that the vehicle was from his office and was in his area when he joined it. He said that it was up to the court to see if there was any evidence connecting the second accused to the offences charged.

He also said that there was ample evidence that the gun was snatched from the first accused person and was used to shoot the lorry in question. He said in his own words *"I can say no there is no evidence that he encouraged anybody to fire*". He referred to first accused person in this statement. The ballistic expert said the gun exhibited was the one that was fired and the accused persons said the same thing and also indicated that the other gun had failed to fire. The vehicle had only one bullet hole. The accused had admitted to have been chasing the lorry. He would not tell what a stray bullet was although he had ever heard about that.

During re-examination he stated that the accused had powers to stop each other from firing. The third accused was leader of the group and that there are rules for the use of firearms. He speculated that from the statement of first accused he would have been in a position to stop third accused from shooting. The witness was not in a position to produce the rules that govern the use of firearms by police officers and which would have allowed the first and second accused to stop third accused from firing the gun. He was not able to produce the rules that would show that second accused automatically took over leadership of the team in question the moment he joined the vehicle, by the mere fact that he was the most Senior Constable on board.

The fifth prosecution witness, PW5 was Francis Daglous Msambwa, of the Firearms and Ballistics Branch at the Malawi Police Headquarters. On 15th August 2008 he received two firearms and 23 live ammunitions, together with three deformity bullets for examination. He tested the firearms at a rifle range and they fired without any problem. He also examined the deformity bullets under a comparison microscope. The results of the comparison were that Rifle No. N 786594 was the one that was used to fire the fateful bullet. He had four photographs taken. The first showed two rifles. The second showed the retrieved bullet used for testing. The third was after the postmortem and the fourth was a combination of test bullets and those found after postmortem. He then prepared a report which he tendered in evidence as exhibit p22. He defined stray bullets as bullets fired from a gun aiming to the real

target but missing the target. He identified a bullet hole on the vehicle and bullet holes on the driver's seat. He said the holes were of direct bullets and not stray bullets.

During cross-examination he said that the deformity bullets were as a result of impact which deforms the bullets. He could not tell how many bullets were fired from the rifle in question. He said that the bullet went through the body of the lorry then the back of the Cabin, through the driver's seat to the victim. As it went through the hard surface it got deformed. It was the deformed pellets that caused the holes on the body of the victim. He was at the hospital when the pellets were being removed from the body of the victim and he witnessed the removal. He saw the bullet wounds on the body of the victim as well as scratches.

The sixth prosecution witness, PW6, was Dr. Charles Patrick Dzamalala, a Pathologist working at the College of Medicine, Blantyre. He had his training at St. Andrews University in Scotland before going to Makerere University in Uganda for training as a pathologist. In this case he had a request from the Malawi Human Rights Commission and a Legal Firm styled Messrs Creysole Derson and Associates to conduct a postmortem on the body of one Yusufu Abdullah whose body was lying at Likuni Hospital. This was because there were two different stories about Yusufu Abdullah's death, one being that he died in a road accident and the other being that he was shot dead. He conducted the autopsy on 15th August, 2008 being the following day. Present at the autopsy were four teams. One team consisted of Senior police officers, a ballistic's expert, one officer in charge of murder investigations and another of the criminal investigations department. Then there was a team from the Malawi Human Rights Commission. One person from Messrs Creysole Derson and Associates was present. Finally there were the relatives of the deceased. The body was identified by Yusufu Ali. In the autopsy he was assisted by four mortuary attendants. On the external appearance he saw several wounds and pictures were taken. Three wounds had characteristics of an entry of bullet into the body. In cutting up the body, starting with head, he found the head to be normal as there were no traumatic marks, illness or any bullet wounds. A cut of the chest revealed a pool of blood inside on the left cavity. A picture of this was taken. The blood in the left cavity measured 2½ litres. That was half of the

normal blood content in a human being. The right cavity of the chest was completely normal. In the pool of blood on the left cavity he found bullet fragments called pellets, one was embedded in the lung and the other was in the blood. Again pictures of these were taken. Also taken in the pictures is a bony fragment. The picture of the lung showed two clear spaces where two bullets pierced the lung. He handed over to the bullet fragments to the Malawi Police Ballistic expert for further examination.

There was not much in the abdomen in terms of traumatic injuries or diseases. Having emptied the blood they turned the body face down to relook at the injuries. Using a metal showing fatal bullet would out of all the bullet wounds he was able to identify the fatal bullet wound. He saw a fractured rib where the bullet went through. He did not find any diseased organ. The deceased died of severe bleeding as a result of the bullet injuries to the left cavity of the body. The idea of road accident was not consistent with the injury. If the amount of blood in the left cavity was to be explained by road accident alone he would have expected severe chest injuries. The wounds at the back of the deceased were consistent with bullet entering while he was alive. There is a distinction between ant-mortem wound and postmortem wound. He said that the bullet wounds at the back had been five and severe although two of them were significantly tampered with in that somebody had cut around them. One wound was a depression of a pellet which he took out of the skin. The pellet had got stuck in the skin.

In explaining the unlikelihood of a road accident the witness stated that if one is getting involved in a road traffic accident, what brings about injuries is that one gets into a fear or fright situation which changes the body and an impact breaks the vessels, leading to bleeding. It is the anticipation which brings on in ones body circulatory changes making blood vessels rigid. The rigid vessels easily burst on impact. In contrast infants tend to survive road traffic accidents because they do not go into fear or fright situation. The deceased in this case having inflicted with bullet wounds in the left cavity was in an infant situation of no fear or fright. Thus the effect of an impact as a likelihood to lead to his demise was negligible if anything.

The witness found that death was because of severe haemorege to the left chest cavity. He said that although pathologists customarily do go to mode of death as opposed to manner of death, he was able to say that the impact at the back lacked features of being gun shot wound from close range. All bullet wounds were at the back and by extrapolation those bullet wounds would unlikely have been suicidal. It is characterized that suicidal wounds are from close range and have special sites in the head's side of the dominant hand.

In this case the bullet wounds at the back of the deceased showed fragments at widely varying degrees of impact with the least one not even penetrating the skin while the fatal one piercing the skin to the lung and causing death. The wounds suggest that a short gun was used and Yusufu Abdullah's body was either the primary or secondary surface. A short gun produces several pellets while a pistol produces one bullet. He prepared his report and submitted it to the Malawi Human Rights Commission, Messrs Creysole Derson & Associates and the Police.

In cross-examination he said close range in terms of firing a gun has specific meaning. It refers to centimeters and not metres. The wounds showed no preferential sites for someone committing suicide as studies on gun shot suicide would show. In suicide there are seven specific sites for gun shot and those sites are not apparent in this case. He is more concerned with what a short gun produces than the actual appearances of the two. It is the effect of such weapons on the body of the person that matter to him.

After the State had closed its case I ruled that prima facie case had been made out against all accused persons and that they are called on their defense. At that point the third accused person applied to change his plea to one of guilty. As a matter of procedure the charges had to be read over to him and he pleaded thus:

Count 1

"I understand the charge. I plead guilty. I admit that I caused the death of Yusufu Abudullah. I admit that I caused that death unlawfully".

Count 2

"I understand the charge. I plead guilty. I admit that I caused the death of Emmanuel Philemon Waziri. I admit that I caused that death unlawfully".

Count 3

"I understand the charge. I plead guilty. I admit that I caused the death of Patricia Motinti. I admit that I caused that death unlawfully".

I therefore recorded pleas of guilty on each of the three counts. The facts narrated by the State fully proved all the essential elements of the offence of manslaughter with respect to each count. To those facts the accused agreed. However the accused person disputed a statement included in the facts that he and the other accused persons demanded a total of K12,000.00 from the driver saying that failure to give them the money would mean that the accused and his colleagues would report the matter to Forestry Officials who would seize the charcoal. He also disputed that he and the driver had agreed that they would collect the money from the driver's house and they began to follow each other. I did not consider the disputed points material to establishing the essential elements of the offence of manslaughter herein but the State insisted that they would maintain those points. Frankly, I did not think that the case of the prosecution on the manslaughter charges would stand or fall as against the third accused person on proof of the allegation of bribery. However I was able to notice that the State intended to make capital out of the allegation of bribery. I therefore entered pleas of not guilty again against the third accused on all three Counts. He too was put on his defense. The case was adjourned for defense on the 18th February 2009. Before the date of 18th February 2009 the Malawi Human Rights Commission applied to join the case as *Amicus Curiae*. The State raised no objection to

the application although the defense raised objection. I therefore heard arguments on the application.

The application by the Malawi Human Rights Commission to join as amicus curiae in the present case was premised on the Commission's broad mandate of protection and investigation of violations of human rights. In discharging the broad mandate the Commission is thus entitled to take up matters to court as a party, or on behalf of complainants, as well as Amicus Curiae where the same is deemed to be an appropriate and effective way of promoting or protecting human rights. The other premise for making the application according to the commission is the inherent jurisdiction of the Court to entertain such an application. The affidavit in support of the application shows that the present matter, unlike the bulk of other criminal cases, raises critical human rights issues as they relate to lawful use of force of firearms by law enforcement agencies vis-à-vis the protection of human rights of life dignity, liberty, freedom and security of a person. The affidavit also shows that these proceedings afford the court an opportunity to expound more on a human rights oriented approach to the use of force of firearms by law enforcement officials. The Commission would thus avail the court an independent Amicus Curiae Brief which would assist the Court arrive at a decision that takes into consideration the human rights issues at stake in the circumstances of the present case beyond the partisan position of the parties thereto.

In arguing the application the Commission recognized that there is no local decision that has stated the type of interest a body or person must have in order to admit in proceedings as amicus curiae. Courts have admitted *amicus curiae* as a matter of course without the courts explicitly stating on record the special considerations taken for the applicant to qualify as amicus curiae. In the *Registered Trustees of Public Affairs Committee v Attorney General, (Malawi Human Rights Commission – Amicus Curiae)* *Civil Cause No. 1861 of 2003*, Chipeta, J. is quoted as having said *"I have… looked at both Section 129 of the Constitution and Section 12 of the Malawi Human Rights Commission Act cited by them along with the brilliant Ruling in favour of their standing in this court in these types of matters as pronounced by Hon Justice*

Nyirenda in *Malawi Human Rights Commission v Attorney General,* *Miscellaneous Civil Cause No. 1119 of 2000 (Lilongwe District Registry – unreported). All I can say in the end is that I think there was ample legal justification for my brother judge letting them into this case.”* Also cited was *Evance Moyo v Republic* *Constitutional Case Number 12 of* 2007 where the Malawi Human Rights Commission was made *amicus curiae* in view of the important human rights issues raised in the matter. Counsel for the Commission invited this court to consider the guide given in the South African Case of *Hoffman v South African Airways* *2001 (ii) BCLR 1235 CC Paragraph* 63 in admitting a party as amicus curiae, namely that:

> *“Amicus Curiae assist the court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the court’s decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation, and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court.”*

In the present case the Commission argued that it has a very strong interest in the issues that arise from the circumstances of the case, namely the use of force or firearms by law enforcement officials vis-à-vis the human right to life, dignity, personal liberty and freedom and security of the person as quarantined by the Republic of Malawi Constitution in Section 16, 19, 18 and 19 (6) respectively. These rights are also enshrined in the African Charter of Human and People’s Rights, the International Covenant on Civil and Political Rights, to which Malawi is a party and also the Universal Declaration of Human Rights which was held to be applicable in Malawi in the celebrated Case of *Chakufwa Tom Chihana v The Republic MSCA Criminal Appeal No. 9 of 1992.* The Commission also sees the issues arising in this matter as quite novel in so far

as their consideration by the Malawi courts is concerned and the Commission has the expertise to provide necessary information to the court in a non-partisan capacity.

