IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MSCA CRIMINAL APPEAL No 14 of 2017

[Being Criminal Case Number 24 of 2013, Before the High Court of Malawi, Lilongwe Registry]

BETWEEN

STEWART LOBO — APPELLANT

AND

THE REPUBLIC — RESPONDENT

CORAM: THE HON. THE CHIEF JUSTICE A.K.C. NYIRENDA SC, JA

HON. JUSTICE E.B. TWEA SC, JA

HON. JUSTICE DR J.M. ANSAH SC, JA

HON. JUSTICE R. R. MZIKAMANDA SC, JA

HON. JUSTICE A.C. CHIPETA SC, JA

HON. JUSTICE L.P. CHIKOPA SC, JA

HON. JUSTICE F.E. KAPANDA SC, JA

HON. JUSTICE D.F. MWAUNGULU SC, JA

HON. JUSTICE A.D. KAMANGA SC, JA

Mwenefumbo [Ms.], Chef Legal Aid Advocate of Counsel for the Appellant

T. Namanja [Mr.] Senior State Advocate of Counsel for the State

Chimtande Mrs. / Minikwa Mr., Court Clerks

Pindani Mrs. / Mthunzi Ms., Court reporters

JUDGMENT

Chikopa SC, JA [The Hon the Chief Justice, Twea SC JA, Ansah SC JA, Mzikamanda SC JA, Chipeta SC, Kapanda SC JA, Mwaungulu SC JA, Kamanga SC JA concurring]:

INTRODUCTION

This is a sad story. It is a story about the death of one George Thekere on July 21, 2011 at Chilinde 1 Location in the City of Lilongwe.

The undisputed facts are that the deceased died from gunshot wounds. The shots were from all accounts fired by a man in police uniform. Investigations led to the arrest and prosecution of the Appellant for Murder contrary to section 209 of the Penal Code. He was convicted and sentenced to twelve [12] years imprisonment with hard labour [IHL]. He was dissatisfied with the conviction. Thus, he has appealed to this court.

GROUNDS OF APPEAL

Nine grounds were filed. If truth be told they could have been crafted better. We have hereinafter set the gist thereof.

The first point is about the insufficiency of evidence. The Appellant thinks the verdict cannot stand in the absence of evidence from the State proving beyond doubt that he was on the material day on patrol duties within Chilinde 1 township, that he was during such duties assigned a gun and ammunition, that he was in camouflage uniform and also that he used the gun and ammunition assigned to him on that fateful day to shoot and kill the late.

Secondly the Appellant contends that the conviction is untenable in the absence of reliable evidence identifying him as the policeman who shot and killed the deceased.

Thirdly the Appellant takes issue with the fact that the conviction is based on circumstantial evidence capable of conclusions other than his guilt.

Fourthly he believes the conviction is untenable in view of the alibi evidence showing that he was at the material time nowhere near the scene of the alleged crime and lastly that the conviction cannot stand in view of the Trial Court's failure to evenhandedly consider the Appellant's evidence.

Taking all of the above into consideration he prayed that the conviction be quashed and the sentence set aside.

PROCEDURE ON APPEAL

Appeals in this Court proceed by way of rehearing. We therefore wish to reiterate the point that in determining this appeal we will ask ourselves the question whether on the facts and law before the Trial Court and now before us we would have come to the very conclusions arrived at by the said Court. If the answer be in the positive in all material aspects the appeal will fail. If, however, the answer be wholly or in part in the negative, the appeal will succeed either wholly or to the extent of the negative responses. See **Billiat Luberto Gadabwali v R** Miscellaneous Criminal Appeal Number 2 of 2013[unrep] where Chipeta SC, JA said:

> *'.... Appeals like this one come to this Court by way of rehearing. Of necessity, therefore, this entails that I treat the matter as if it was coming before me for the first time. This means allowing myself to look at the very material the Honorable Judge looked at in the Court below before he come to a decision, and assessing the same myself to see whether I could have come to a different decision'* ***[Sic]***

THE LAW

A lot of law was referred to by the parties both in this and the Trial Court. We can only be thankful. We however do not think that we should refer to all of it at this stage. We would rather, except where necessity leaves us with no option, do so while we debate and decide on the questions raised in this appeal.

We must also state the fact that in criminal matters the burden is always on the State to prove its allegations beyond reasonable doubt. The accused has no obligation to prove their innocence. Where there is therefore at the close of a prosecution doubt as to an accused person's guilt the same will always be resolved in their favour by way of acquittal.

Perhaps the best exposition of what amounts to proof beyond reasonable doubt is to be found in **Miller v Ministry of Pensions** [1947] 2 All ER 372 at 373 where the venerable Denning J[as he then was] said as follows:

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

In the circumstances of this case it is also worth mentioning that it is possible to conclude proof beyond reasonable doubt and therefore guilt if on the totality of the evidence before the Court the only conclusion to be had is the accused person's guilt. We should also add that since the advent of the new constitutional dispensation an accused is not obliged to say anything in their defence or at all. They are allowed to remain silent before and during trial. See section 42(2) (a), (c) and (f) (iii) of the Constitution and **Maxwell Namata v R** MSCA Criminal Appeal Number 13 of 2015 [unrep]. Where however an accused decides to testify or gives an explanation the court's approach to the accused's story should never be *'is the accused story true or false?'* resulting, if the answer were false in finding that the accused must be taken to have been lying. The proper question to be asked is *'is the accused's story true or might it reasonably be true?'* with the result that if the accused might reasonably be telling the truth then she in fact is. See **Gondwe v R 6 ALR** Mal 33 at 37 cited with approval in **Maxwell Namata v R**[supra].

THE ISSUES

If we may recollect there is no doubt that the deceased was killed by gunshots. Fired by a person dressed in a police uniform. The main question therefore is whether that

person is the Appellant. Allied to that question are issues to do with identification, alibi, circumstantial evidence and whether the Appellant was, on the material day, issued with a gun and ammunition indeed whether he used such gun/ammunition to commit the offence the subject of this appeal.

There are also questions about procedure. From the record the notice of appeal was against the Court below's decision of December 20, 2016. This was a decision on the sentence. The grounds of appeal and the skeleton arguments on the other hand relate to the conviction which is a decision made on October 4, 2016. Technically there was, in our view, no notice of appeal and therefore no appeal against the conviction. And while there was a notice of appeal against the sentence, there were no grounds of appeal and skeleton arguments in relation thereto.

There was also an issue about the Respondent's case. They had up and until the date of hearing of the appeal not filed any skeleton arguments.

Two questions came up for our consideration. Was there a competent appeal before us in view of the confusion, set out above, regarding the decision[s]appealed against, the target of the notice of appeal and the skeleton arguments? Secondly should the Respondent be heard at all seeing as she had not filed any skeleton arguments by the date of hearing?

THE ARGUMENTS

THE APPELLANT'S

Procedure

The Appellant admitted his mistakes. He informed us that he was desirous of appealing against both the conviction and sentence. Accordingly, he sought leave to amend the notice of appeal to indicate his above desire, to file the amended notice out of time and finally to similarly amend and file the skeleton arguments. In respect of such request the Appellant asked this Court to look more at the interests of justice than technicalities and procedural niceties.

We granted the Appellant's prayer. We thought it more important that we put more emphasis on the interests of justice and the Appellant's wish to have his day in court

than