In objecting to the application, Counsel for the defense submitted that although the Commission had stressed its non-partisan position, the defense failed to appreciate how the Commission would fail to take position. The Malawi Human Rights Commission was the one that initiated and arranged for the postmortem examination on the body of Yusuf Abdullah. They got the pathologists report. Again the defense wondered why the Commission did not join the proceedings at the beginning. They waited until after the court had found the defendants with a case to answer. If the Commission believes it has helpful material in the matter it can pass on to the State. After the Commission had replied to the concerns of the defense I granted the application on the strict understanding of the non-partisan role of the Commission. I also indicated that I would include my detailed reasons for my allowing the application in the final judgment.

I thus proceed to give my reasons. The Malawi Human Rights Commission appeared to have been interested in the human rights aspects of the tragic and fateful events of 12th August, 2008 at Mchesi almost immediately the three deaths occurred. It was the Malawi Human Rights Commission together with a local firm of lawyers called Messrs Creysole, Derson & Associates who quickly arranged for postmortem of Yusufu Abudullah and invited the hystopathologist, Dr. Charles Dzamalala, to conduct the postmortem. It was clear to me as the trial of the matter progressed that there were serious and novel human rights issues involved. As such the Malawi Human Rights Commission with its expertise in human rights matters would have, in my considered view, contributed most valuably in my addressing those human rights issues. I must state that in accordance with its constitutional mandate and indeed under the Human Rights Commission Act Cap 3.08 of the Laws of Malawi the Malawi Human Rights Commission brings up such matters to the attention of the court as would contribute to the protection and promotion of human rights. Indeed the Commission has the mandate to bring actions to court in its own name as well as on behalf of individuals. In doing so the Commission would be

performing an important public duty. I would have no hesitation to say that the public duty that the Commission performs and sought to perform in the present case amounts to sufficient interest to confer the Commission standing herein (See *Malawi Human Rights Commission v Attorney General*, *Miscellaneous Cause No. 1119 of 2000 (Lilongwe District Registry).* In the present case the Malawi Human Rights Commission applied to be amicus curiae clearly expressing that it was not to seek to advance either the case for the prosecution or for the defense but to assist the court as it addresses the novel human rights issues in relation to the use of force and firearms by law enforcement agencies. The South African Case of *Hoffman v South African Airways* (Supra) addressed the question of admitting a party as amicus curiae in the paragraph earlier quoted. I am in full agreement with the sentiments expressed in that paragraph and I adopted them for the purposes of the application before me. Those sentiments too provided a basis for my admitting the Malawi Human Rights Commission to be amicus curiae in the present case.

Let me add that there have been a number of cases where the Malawi High Court has admitted the Malawi Human Rights Commission as having standing. These include the cases of *Malawi Human Rights Commission v Attorney General,* (Supra), *The Registered Trustees of Public Affairs Committee v Attorney General, (Malawi Human Rights Commission – Amicus Curiae) Civil Cause No. 186 of 2003* and *Evance Moyo v Republic Constitutional Case Number 12 of 2007.* In all these cases there had to be a justification, through an application, for the Malawi Human Rights Commission to be joined in as amicus curiae. It is important that such an application be made early. Although in the present case the application was only made after a ruling of a case to answer and therefore naturally objected to by the defense, I allowed it. I did not think that it would prejudice the accused persons in any way in that it would turn their case into a bad one or worsen it. As matters turned out the Malawi Human Rights Commission in its amicus brief focused on the human rights issues of the case and the relevant law including applicable international human rights instruments and case authorities both from within the jurisdiction and from comparable foreign jurisdiction and tribunals. I am grateful for the brief. These therefore constituted the reasons for my allowing the application.

The case therefore proceeded to defense after I had allowed the Malawi Human Rights Commission to join the trial as amicus curiae.

The defense of Joshua Cheuka, DW1, was that on 11th August 2008 he was picked from his house in Area 22 by a 997 Rapid Response Police Vehicle Registration No. MP 1864 for him to start night patrol duties. He was himself stationed at Lilongwe Police Station and he worked in the 997 Rapid Response Police Department. He holds the rank of Constable. In the vehicle that picked him was the driver Sub-Inspector Mulotha and Constable Muhonjo. From his house the vehicle proceeded to the house of woman Sergeant Chapendeka who was to be the Supervisor of the team during the night of 11th to 12th August 2008. They did not find her. They proceeded to Lilongwe Police Station where they found Constable Thamala on night duty and informed him that they did not find the Supervisor for the night. It was Constable Thamala's duty to inform the bosses that the Supervisor had not been found. DW1, then signed for one R4 rifle and 17 rounds of ammunitions. Constable Muhonjo too signed for an R4 rifle but Sub-Inspector Mulotha did not sign for any gun. Then they left for the house of Sergeant Chapendeka but did not find her again and this was communicated to the control room at Lilongwe Police Station. Constable Muhonjo took charge of supervision and that night the team performed its duties very well.

At the time of knocking off the team went back to the office and collected Constable Thamala as he too knocked off. Constable Thamala lived in Area 36 in Lilongwe. He was taken to Area 36 to be left. Constable Saidi who was due to commence duties at the Office was to be collected. Constable Saidi too lived in Area 36. Constable Thamala dropped at the junction leading to his house. The vehicle proceeded with a view to get Constable Saidi from his house. Constable Saidi was to work in the 997 control room at Lilongwe Police Station On 12th August 2008. Before they got to Constable Saidi's house, and at a place near a junction to his house, they saw a vehicle carrying charcoal having just arrived. They went to the place, the three of them being Sub-Inspector Mulotha the driver, Constable Muhonjo and DW1. They stopped their vehicle

right behind the lorry carrying charcoal. He and their chosen Supervisor, Constable Muhonjo, went to check the vehicle and to ask the driver if he had documents authorizing him to carry charcoal. They did not find the driver at the vehicle. They asked the people off- loading the charcoal but these could not state clearly where the driver had gone. They thus stopped the off loaders from off-loading. They reluctantly stopped off loading. The team Supervisor then went to their vehicle and sent a radio communication to the control room that they had detained a charcoal vehicle and that the control room should give them a contact for the Forestry Department. The Officer-In-Charge of 997 Rapid Response at Lilongwe instructed the accused persons to remain where the charcoal vehicle was as he informed the Forestry Department about it. They waited for a long time there although the Supervisor, Constable Muhonjo, kept reminding the office about the detained lorry.

As they waited they suddenly saw the charcoal vehicle drive off although he had not seen the driver enter through the driver's door. The driver probably entered through the passenger door, as the witness was always watching the driver's door. At the time they were waiting for communication from the control room Constable Saidi found them and joined them with a view to use the vehicle to the Office. Constable Muhonjo also informed the control room that they had been joined by Constable Saidi. When the lorry with charcoal began to run away the four Policemen jumped into the 997 vehicle with a view to pursue the lorry but their vehicle failed to start. They had to jump off and push it for a little distance before it started. This time they could no longer see the charcoal lorry. Sub-Inspector Mlotha sat alone in the front of the vehicle as he drove it and the three Constables sat in the back facing the opposite of the other. In other words their backs were against each other. Constable Saidi and DW1 faced one direction while Constable Muhonjo faced the opposite direction. Although initially they could not see the lorry and the direction it had taken they pursued it on the basis of directions given by people who stood by the road side and saw the direction the lorry had taken. When they got to a road to Biwi, towards bottle stores, they saw the lorry. They pursued it on the bumpy road. They had to hold the vehicle with one hand and DW1 pressed the rifle against the seat with the other hand. When they drove close to Biwi Filling Station DW1 was surprised that his gun was

pulled by his Supervisor, Constable Muhonjo, who then quickly fired it. DW1 then told Constable Muhonjo not to push the blame to him at the Office on the firing of the gun. The vehicle then passed Biwi Filling Station. DW1 then saw Constable Muhonjo's firearm about to fall and he held it so that it should not fall. Having travelled several metres they found the charcoal vehicle, BN 8444, having been involved in an accident and having hit a minibus. They drove past a little and stopped. DW1 dropped off and got near the vehicle when he saw a male person damaging the door of the vehicle to pull out the driver of the charcoal vehicle. Shortly there-after he heard people talking about stoning the police. The driver, Sub-Inspector Mlotha then said they should run away, otherwise the vehicle would be damaged and they would be killed. He went back to join the police vehicle and they sped to the office to inform traffic police. They got to the office and found Constable Kankhombwa receiving telephone calls, so they had to wait. The second in-charge of 997 at Lilongwe, Mr. Kabambe, got into the office and asked if they had fired a gun at Mchesi. DW1 did not wait for the Supervisor to speak, but he himself said yes and that it was the Supervisor who fired. When the Supervisor was asked he admitted that it was true that he was the one who fired as his gun had jammed. Then Mr. Kabambe left, having been called by the Officer-in-charge. Then the in-charge of 997 appeared and said there was a riot at Mchesi with people damaging vehicles. He then instructed the officers who were there to take the guns to Mchesi to bring order. Later they too were told to go and join the others at Mchesi to bring order. It took a long time to bring order to Mchesi. He denied the manslaughter charge because he did not fire the gun. He had no intention to fire it and that was why he had pressed it against the vehicle seat.

He was subjected to lengthy and vigorous cross-examination. He said his role was to check the driver's door to see that the driver did not get in. The co-accused would state for themselves what their roles were. He did not see the driver get into the lorry but he suddenly saw the lorry move. He is not a trained Forestry Officer but what he knows is that it is illegal to deal in charcoal without authority. The law stops the selling of charcoal. He conceded that 997 Rapid Response ensures that there are no violent crimes. Selling charcoal is not a violent crime but he did not do anything beyond the mandate of 997 Rapid Response. He did not know what the

driver of the lorry was running away from. If it was him he would not have fired the fun as it was not necessary to fire the gun. He said that at the time Mr. Jailosi recorded his statement the accused had already admitted that there had been firing of a gun. He said that they did not pick up Saidi from his house but that Saidi found them at Phwetekere market. He never saw 3rd accused try to shoot using his gun and it failed. He took hold of 3rd accused's gun after the 3rd accused had fired his. He did not approve of the 3rd accused to shoot at the vehicle. It was the decision of the Supervisor to shoot. He and the driver never met and there was no demanding of money. It is not true that they demanded money for them not to report the matter to Forestry Department. It is not correct to say that the shooting was because the driver failed to give any money.

DW2 Nicholas Saidi is the second accused person. He testified that he is a Constable in the Malawi Police Service and is based at Lilongwe Police Station. On 12th August 2008 he was due to start work in the 997 Control Room at Lilongwe Police station from 6.00 am to 6.00 pm. A vehicle collects them and drops them as a matter of work procedure. On that day he was to work with Constable Kankhombwa in the Control Room. He waited for the vehicle but the vehicle did not come. He lives in Area 36 within the City of Lilongwe. He began to walk to work around past 7 O'clock in the morning. He got to Phwetekere market and there he saw their vehicle Registration No. MP 1864 behind a lorry carrying charcoal. He got to the place where the vehicle was. He found three of his colleagues being Sub-Inspector Mlotha, Constable Muhonjo and Constable Cheuka. These had started work at 6.00 pm the previous day and were expected to have knocked off at 6.00 am. Constable Muhonjo who was the supervisor of the team told him that they had detained the charcoal vehicle and had informed Mr. Chitheka, the Officer-in-charge of 997 who in turn would connect with the department of Forestry. He then requested Constable Muhonjo to send a message to the control room to inform his colleague with whom he was to work that he would be joining him in due course. At the time Constable Saidi got to the scene the off loaders had already been stopped off-loading the charcoal. They told him that the driver of the lorry was not there. He did not even speak to the assistant driver. Constable Muhonjo continued contacting Mr. Chitheka, asking about the Forestry people as it

was taking too long for them to get to the scene. Mr. Chitheka confirmed to Constable Muhonjo that Forestry officials had been informed and that the vehicle should not leave. As they waited they just saw the vehicle of charcoal start to run away. He did not see where the driver came from. He himself had been sitting at the back of the 997 vehicle. The driver, Sub-Inspector Mulotha shouted, ***"See the driver is running away!!"*** They all got on the vehicle to pursue the lorry but their vehicle could not start. It took some pushing for a little while before it could start. By the time it started, the charcoal vehicle had disappeared. Some by standers on the road indicated the direction the charcoal vehicle had taken saying the vehicle was cruising.

Then in Biwi location they saw the vehicle at a distance. They had sat back to back in the vehicle. At Biwi Filling Station he heard the sound of gun shot. He himself was not armed. As they got near Summit Cultural Centre on the edges of Biwi and Mchesi Townships they found that the charcoal lorry had been involved in an accident, hitting a minibus in the process. Their vehicle stopped and DW1 went to the scene of accident while he remained in the vehicle with the driver. Then the 2nd In-charge of 997 Mr. Kabambe communicated with the driver that they had to leave the place and get to the Office. At the office they met Mr. Kabambe who asked them on the person who fired a gun in Mchesi. Constable Cheuka told the boss that it was Constable Muhonjo who fired a shot using his gun. Constable muhonjo then admitted to the boss that he was the one who had fired the shot using Constable Cheuka's gun. DW2 himself was not asked any question. Then the investigator, Mr. Jailosi, called him to CID Office and asked him to explain what happened since he had been present. He told Mr. Jailosi that Constable Muhonjo fired a shot using a gun he took from Constable Cheuka. Then Constable Cheuka was called and he explained likewise. Finally Constable Muhonjo was called and he admitted having fired the gun using a gun from Cheuka. Each wrote their own statements. He was not charged with any offence although the rest of the accused were charged with murder. He was only surprised that he too was invited to enter a cell. He knew nothing about money being asked from the driver of the lorry. He never saw the driver. The mere fact that he was a Senior Constable on the 997 vehicle that day did not make him Supervisor of the team. A Supervisor for 997 is identified at the start of the mission. That time the Supervisor was

Constable Muhonjo. Once a Supervisor has been appointed anyone joining the team has no authority beyond the Supervisor. The Supervisor is the one who gives situation report to the boss. On that vehicle the driver was the most Senior person. Yet he was not the Supervisor. What Mr. Jailosi told the court about seniority is not true. He would not have given instructions to a team he had just met. He joined the vehicle because it was the vehicle that always collected him from home to work. He worked in the control room. It is not true that he be connected to the offence merely because he was the most senior Constable on the vehicle. It is also not correct that he be connected to the crime because he was present when the incident took place. He never participated in the act of shooting. He met neither the driver nor the assistant driver. He never knew about money. He only heard the issue of money in court.

This witness was also cross-examined vigorously in an attempt to shake his credibility. To a greater extent reliance was made on apparent inconsistencies in the caution statement he gave at police and his viva vorce evidence in court on the time he joined the other police officers or the 997 Rapid Response vehicle. He was firm that he found the other three officers at Phwetekere market at Area 36 and that when the assistant driver and Mname said four police officers demanded money from driver he was unaware of it. His house was about 1.5 Km away from where the vehicles were. The vehicle took about half an hour from the time he found it to the time it ran away. He did not have any role at the place. He did not know that Constable Muhonjo's firearm failed to function.

DW3, Constable James Muhonjo, testified in his defense that on 11th August 2008 he was picked from his house in Area 22 around 18.00 hours by a 997 Rapid Response vehicle Registration no. MP 1864 to go and start work as 997 Police Patrol. The driver, Sub-Inspector Mlotha, was alone. Sub-Inspector Maseko who was supposed to be the Supervisor that night was sick. From there they went to the house of Constable Cheuka and picked him before proceeding to Police woman Sergeant Chapendeka who was expected to be deputy Supervisor for the night. They did not find her at her house. They proceeded to Lilongwe Police Station where they found Constable Thamala in the control room. He and Constable Cheuka signed for an R4 gun each and he took

15 rounds of ammunition while Constable Cheuka took 17 rounds. They again left for the house of Sergeant Chapendeka but did not find her. This was communicated to the control room. The team worked throughout the night with him as Supervisor. On the morning of 12th August 2008, a Tuesday, they took Constable Thamala to his home Area 36 as he had knocked off. They also planned to collect the 2nd accused, Constable Saidi, who lived in Area 36 and was scheduled to work in the control room on that day. They dropped Thamala on the way and proceeded to pick up Constable Saidi. As they went they saw a truck ahead beyond the junction to Constable Saidi's house. They went close to the truck to see it and saw that it had charcoal. They stopped the vehicle behind the charcoal lorry. They asked for the driver of the lorry but he was said to have left. A tall gentleman appeared from the left side of the truck and said the driver was not there. DW3 then told the off –loaders to stop off-loading the charcoal. He then told the tall gentleman who turned out to be the assistant driver that he was informing the office. When he told the office through the control room he was told to wait as contacts were being made with the Forestry Department. Superintendent Chitheka who is the Officer-in-charge of 997 at Lilongwe Police Station told him to wait there as Forestry people had been informed. It was at that time that Constable Saidi arrived at the scene. Then they waited for more than half an hour for Forestry Officials. Then he heard the driver of their vehicle Sub-Inspector Mlotha shout *"It is running away!"*. He was surprised. They tried to pursue it but their vehicle failed to start. They pushed their vehicle for some distance before it could start. Then they began to pursue the charcoal lorry with by standers indicating to them the direction the lorry had taken. They pursued the truck through Biwi. At Biwi Filling Station, having noticed that the lorry was not stopping, he took a gun from the two that were on the vehicle seat and he tried it. It failed. He then took the second one and targeted to shoot the tyre of the lorry for it to stop. At the time he pulled the trigger the lorry swerved because the road was bumpy. It swerved to the left. He never expected that the bullet which had been released had hit anywhere because the lorry moved a long distance from that point to Mchesi.

In Mchesi they found that the truck had hit a minibus. They stopped a short distance away from the accident spot. It was Constable Cheuka who went to the scene to assist anyone needing

help. He said they had to leave the place because the situation did not permit them to stay. He said that he used the gun as a last resort, not to kill but to stop the deceased. As a police officer he had learned that one of the objectives of the Malawi Police Service was to protect life and not to kill. The bullet missed its target and hit the deceased. At the office they were asked by Assistant Superintendent Davie Kabambe as to who fired a gun in Mchesi. It was Constable Cheuka who was quick to answer that the 3rd accused fired using his gun. They were then taken to Mchesi to control riots. Investigations into the matter only began after they returned to the office. Constable Saidi was called into CID Office first and questioned before Constable Cheuka was also called and questioned. He was called last and questioned. He admitted to have fired the gun on the charcoal lorry. He said that Constable Cheuka and Constable Saidi did not take part in shooting the deceased and that he was the Supervisor. He said that in court he had tried to plead guilty to the offence but for the State's insistence that he demanded money as a bribe from the driver of the lorry. He denied ever demanding the money. The place was a market place and there was a big group of people who witnessed the goings on. It was not true that there was an agreement that they were to collect money from the driver's house.

The accused was subjected to vigorous cross-examination. He remained firm that he was made the Supervisor of the team. He also remained firm that he never picked Constable Saidi from his house but that Constable Saidi found them at Phwetekere market. He said that they were all arrested on the 12th August, 2008 and not on 15th August, 2008. As Supervisor on that day he supervised even the driver who was of higher rank than himself. He never decided jointly with Constable Saidi and Constable Cheuka to pursue the driver. It is not true that at first he denied shooting as was stated by Mr. Jailosi, the investigator. He did not know that the deceased lived in Mchesi. At the time he shot, everybody's mind was to the vehicle as they held on to the vehicle. He fired one shot although he heard that there were three bullet wounds. From the point he fired at the lorry it travelled about 300 metres before it was involved in an accident. Mr. Jailosi never raised the issue of money to him during investigations. He regretted that the lorry driver and two passengers of a minibus died while others got injured.

The fourth defense witness, DW4, was Superintendent Chitheka who is Officer-in-charge of 997 Rapid Response at Lilongwe Model Police Station. On 12th August, 2008 at 7.30 am as he approached his office he heard a transmission in their police radios being transmitted by one of the 997 Patrol vehicles calling for the officer in control room. He got hold of the transmission which indicated that the Patrol team was on its way to collect Constable Saidi for control room duties when they found a lorry carrying charcoal abandoned. He ordered the Patrol team to remain there as he informed Forestry Officers to play their part. He got in touch with Forestry Officer Chigaru, who confirmed he would relate the information to Senior officers at the Regional level. He then entered a meeting. After 30 minutes his deputy, Assistant Superintendent Kabambe, called him and informed him that the motor vehicle carrying charcoal had been running away and had made an accident at Mchesi. Then it was rumoured that there had been a discharge of firearm. He got reports from different directions about discharge of firearm. He summoned his officers one by one. Sub-Inspector Mlotha said he knew nothing and he had no rifle. Constable Saidi said he was not on duty at the time and had no rifle. Constable Cheuka said that Constable Muhonjo grabbed his rifle and discharged it after his had failed to function. Constable Muhonjo said he did not discharge his rifle. The witness then reported to the Office-in-charge and thereafter investigators took over. He said that it was true Constable Saidi was not on duty on that day.

During cross-examination he said that Assistant Superintendent Kabambe gave a negative response.

Defense witness No.5, DW5 was Francis Chilimampunga, Regional Forestry Officer for the Centre. On 12th August 2008 at about 7.55 am he got a phone call from a Forest guard at Bunda Road Block informing him that 997 Rapid Response had called saying they had impounded a truck loaded with charcoal at Phwetekere market. The guard then asked him to send a patrol team to the market. He himself instructed Mrs. Kachala who was responsible for Law enforcement in the Region to get in touch with the caller and find out why the police could not bring the vehicle to their office. He said that each time there are such reports they have to put

together resources including hiring police officer, sometimes seven to ten to provide security. Again they are hesitant to get to crowded places like markets without sufficient security because they have had bad experience where their patrol vehicles have been smashed. As he waited to hear from Mrs. Kachala as to what action she had taken, he learnt that the vehicle had been running away and had been involved in a road accident in Mchesi. The Forestry Official therefore had to cancel all arrangements they were making in connection with the truck loaded with charcoal found at Phwetekere market.

During cross-examination he said that according to the Forest Act 1997, of which he was familiar, any Forestry Officer or Police Officer can detain a vehicle carrying Forestry Products. He was not surprised with the detaining of the truck carrying charcoal at Phwetekere by the Police. He could not say anything on whether or not the accused persons demanded money from the driver.

Having heard the evidence of the Regional Forestry Officer the court then directed that oral submission be made on 6th March, 2009 and that written submissions be ready before then. As it turned out only counsel for the State was available on 6th March, 2009 for oral submissions although each party had filed with the court written submission. I then directed that I would proceed to prepare judgment without listening to oral submissions.

I have had recourse to the written submissions. The State has presented to this court a 64 page typed copy of its submission summarizing the evidence and making its own analysis of the evidence. The defenses' submissions are in 10 pages with some cited case authorities attached, to analyse the applicable law and seek to apply them to the facts. The brief of the *Amicus Curiae*, the Malawi Human Rights Commission, is in a 16 page typed document to which are attached some case authorities that were cited. As can be seen the written submissions themselves put together are quite voluminous. I do not consider it necessary to outline the submissions by each party herein. Suffice it to say that I will take the arguments into account in the remainder of the judgment. I will ignore any misrepresentation of the facts as appears to be

the case in some of the submissions. What matters is the evidence as was recorded by the court.

However, considering that the Malawi Human Rights Commission was no active participant in the trial and also considering that it places its reliance on the brief it submitted in the form of closing submission, I consider it appropriate to outline its arguments as contained in those submissions. The Malawi Human Rights Commission recognized that the three accused persons were at the material time Policemen on board a 997 Rapid Response Vehicle which pursued a truck carrying charcoal and driven by Yusuf Abdullah. In the course of so pursuing the truck Constable Muhonjo fired at the fleeing vehicle. The fleeing vehicle collided with a minibus before crashing into a building. Yusufu Abdullah and two passengers of the minibus, namely, Emmanuel Philemoni Waziri and Patricia Motinti, died as a consequence of that accident. A postmortem report of Yusufu Abdullah's body showed that he had bullet wounds and bullet fragments were found inside the body. The Commission thus raises two issues for consideration, being

(a) Whether or not the deaths of the deceased persons, in particular, Yusufu Abdullah, that ensued from the use of force by the accused persons amounted to the arbitrary deprivation of life and a violation of the human right to life.

(b) Whether or not the deaths of the deceased persons in particular, Yusufu Abdullah, that ensued from the use of force the accused persons amounted to the violation of the right to human dignity.

The commission's submissions focused on aspects of the lawful use of force or firearms by law enforcement agencies and the human rights to life and human dignity. The Commission directed this Court to Section 16 of the Republic of Malawi Constitution which provides that every person has the right to life and no person shall be arbitrarily deprived of his or her life. It also drew the attention of this Court to Article 3 of the Universal Declaration of Human Rights,

held applicable in Malawi in *Chakufwa Thom Chihana v The Republic*, (infea) which provides for the protection of the right to life, liberty and security of the person.

Article 4 of the African Charter on Human and People's Rights (the African Charter) provides that:

> *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right"*.

Again Article 1(1) of the International Covenant on Civil and Political Rights recognizes the right to life in the following words.

> *"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life"*.

The commission submits that the right to life is one of the fundamental rights of people as it is pre requisite for the enjoyment by an individual of the other array of rights guaranteed by Chapter IV of the Republic of Malawi Constitution. The South African Constitutional Court case of *State v Makwanjane and Mchunu Case No. CCT/3/94* referred to the right to life as *"the supreme right", One of the most important rights", the primordial right", "the foundation and cornerstone of all other rights", "the prerequisite of all other rights" and "one which is basic to all human rights"*.

It is the Commission's view that apart from the proviso to section 16 of the Constitution where human life is taken away through the imposition of the death penalty meted out by a competent court of law in respect of a conviction for a criminal offence, all other forms through which life may be taken away from a human being may amount to the arbitrary deprivation of life. Arbitrary deprivation of life is proscribed.

The Commission however also recognizes that there are situations where lethal use of force by law enforcement agencies may be sanctioned by the law and therefore not amounting to arbitrary deprivation of life.

As regards the human right to human dignity the draw this courts attention to Section 19(1) of the Republic of Malawi Constitution which provides that the dignity of all persons shall be inviolable. Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 4 of the African Charter recognizes that every individual has the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. Thus all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment must be prohibited. As Chaskalson P said in *State v Makwanjane and Mchunu* *(Supra)* *"by committing ourselves to a society founded on human rights we are required to give particular value to the human rights to life and dignity, and this must be demonstrated by the State in everything that it does"*.

As to whether the deaths of the deceased, in particular Yusufu Abdullah, that ensued from the use of force by the accused amounted to a violation of the human right to human dignity of human beings the Commission referred this Court the law on the lawful use of force and the power to use firearms by police officers. It was submitted that Section 15(1) of the Constitution obliges all organs of the government and its agencies, as well as all legal and natural persons to uphold the human rights enshrined in the Constitution. Therefore the accused persons are not exempt either in the capacity of agents of government or in their natural capacity from the observance of Section 15 of the Constitution being the upholding of the human rights provided for in the Constitution.

Again Section 30 of the Police Act Chapter 13:01 of the Laws of Malawi regulates the use of firearms by the police. Any police officer may use any firearm against any person in lawful custody when such person attempts to escape or any person who by force rescues or attempts to rescue another in lawful custody or any person who by force prevents or attempts to prevent the lawful arrest of himself or any other person. There must be reasonable ground to believe that the police officer can not otherwise prevent the escape and must give warning to the person that he is about to use such firearm against him, which warning goes unheeded. A firearm shall not be used unless the officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm and that he can not otherwise effect such arrest or prevent such rescue. Further no police officer shall, in the presence of his superior officer, use such firearm against any person except under the orders of such superior officer. The use of the firearm shall as far as possible be to disable and not to kill.

In the case at hand, the Commission submitted the court has to examine specific issues namely:

(i) Whether the police officers in question had a person in their custody charged with a felony and whether that person was escaping or attempted to escape, and that, that person was in fact the deceased.

(ii) Whether the deceased person was preventing or attempting to prevent the lawful arrest of himself or that of another person through the use of force.

(iii) In the event that the deceased was escaping or attempting to escape, whether the police officers had reasonable ground to believe that he could not otherwise prevent the escape, and if so, that he gave to such person warning that he was about to use such firearm against him and such warning was unheeded.

(iv) In the event that it is established that the deceased person was preventing or attempting to prevent the lawful arrest of himself or that of another person through the use of force or that he was preventing or attempting to prevent his

arrest or that of another person through the use of force, the court would have to further establish that in those circumstances the police officer concerned or any other person were in danger of grievous bodily harm, and further that there was no other means of effecting the arrest or preventing the rescue.

(v) Most importantly the court would have to satisfy itself that the use of the firearms was to disable and not to kill.

(vi) The contents of Section 30 of the Police Act is also reflected in leading international human rights instruments on the use of firearms by law enforcement officials. The leading instrument in that regard would be the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials. Again the United Nations Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. The Commission also cited the cases of *Leonidi's v Greece (2009) ECHR 43326/05*, *Nachova and Others v Bulgaria Application Nos. 43577/98 and 43579/98 of 2004 and McCann and Others v the United Kingdom Series A No. 324 (1995) 21 EHRR* all being decisions of the European Court of Human Rights interpreting Article 2 of the European Convention on the right to life and the use of firearms by law enforcement officials in effecting an arrest.

These cases were cited to offer some guidance to this court on how provisions guaranteeing the right to life and human dignity as in our Constitution and the law on the use of firearms by law enforcement officials have been interpreted.

The Commission called upon this Court to import human rights, particularly as they relate to the use of lethal force by law enforcement agencies and the observance of the human rights to life and human dignity in the present matter. It was the Commissions submission that police officers either as agents of government or in their individual capacity are obliged by Section 15

of the Constitution to uphold human rights. The human right is enshrined in our Constitution and Section 44(1) and prescribes derogation, limitation or restriction of this right. The right to dignity can only be limited in terms of Section 44(1) of the Constitution if such limitation or restriction is provided by law, is reasonable, is recognized by international human rights standards and is necessary in an open and democratic society. The Commission called upon the court to examine if the manner in which force was employed in the circumstances of the present case can stand a scrutiny on the basis of Section 44(2) of the Constitution and whether or not such use of force can be said to be sanctioned as lawful in line with the provisions of Section 30 of the Police Act. This court is also called upon to determine whether or not the use of force in the present case conforms to international human rights standards, due regard being had to the guarantees or the human rights to life and human dignity in the international instruments and provisions in international human rights instruments on the conduct of law enforcement officials on the use of firearms. The Court should also determine whether the use of force in the present case can be said to be reasonable and necessary in a democratic society. In so determining the court should consider whether or not the target of the lethal force was a violent person, or was in the act of committing a violent crime or posed a danger to life of the police officer in question. It should also consider whether necessary warning was given to the target that a firearm was about to be used and that, that warning went unheeded and whether there were no other means of preventing the target from escaping. The court should also consider whether in the circumstances the use of firearms intended at disabling and not killing and it was absolutely necessary to use the firearm and if so whether the force so used was proportional. The Commission then urges this court to find the use of force in the present case can not be said to have been sanctioned by law since it was not in line with Section 30 of the Police Act and relevant international human rights standards. That the accused persons failed to uphold human rights contrary to Section 15(1) of the Constitution and that their use of force restricted or limited human right without meeting the requirements of Section 44(2) of the Constitution. They violated the human rights of the deceased persons, in particular Yusufu Abdullah, by arbitrarily depriving them of their life and human dignity guaranteed under Section 16 and 19(1) of the Constitution respectively. I must say that I appreciate these and the other

submissions made by the State and the defense. I will take them into account as I prepare the remainder of this judgment.

Now this is a criminal matter. It is critical at the outset to observe that the burden of proof throughout a criminal trial rests on the prosecution who allege that a crime has been committed. It is never for the prisoner to prove his innocence, but for the prosecution to establish his guilt. What this means is that it is for the prosecution to prove each and every essential element of the alleged crime. At the end of the trial the Court will look at the evidence and ask whether the prosecution have so proved the essential elements of the crime or offence. This is trite law. Section 187(1) of the Criminal Procedure and Evidence Code is clear on this point. It is also trite law that in proving the offence charged the prosecution has to meet a very high standard of proof beyond reasonable doubt. It is not enough for the prosecution to simply raise possibilities in the hope that the accused will incriminate himself or herself in the course of defense. It is the evidence of the prosecution that must establish the charge beyond reasonable doubt. As stated earlier the accused has no duty to prove his innocence. In fact in the present Constitutional Order the accused has the right to remain silent and need not be compelled to say anything in his defense (See Section 42(2)(f)(iii) of the Republic of Malawi Constitution). Where an accused person exercises his or her right to remain silent, that exercise is not to be construed against him or her.

To avoid misconceptions I must state here that the ruling of a prima facie case does not mean that at that point the prosecution have proved the case beyond reasonable doubt. The law is settled that a ruling of a prima facie case indicates that grounds for presuming that the accused has committed the offence have been raised. Although a *prima facie* case is regarded as one where a reasonable tribunal, properly directing its mind to the law and the evidence, could convict if no explanation is offered in defense, it can not be one and ought not to be viewed as one which might remotely be thought sufficient to sustain a conviction (See ***Republic v Dzaipa*** *Revision Case No. 6 of 1997 (unreported);* *D.P.P. v Chimphonda* *7 MLR 94 and* *Chidzero v Republic* *Cr. App. No. 111 of 1976 (unreported).* In a ruling of a prima facie case under Section

254 of the Criminal Procedure and Evidence Code a court does not consider whether if compelled to do so, would at that stage convict or acquit but whether the evidence is such that a reasonable tribunal might convict. A ruling of a case to answer unlike one of no case to answer, does not contain a detailed analysis of the evidence thus far and does not include reasons for so ruling. In the present case therefore when I made the ruling that the three accused persons had a case to answer I did not mean that I had at that point considered whether the State had proved the charges beyond reasonable doubt. It is at this point of writing the judgment that I will consider whether the State has proved the charges against each accused person beyond reasonable doubt. If I find that the standard has not been met I will not hesitate to give the benefit of the doubt to the accused and acquit them. Of course if the standard would have been met I will be obliged to find the accused persons guilty. Let it also be said here that the charges must be considered as against each accused person notwithstanding that they are jointly charged.

The charges before this court are manslaughter contrary to Section 208 of the Penal Code in three counts and relating to the deaths of Yusufu Abdullah, Emmanuel Philemon Waziri and Patricia Montiti. Section 208 of the Penal Code provides that:

> *"Any person who by an unlawful act or omission causes the death of another person shall be guilty of the felony termed "manslaughter". An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm".*

For the offence of manslaughter to be established in the present case it must be established beyond reasonable doubt that:

(a) Death of the three persons in the respective charges occurred.

(b) Death was caused by the accused persons.

(c) The accused caused the death of the deceased by an unlawful act or omission.

As to the first point there is ample evidence that on 12th August, 2008 in the morning hours and at Mchesi Township Yusufu Abdullah, Emmanuel Philemon Waziri and Patricia Montiti died. I would add that these persons died a brutal, tragic and painful death. Their loss of life was most untimely and sad. Going by the record there is no doubt on my mind that the death of these three persons would have been avoided and as we sit here they should have been alive and enjoying their other rights apart from the right to life. As proof of death in this court there is a post-mortem report confirming the death of Yusufu Abdullah which report forms part of the evidence. There is ample oral testimony given in this court that the two others, Emmanuel Philemon Waziri and Patricia Montiti died when the minibus they were travelling in was hit by the lorry Yusufu Abdullah was driving. I am satisfied that these too died. The pandemonium that ensued both in Mchesi and at the Kamuzu Central Hospital Mortuary leading to the hurried burial of the deceased prevented the conduct of postmorterm on their bodies.

In considering the cause of their death I must look at the law relating to causation. According to Section 215 of the Penal Code a person is deemed to have caused the death of another although his act is not the immediate or not the sole cause of death:

(a) If he inflicts bodily injury in consequence of which that other person undergoes surgical or medical treatment which causes death.

(b) If he inflicts a bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living.

(c) If by actual or threatened violence he caused another to perform an act which caused the death of such person.

(d) If by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death.

(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

It is to be noted from the record and this is not disputed that the deaths of Emmanuel Philemon Waziri and Patricia Montiti was a direct result of fatal injuries they sustained when the minibus they were travelling in violently collided with the speeding lorry Yusufu Abdullah was driving. Again it is not disputed that the reason why the charcoal lorry was speeding was because it was under hot pursuit by the 997 Rapid Response vehicle. All three deceased who had been alive shortly before the impact were discovered dead at the scene of the impact. I find that there was causal connection between the deaths of the two passengers of the ill-fated passenger minibus and the death of Yusufu Abdullah. I find that the speeding lorry that rammed into the passenger minibus caused the fatal injuries to the passengers of the minibus. There is ample evidence and I find it as a fact that Yusufu Abdullah died, not as a result of the impact of the lorry, on the minibus and a nearby building, but as a result of a bullet fired on him by the third accused person.

PW5 Dr. Charles Dzamalala was very elaborate on how he conducted the post-mortem on Yusufu Abdullah and how he found three pellets of a bullet in the body of Yusufu Abdullah. He was clear and convincing in his evidence that the fatal pellet was in the left lung which had caused heavy loss of blood into the left cavity of the chest. That blood when emptied amounted to two and a half litres, constituting half the normal blood quantity in a human body. Again convincingly, Dr. Dzamalala discounted the cause of death on Yusufu Abdullah as being the accident the lorry had with the minibus and with the nearby building. I find that Yusufu Abdullah died as a direct consequence of the pellets of the bullet that entered his body having been fired by the third accused person. The third accused person has admitted this point throughout the life of this trial. When plea was first taken in this trial his plea was:

> *"I understand the reading of the charge. I admit the charge. I did cause the death of Yusufu Abdullah. I do not admit that I caused the death unlawfully"*.

The only reason why plea of not guilty was entered is because he denied one essential element of the offence namely causing the death unlawfully. I am of the firm view that Yusufu Abdullah slid into a condition of unconsciousness when he was hit by the pellets of bullet and lost control of the lorry well before the lorry hit the minibus. Yusufu Abdullah may probably have died even before the lorry he had been driving collided with the minibus. Be that as it may I find that the deaths of the two passengers of the minibus were a direct consequence of the act of the third accused person in firing a bullet and hitting Yusufu Abdullah, killing him in the process, whose lorry then hit the minibus, killing Emmanuel Philemon Waziri and Patricia Montiti instantly. I find that the third accused person by his act caused the death of Emmanuel Philemon Waziri and Patricia Montiti as there was an immediate causal connection between his firing a bullet at Yusufu Abdullah and the deaths of the two passengers of the minibus. All the evidence from the prosecution points to the fact that there was only one bullet fired. The prosecution witnesses who heard the firing only heard one shot fired. It was a complete surprise to me to read at page 41 of the prosecutions closing statements that:

> *"4.7 The deceased driver was shot at three times"*.

While it is true three bullet fragments were found in the body of the deceased driver the evidence clearly shows that one bullet went through the metal barrier of the lorry and through some open space to the cabin before it fragmented. I do not imagine that the third accused was so accurate as to make three bullets go through the same hole when he was also travelling on the bumpy road with the lorry swerving as it sped down the road. The statement by the prosecution is totally misleading and not consistent with the evidence before this court.

It would be far fetched to imagine that perhaps the other two bullets as alleged by the State hit the two other deceased persons. I have already established that the causal link between the one bullet that the third accused fired and hit Yusufu Abdullah and the death of Emmanuel Philemon Waziri and Patricia Montiti is through the lorry colliding with the minibus and inflicting fatal injuries on the latter.

I must now consider whether the first accused and second accused can be said to have jointly with the third accused person caused the death of the three deceased persons.

This question arises from the fact that at the time the 997 Rapid Response Patrol vehicle was in hot pursuit of the lorry driven by Yusufu Abdullah the two accused persons were in the Patrol vehicle. There is uncontroverted evidence that neither the first accused person nor the second accused person fired a shot at the deceased persons. This is why this court is surprised by the quotation in the States' submission at page 52 which quotation is attributed to the first accused person that:

> *"Muhonjo's R4 rifle was not operating then he picked my rifle and shot. At the time I was shooting, I had already picked his rifle."*

In fact this was a misquote of the caution statement that the First accused is said to have made at police. The real point that the State was attempting to establish was whether First and Second Accused caused the death of the deceased through their participation in a joint enterprise. The State thus drew the attention of this court to Section 22 of the Penal Code under parties to offences, which Section provides that:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable*

> *consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

In the State's submission the unlawful purpose the accused persons prosecuted and which unlawful purpose resulted in the death of the deceased was to get bribes from the deceased. According to the State the death was therefore as a result of the unlawful prosecution of an unlawful purpose. According to page 41 of the States submissions:

> *"In the present circumstances the accused formed a common intention i.e. to get bribes from the deceased. The deceased driver decided to run away after noticing that the accused's vehicle had developed a fault. The accused decided to chase him. The soliciting of bribes was outside their mandate. As the deceased driver sped off they decided to follow him. They chased him and shot at him. The manner in which the accused wanted to get the bribe resulted into the death of the deceased. The death was therefore as a result of the unlawful prosecution of an unlawful purpose."*

It seems that the States view is that the deceased was running away from giving bribes rather than running away from facing the law. The State have called in aid a paragraph from Archbold Criminal Pleading, Evidence and Practice 1999 page 1549 at 18-16 which reads:

> *"If three persons amuse themselves by shooting with a rifle at a target without taking proper pre-cautions to prevent injury to others, and one of the shots kills a man, all three are guilty of manslaughter although there is no proof which of the three fired the fatal shot: R v Salomon (1860) 6 QBD 79. Again, if two persons incite each other to drive furiously and one of them runs over and kills a man, it is manslaughter by both: R v Swindal and Osborne (1846) 2 ctK 2307 …."*

Of course the present case is not one where three people amused themselves with shooting with a rifle at a target without taking proper precautions to prevent injury to others. This is not a case where there was rifle shooting game or competition. Therefore the quotation above need to be understood within its own context.

As for the unlawful purpose so heavily relied on by the State being that of getting bribes I wish to observe that bribery or corruption is not one of the charges brought before me. If it was, I would have looked for proof beyond reasonable doubt. Even for the purpose of this case it would not be enough simply to allege corruption and bribery without proof of the same. Repeating an allegation of corruption in the evidence does not of itself amount to proof of corruption or bribery. In this case there were inconsistent stories about the bribery allegation given by PW1 and PW3 both of whom claim to have been present when the bribe was demanded from the driver. PW1 the assistant to the driver said that the demand for the bribe was made through him to the driver before they met the driver. Some aspects of his testimony are pertinent.

> *"On 12th August 2008 we were at Area 36 offloading charcoal. We get them from Salima. As we offloaded, 997 came and asked me where my driver was. I told them that my driver had left. They told me to go and call him. I went looking for him. I came back and asked why they were looking for him. They are the three accused. They said they wanted K3,000 each and I said there was no money. They threatened me and they stopped me from offloading. The driver was behind a second vehicle. I went to tell him. Yusufu came and discussed with them and they did not agree. They left to a place behind and met another driver called Shehe whom he told to take the vehicle home. The driver came and started the car and one of the three came and told him to step out or he would die on account of other people's things. He dropped off. Yusufu came and entered the vehicle and started the vehicle. As he drove off I ran after the vehicle. He stopped for me and I jumped on. Then after driving a short distance*

he stopped and told me to get off and go and ask for money from someone …. They told me why they wanted money. They said when they get a vehicle, Forestry people give them lots of money for the charcoal. So we too had to give money for the charcoal.”

During cross-examination he said:

“Police of 997 came to the market. They were four …. There were lots of people and the market was busy. One of the police of 997 demanded K3,000.00 for each of them. I stood 10 metres from the vehicle … When the police mentioned K3,000.00 the driver was not there. We failed to agree. The driver came because the police had now stopped us off-loading. It is their conduct always when 997 arrive they demand money … These are always demanding money… I did not know what they discussed because I was standing off. I can not say whether their discussion was in respect of money. The driver left. He told me to go home and look for the money and if the police followed him he would give the money at home.”

It is to be noted from the evidence of PW1 that there was no mention of K12,000.00. Again PW1 did not say who among the three demanded the money although he said one of them did. Again PW1 did not know what the police discussed with the driver. According to PW1 the driver began to drive away leaving him, as an assistant driver, behind such that he had to run after the vehicle. This renders credence to the point that the driver left the scene abruptly. It is notable from PW1’s evidence that there was no agreement about the giving of a bribe. According to PW1 the driver said if the police followed him he would give them money at home.

Now the evidence of PW1 should be contrasted with that of PW3 John Mname who is popularly known as UDF in his area. PW3 when talking about the issue of soliciting a bribe said:

> *"At Area 36 we were off-loading the charcoal. As we off-loaded we were stopped by people from 997. I for-get the people in 997. They said we should not "nyengerera." They wanted money. They were saying, "tisamunyengerere" meaning Yusufu Abdullah. The police were standing 10 centimetres away from me as they said this. They were very close. It is like here and the table there (points to a distance of about 4 metres). They demanded K12,000.00 from the deceased. The deceased wanted to go home to bring the money. There was Tall. Tall was the assistant driver. Tall went to the driver to collect the money.I Yusufu Abdullah said that he would go home and collect K7,000.00. I mean K12,000.00. The discussion with the police took us about 2 hours. The 997 then said they would call Forestry and would all be given K12,000.00 each... That was when Yusufu left followed by them to collect the money ... Yusufu left together with 997 but their vehicle had difficulties in starting. It had to be pushed. Then we learnt that Yusufu died at Mchesi."*

In cross-examination he said:

> *"Yes the police were demanding K12,000.00. They said they would share K3,000.00 each. I recall clearly that I made that statement. That statement which I gave police I said they would share K4,000 each. They were four people ... They said K12,000.00 so that so that they share K4,000.00 each... It is difficult for me to speak... Yusufu told the police that they should go with him home to collect the money. That I heard.... Yes the same police said they wanted K3,000.00."*

It is clear that there are material contradictions between the evidence of PW1 and PW3 as to the solicitation of money by the accused persons yet both claim to have been present when the demands were made. It should be noted that PW3 was merely employed to off-load the charcoal while PW1 was the assistant driver who was closer to the driver. If one things was said

in the hearing of both witnesses then one wonders why there were material differences in their evidence. PW1 said the demand was for K3,000.00 initially he said by the three accused although in cross-examination he said they were four. PW3 said the demand was for K12,000.00 and the four accused said they would share K4,000.00 each. Perhaps noticing that his arithmetic was wrong he changed to saying they would share K3,000.00 each. According to PW1 when the driver left the police he said that if the police followed him he would give them money at home while PW3 said that the driver told the police to follow him home to give them the money. It seems PW3 had difficulties to tell whether the amount was K7,000.00 or K12,000.00. It is to be noted that the investigator of the case Mr. Jailosi attached little or no weight to this claim of demand for a bribe and he never relied on it. He never mentioned it in his evidence-in-chief.

The record shows that at no point in the long cross-examination and re-examination did PW 4 Mr. Jailosi allude to the issue of a bribe having been solicited by the three accused person. This was the officer who was in charge of the investigations in this matter. With regard to the second accused he said he arrested him because he had been together with the three other policemen on the 997 Rapid Response vehicle that chased the lorry driven by Ysusufu Abdullah. The witness must have considered the allegation not worth of investigating. He must have considered that it was not material to proving the case as the unlawful purpose which the three accused persons must have been pursuing. Perhaps he doubted the truth about it, if the allegation of the soliciting of bribes was made. Both PW1 and PW 3 were emphatic that the reason why the accused demanded the bribe was for them to overlook reporting the matter to Forestry officials. According to PW3 this discussion lasted two hours. Yet there is overwhelming, indeed uncontroverted evidence of the Officer-in-Charge of the 997 Rapid Response Section at Lilongwe Police Station and the Regional Forestry Officer for the centre confirming that the third accused reported to his office and through his office to Forestry Officials immediately the charcoal vehicle was impounded. The report was through police radio message. The fact that the third accused reported to his office and Forestry Officials about the impounded charcoal lorry casts into serious doubt the statement of both PW1 and PW3 as to

the reason for the accused demanding money. That doubt must be resolved in favour of the accused. Perhaps one final point about the weakness of the claim of bribe is that Sub-Inspector Mlotha who was the driver of the vehicle in question was acquitted at the very beginning of the trial because the State offered no evidence against him. The inevitable conclusion here is that the State too did not consider the issue of soliciting a bribe as having the said Jonathan Mlotha being connected to the commission of the manslaughter. It must be recalled that PW1 and PW3 said there were four people who demanded the bribe including the driver. If the allegation of soliciting a bribe did not sufficiently connect Jonathan Mlotha to the manslaughter in the view of the State, there does not appear to be any justification for the same to sufficiently connect the first and second accused to the manslaughter in this case The conclusion that this court comes to is that there is serious doubt on the evidence before me that the soliciting of bribe was done considering the contradictory nature of the evidence.

Again there appears to be a tenuous connection, if any, between the demand for a bribe and the manslaughter in all the circumstances of the case. It has not been established beyond reasonable doubt that the first accused and the second accused were jointly with the third accused person prosecuting an unlawful purposes, namely to get a bribe, when the third accused fired at the deceased Yusufu Abdullah.

Another premise on which the State invites the court to hold that the first and second accused persons participated in a joint criminal enterprise with the third accused is that they were present during the commission of the crime and offered encouragement to the third accused person to cause the death of Yusufu Abdullah and the other deceased persons. Indeed PW4 the Officer-in-charge of the investigations said the reason he arrested the second accused is that he was present when the crime was committed. It is significant to note that PW4, Assistant Superintendent Jailosi, did not charge the second accused with manslaughter although he did charge the first and third accused person. He did not charge second accused with any offence. This is significant because he must have found it not just unnecessary, but inappropriate, to

charge the second accused person with the present offences or with any offence. The significance of this point will become clearer later in this judgment.

In pursuing the point just stated the State cited the case of *Gama and Nthala v Reginam 1964-66 ALR Mal 528* which held that the fact that an accused person was voluntarily and purposely present at the commission of an offence and offered no opposition to it, though he might reasonably be expected to prevent it and had the power to do so, may in some circumstances amount to evidence of encouragement sufficient to justify a conviction for aiding and abetting, whether it does or not will be purely a matter of fact for the court to decide. In the present case PW4 said in his evidence that he found no evidence of encouragement on the part of the first and second accused person as the third accused took the gun from the vehicle seat to shoot at Yusufu Abdullah. I think that case of *R v Clarkson and Caroll [1971] 3 ALL ER 344* provides some useful guide on this matter. This was a case of aiding and abetting the commission of a rape. The appellants were soldiers in the Germany army. They were in their Barracks partying. One of the soldiers took a German girl who had been partying with the rest and brought her to his room. He raped her and the noises attracted other soldiers including the appellants to the room. They witnessed other soldiers rape the girl three times. They stood there observing the rape but did nothing more. They were charged with aiding and abetting the rape although there was no evidence that they had done any act or uttered any word which involved direct physical participation or verbal encouragement. They were convicted of the offence of rape as aiders and abettors. They appealed against that conviction and their appeal was allowed. The conviction was quashed because the mere presence at the crime scene without more did not amount to participation in the commission of the crime. The words of Megan, J. are instructive when he said at page 347 that:

> *"Loney v R (1882) 8 Q BD 534 decided that non-accidental presence at the scene of the crime is not conclusive of aiding and abetting ... It is not enough that the presence of the accused has, in fact, given encouragement. It must be proved that he willfully encouraged."*

In the R v Coney case Hawkins said of the R v Clarkson and Others case that:

> *"In my opinion to, constitute an aider and abettor some active steps must be taken by word, or action, with intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intention at or unintentional, a man may unwillingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence or non-interference, or he may encourage intentionally by expressions, gestures or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to standby, a mere passive spectator of a crime, even for a murder. Non-interference to prevent a crime is not itself a crime." (See R v Coney (1882) 8 QBD at 557 – 558).*

I entirely agree with these sentiments. It is not the case that whoever is present at the scene of crime is a party to the commission of the crime. There must be evidence of participation or actual encouragement for one to be a party to the crime whether as a principal offender or an aider and abettor. It is not every encouragement that will make a person an offender or an aider and abettor. Not even the mere presence at the scene of crime. This being a criminal matter such evidence must be such as to prove the point beyond reasonable doubt. In the case at hand PW4 the Officer-in-charge of investigations in this case told this court that he found no evidence that the first and second accused persons encouraged the third accused person to shoot at Yusufu Abdullah. He in fact went on to say that he arrested the second accused person because the said accused had been on the 997 Rapid Response vehicle as it pursued the lorry driven by Yusufu Abdullah. That is not enough to criminally connect the second accused person to the manslaughter. Again it is hard to imagine that a person facing or looking the opposite direction as was the case with the accused would have been said to encourage someone behind committing a crime. It is clear in the evidence that the vehicle sped through a rough road and the accused had to focus on holding tight to the vehicle as they faced opposite directions. That

evidence casts into serious doubt any suggestion of criminal encouragement on the part of first and second accused. It did not criminally connect the driver of the vehicle. It can not connect the first and second accused persons. Moreover there is credible explanation of the presence of second accused person on the vehicle. He joined the vehicle, as he always did before, in order for him to report for duties in the control room, and not on the patrol. The second accused person was not on duty at the time he travelled on the vehicle. That evidence has not been controverted. That the second accused was not on duty at the time of the incident contradicts the suggestion by the State that as the most Senior Constable on the 997 vehicle he automatically assumed Supervisory role and should have stopped third accused from shooting. The third accused remained Supervisor of the patrol team throughout the night and throughout the time of the incident. May be this was an attempt to connect the second accused to the manslaughter on the ground of omission. Section 215 of the Penal Code on causing death by omission is very specific on the type of omission that would bring causal link between the manslaughter and the second accused. The circumstances in the present case fall far short of establishing a causal link through omission. The short of the discussion above is that mere presence of the first accused and the second accused persons on the 997 vehicle did not establish a causal link between them and the manslaughter in the present case. The State knew that it did not for the driver of the vehicle. PW4 knew that it did not, especially for second accused and therefore he did not charge him with the offence.

The State also attempted to connect the first accused person to the manslaughter because it was his gun that was used to fire the bullet that ultimately killed Yusufu Abdullah. In its submission the State at page 52 quoted a statement of the first accused which he gave at Police that:

> *"muhonjo's R4 rifle was not operating then he picked my rifle and shot. At the time I was shooting, I had already picked his rifle."*

I already observed that this was a misquoting of the statement. Be that as it may, the State went on to submit that:

> *"The above statement eliminates any hypothesis of the gun having been grabbed from him. After supplying the weapon to the deceased driver, the first defendant took the third accused's gun and kept it. He actually willfully offered assistance to the third defendant. The fact that the first defendant approved of the action taken by Muhonjo is without question and is further confirmed by himself in his statement which he wrote using his own handwriting when he confessed….."*

With greatest respect to the State, not only do I find this statement confusing and misleading, but it is in my view a desperate attempt to connect the first accused to the crime. The State talks of first accused having supplied the weapon to the deceased driver. The question is which one? PW4, the Officer-in-charge of the investigation, said that third accused person grabbed the gun from first accused. The third accused himself said he grabbed the gun from the first accused, just as the first accused said the gun was grabbed from him. Nowhere in the evidence before this court is there proof that the first accused "supplied the weapon" to third accused or that he "willfully offered assistance to the third defendant" as the State in its submission would like this court to believe. The duty of the State is not to secure a conviction at all costs but to lay before the court evidence which establishes the charge beyond reasonable doubt. There is no proof beyond reasonable doubt that the first accused "supplied" the gun and "willfully offered assistance to the third defendant." On the contrary there is evidence that the third accused grabbed the gun from the first accused. There is reasonable doubt that the first accused "supplied the weapon" and that he "actually willfully offered assistance to the third defendant." That doubt as a matter of law must be resolved in favour of the accused.

Further the State argued that the first accused offered no resistance to his gun being taken away. I am unable to appreciate that point in the light of the fact that the gun was grabbed from first accused. I am unable to appreciate that "The first defendant confessed that he let his

gun used by the third defendant" in the light of the evidence before me (See page 55 of the State's Submissions). The State goes on at page 55 to say about first defendant that:

> *"He confessed albeit indirectly, that it was necessary to shoot at the deceased."*

The concept of an indirect confession statement appears to be novel. Further, and with respect, there is no evidence to support the above statement. I do not consider it necessary to discuss the State's submission that the first accused and second accused should be responsible for the deaths as accessories after the fact. The present circumstances do not lend themselves to that consideration. The two accused persons, the first and second accused persons, cannot in the circumstances be accessories after the fact of manslaughter. There is no evidence to establish that they are accessories after the fact. The result is that the State have not established causal link between the first and second accused on the one hand and the manslaughter on the other.

I must now consider whether the deaths of the three victims was by an unlawful act. The act that resulted into the deaths was the shooting of a firearm. The third accused said that he used the firearm as a law enforcement official to stop the deceased, Yusufu Abdullah, from running away. He suggests that the firing of the firearm was with a view to effect an arrest. Both the State and the Malawi Human Rights Commission have drawn my attention to the applicable law as to whether the use of the firearm by the law enforcement official in the circumstances that present themselves in this case amounted to an unlawful act or not. I earlier summarized the submissions of the Malawi Human Rights Commission. The States submissions on the point are more or less along the same lines as those of the Malawi Human Rights Commission.

The defense story is to the effect that the third accused person shot at the deceased, Yusufu Abdullah, in due execution of police duties to effect an arrest. It is to be noted that the Constitution of the Republic of Malawi provides for the establishment of the Malaw Police Service to be constituted by an Act of Parliament, specifying the various divisions and functions of the Malawi Police Service. Section 153(1) of the Constitution provides that:

"The Malawi Police Service shall be an independent organ of the executive which shall be there to provide for the protection of public safety and the rights of persons in Malawi according to the prescriptions of this Constitution and any other law".

Indeed under Section 15(1) of the Constitution the Malawi Police Service as an organ of the executive is engendered to respect and uphold the human rights and freedoms enshrined in the Constitution. The Police Act Cap 13.01 of the Laws of Malawi spells out in detail powers, duties and privileges of police officers. Powers and functions of Police Officers under the Police Act must be exercised in accordance with the Constitution of Malawi. Powers and functions of police officers must be exercised in accordance with the law if it is to be lawful. It will be unlawful exercise of those powers and functions if the exercise is contrary to what the Constitution and the Police Act and other relevant law provide. The police tend to sum up their functions by saying that they have a duty to protect life and property. In terms of value it is life that is of greatest value and it is the duty of the police to attach the greatest value to human life. The right to life is guaranteed in our Constitution by Section 16 which provides that:

"Every person has the right to life and no person shall be arbitrarily deprived of his or her life.

Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the Laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life".

What is clear from this provision is that the taking away of another person's life by way of summary execution during peace time is proscribed. The Constitution provides, as the only exception, where the taking away of life is done in execution of a death sentence imposed by a court of law after trial and conviction. It will be noted that in Malawi even this narrow

exception to the right to life has been outlawed by the case of *Kafantayeni and Others v Attorney General Constitutional case No. 12 of 2005* in the Constitutional Court of Malawi decision delivered on 27th April 2009. Although the Court was limited in its declaration as unconstitutional, to the mandatory death sentence under Section 210 of the Penal Code, the Court was clear that the right to life is inviolable.

I have considered the Constitutional guarantee of the right to life in Malawi, the case authorities of *Kafantayeni and Others v The Attorney General (Supra)* on the South African Case of the *State v Makwanjane and Mchunu Case No. CCT/3/94* and the various international human rights instruments cited to me and I remain without any doubt on my mind that the right to life ranks supreme to all other rights guaranteed by our Constitution. I agree that it is the most fundamental of all rights in that it is a prerequisite for the enjoyment or exercise of all other rights. For instance if Yusufu Abdullah was accused of having committed any crime he had the right to be treated with dignity, to have access to justice and to have a fair trial. Now that he no longer has life he can not enjoy or exercise any of the rights I have just mentioned. This therefore calls for greater vigilance on the part of law enforcement officials in the protection and respect of rights when it comes to human life. Doing the contrary would render an act that takes away life unlawfully.

In so far as the use of firearms by law enforcement officials is concerned the Police Act clearly spells out the legitimate limits of the use of firearms by police officers. Section 30(1) of the Police Act provides that:

> *"30-(1) Any police officer may use any firearms against –*
>
> (a) *Any person in lawful custody charged with or convicted of a felony when such person is escaping or attempting to escape;*
>
> (b) *Any person who by force rescues or attempts to rescue any other person from lawful custody;*

(c) *Any person who by force prevents or attempts to prevent the lawful arrest of himself or of any other person;*

Provided that:-

(i) *Resort shall not be had to any such firearm as authorized under paragraph (a) unless such officer has reasonable ground to believe that he cannot otherwise prevent the escape and unless he shall give warning to such person that he is about to use such firearms against him and such warning is unheeded;*

(ii) *Resort shall not be had to any such firearms as authorized under paragraph (b) and (c) unless such officer has reasonable ground to believe that he or any other person is in danger of grievous bodily harm and that he can not otherwise effect such arrest or prevent such rescue;*

(iii) *No police officer shall, in the presence of his superior officer use such arms against any person except under orders of such superior officer;*

(iv) *The use of firearms under this section shall as far as possible be to disable and not to kill.*"

It will thus be observed that the use of firearms by police officers is very much restricted. The authority vested in a police officer under Section 30(1) is in addition to and not in substitution for any authority to use firearms vested in a police officer by any other law. (See Section 30(2) of the Police Act). It is an overarching requirement that the use of firearms by police officers as authorized by Section 30 of the Police Act shall as far as possible be to disable and not to kill. It follows that in the use of firearms the police are not to kill or take away human life. In the present case Yusufu Abdullah can not be said to have been in lawful custody charged with a felony nor was he a person convicted of a felony who was escaping. Even if he was in lawful custody and escaping use of firearm would still have been restricted by the proviso (i) to Section 30(i). There had to be reasonable ground for the accused police officer to believe that he could

not have otherwise prevented the escape without using firearms. There is no evidence to show that there was such reasonable ground for the accused police officer to believe there was no other way of stopping Yusufu Abdullah from escaping other than the use of firearms. The further restriction is that even where it became necessary to use firearms there had to be a warning first about the readiness to use firearms against the escape and the escapee must have not heeded such warning. In the present case there is no evidence of such warning. Although the law does not specify what form such warning should take, in my view it is not enough merely to see that a police officer one is dealing with has in his or her possession firearms. Probably a shout, some visible signal capable of being interpreted as a warning and nothing else and the firing of warning shot in the air would suffice as warning.

Further there is no evidence that Yusufu Abdullah used any force to prevent or attempt to prevent a lawful arrest of himself or any other person. In the circumstances it can remotely be imagined that Yusufu Abdullah used force to rescue or attempt to rescue any other person in lawful custody as provided for in Section 30(1)(b) of the Police Act.

As to the requirement that the use of firearms by a police officer as authorized by Section 30 of the Police Act I cannot imagine that a police officer would be authorized to use a firearm to disable and not to kill without first being trained on the proper use of a firearm. I am of the view that a police officer would have been properly and thoroughly trained on the proper and authorized use of firearms even before he or she is allowed access to firearms. Considering the very restricted use of firearms a police officer is authorized, I consider that the training will have to include as to what parts of the body of a human being when fired at would only result in the person being disabled and not killed, and what parts of the body when hit would result in loss of life more or less instantly as was the case of Yusufu Abdullah. I am reinforced in this view by the evidence of Dr. Charles Dzamalala when he talked about preferential sites of the body in a suicide. He indicated to this court that research has revealed that there are seven preferential sites of the body for a suicide using firearms. I would imagine that any person serious about a suicide would not shoot his leg or arm unless he is banking on a huge loss of blood. In fact what

would disable an escapee and stop him or her from escaping are the body parts that are used in escaping such as legs if running or hands if driving. Shooting at a person in the chest, whether from the front or the back, or shooting through the head of an escapee, though it may achieve the halting of the escape, cannot be said to have been intended merely to disable and not to kill. In the case at hand there is no evidence to support conclusion that the use of the firearm was merely intended to disable Yusufu Abdullah and not to kill him. There is nothing to support a conclusion that the use of the firearms by the law enforcement official in this case was to disable and not to kill. The third accused person purported to suggest that when he fired the bullet he intended to hit and remove a wheel of the lorry Yusufu Abdullah was driving so as to stop it. He then suggested that what hit and killed Yusufu Abdullah was a stray bullet. The expert witnesses in this case ruled out that the bullet that hit and killed Yusufu Abdullah was a stray bullet, and justifiably so. One would have to stretch one's imagination to believe the assertion by the accused police officer. There is overwhelming evidence both viva voce and documentary in the form of pictures to show that Yusufu Abdullah was the target and not a wheel of the lorry. The position of the bullet hole at the back of the lorry is quite revealing on this aspect. That bullet hole is far removed from the wheel that could have been aimed at. The positioning of the single bullet hole right behind the driver's seat must have been as a result of a targeted bullet.

Having examined the privisions of Section 30 of the Police Act on the use of firearms by police officers I come to the conclusion that in the present case the third accused person did not comply with the law in Malawi on the use of firearms by police officers. The law in Malawi on the use of firearms requires careful reasoning and good judgment on the part of law enforcement officials. It certainly does not protect trigger-happy law enforcement officials who easily get excited about a situation and pull the trigger, be it aimlessly or on target.

In considering whether the use of the firearm in this case was unlawful or not I have had to consider whether the third accused could be said to have acted in self-defense in the defense of another in imminent threat of death or serious injury as envisaged in proviso (ii) of Section 30(1)

of the Police Act. I found the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials and some relevant foreign case authorities illuminating. These have been cited to me in the submissions. I have studied them and I find them useful and important in complementing the local laws. According to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, law enforcement officials in carrying out their duty, shall, as far as possible apply non-violent means before resorting to the use of force or firearms. Whenever lawful use of force and firearms is unavoidable, law enforcement officials must exercise restraint and act in proportion to the seriousness of the offence and the legitimate objectives to be achieved. Regarding self-defense, law enforcement officials shall not use firearms against persons except in self-defense or in the defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such danger and resisting their authority, or to prevent his or her escape. The basic principles provide that intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life. There is nothing to support an idea that the third accused acted in self defense or in the defense of another against the imminent threat of death or serious injury at the hands of Yusufu Abdullah. Yusufu Abdullah may have deserved to face justice but that justice should have been through due process of law through the courts. Yusufu may have been escaping but, it was not for the accused police officer to exact summary justice on Yusufu Abdullah by so arbitrarily taking away his life in such a brutal manner. The United Nations Code of Conduct for Law Enforcement Officials provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. In this case it was clear that it was not strictly necessary to fire at Yusufu Abdullah. It is imperative that law enforcement officials in this country adhere to the law and to the international human rights instruments including the United Nations Basic Principles on the use of force and firearms by Law Enforcement Officials and the United Nations Code of Conduct for Law Enforcement Officials.

The case of ***Leonidis v Greece*** *2009 ECHR 43326/05* decided by the European Court of Human Rights is an example of unlawful use of firearms by law enforcement officials. The facts show that the Son of the appellant was walking along a Greek street with two friends. Two plain clothed policemen were on patrol in an unmarked police vehicle. One of them decided to undertake a random identity check on the three young men. The three young men ran away as the police officers approached. One of the police officers ran after the victim and caught him. The Police Officer was holding a loaded revolver. He pushed the victim against a car with his left hand and immobilized the victim. The victim raised his hands and placed them on the car roof. The gun aimed to the sky. The policeman twisted the victim's left wrist behind his back to handcuff him. The victim then jabbed the police officer with his right elbow in the right side, causing him sharp pain. The Policeman reacted to the pain by bending forward, but as he drew himself back up, his revolver went off. It fired a single shot in the lower part of the victim's right ear, instantly killing him. The court held that the conduct of the police officer had amounted to a violation of the right to life and that the appellant's son loss of life was as a breach of the right to life.

The Court observed that after the victim had been immobilized, the police officer had no reason to keep hold of his gun, especially with his finger on the trigger. The victim was not holding a weapon and was not in any way threatening the police officer's life and the police officer had not shown the prudence and discipline expected of a police officer of his experience. The court concluded that there can be no absolute necessity to use force or firearms where the person to be arrested poses no threat to life of his and is not suspected of having committed a violent offence, even if refraining from using lethal force means losing the opportunity to arrest the fugitive.

In *Nachova and Others v Bulgaria* *Application No. 43577/98 and 43579/98 of 2004* the European Court of Human Rights interpreted the European Convention provision of the use of firearms to arrest person. The Convention prohibited the use of firearms to arrest persons who were suspected of having committed non-violent offences and who were not armed and who

did not pose any threat to the arresting officers or other. In the application lethal force had been used to arrest the deceased persons who were not armed. The State was held responsible for the actions of the law enforcement officials.

In the case at hand there was no evidence that Yusufu Abdullah was armed and that he posed a threat to the life of the accused or any other people. The use of firearm in this case was not in self-defense of the third accused or any other person. I am in no doubt at all that the use of firearms in the present case was unlawful. It was a violation of the fundamental right to life of Yusufu Abdullah and also resulted in the violation of the right to life of Emmanuel Philemon Waziri and Patricia Montiti. It was a violation of the right to human dignity under Section 19(i) of the Constitution. The use of firearms in this case demonstrated failure on the part of the accused law enforcement officer to uphold, respect and protect human rights under Section 15 of the Constitution. The accused arbitrarily, abruptly and brutarily brought to an early end the lives of the three deceased persons and did so unlawfully.

Having established that the third accused person unlawfully caused the death of Yusufu Abdullah, Emmanuel Philemon Waziri and Patricia Montiti I come to the inevitable conclusion that all three counts on the charge sheet have been proved beyond reasonable doubt as against the third accused person James Muhonjo. I find him guilty on each of the three counts and I convict him of manslaughter contrary to Section 208 of the Penal Code on each of the three counts.

The State failed to prove beyond reasonable doubt that Joshua Cheuka and Nicholasi Saidi caused the death of the three deceased persons. I resolve the doubt in their favour and I acquit both of them of the three manslaughter charges on the charge sheet. This means that Joshua Cheuka and Nicholasi Saidi must be set at liberty unless they are held for other lawful reasons.

PRONOUNCED in open court this 2nd day of April 2009 at Lilongwe Registry.

R.R. Mzikamanda

J U D G E

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CRIMINAL CASE NO. 73 OF 2008

BETWEEN

THE REPUBLIC

-VS-

JOSHUA CHEUKA ……………………………………………………………………………………………… 1ST ACCUSED
NICHOLASI SAIDI ………………………………………………………………………………………………. 2ND ACCUSED
JAMES MUHONJO ……………………………………………………………………………………………. 3RD ACCUSED
JONATHAN MLOTHA ………………………………………………………………………………………. 4TH ACCUSED

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Thabo Chakaka Nyirenda, Counsel for the Applicant(s) State
: Mr. Wapona Kita, Counsel for the Respondent/Accused
: Malera – Court Reporter
: Mr. Kafotokoza – Court Interpreter

SENTENCE

I have attentively listened to the address both by the State and the defense regarding the matters I should take into account in coming up with an appropriate sentence for the Court. I will take these matters into account. To begin with it is true that a first offender as the convict is and a young offender as the convict is to deserve a measure of mercy which I intend to accord him in this sentencing process. I will also bear in mind the fact that from the outset the convict tried to plead guilty to the offences particularly in relation to the death of Yusufu Abdullah. He did also state during the time of defense that he regretted the deaths of all the three victims of his crime. These are matters that speak in his favour and must influence me in sentencing him.

I very much agree with Justice Jere the famous quote from the case of *Rep v Shouti*. Yes a sentence must be fair to both the accused and the society.

In the present case the three deaths that occurred are a serious matter both the families of the deceased and the society to say nothing about the deceased themselves. Manslaughter is inherently a serious offence as reflected in the maximum sentence of life imprisonment it attracts. I will not impose on the prisoner the maximum. His Life Imprisonment is regarded as longer than the number of years of imprisonment a court may impose. I bear in mind the seriousness of the offence. More so I bear in mind that the three manslaughters were committed in serious circumstances. To say the truth these victims died an unnecessary death for their deaths could very easily have been avoided if the convict had restrained himself in the use of the firearm entrusted to him. The law governing the use of firearms by police officers especially under Section 30(1) of the Police Act are very restrictive and the convict as a trained police officer should surely have borne all that in mind.

Society indeed is not just saying Mr. Muhonjo caused the death of three people but is saying the police of 997 Rapid Response caused the death of these people. This has reflected badly on the police. This has overshadowed the excellent work 997 Rapid Response Department is doing in preventing violent crimes or in responding to them. The single act which the convict did resulted not only in the death of three innocent persons but also in the injury of others who had been in the minibus and the extensive damage to property in the riot that was triggered and that ensued the single act of the convict. I have to balance the interests of society and those of the convict in sentencing him. I come to the conclusion that a meaningful sentence of a custodial term is the most appropriate here. I therefore sentence the convict to suffer a term of imprisonment with hard labour for 12 years effective on each count the 12th of August 2008 when he was arrested. The sentence will run concurrently.

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The firearm shall be returned to Lilongwe Police Station.

R.R. Mzikamanda

J U D G E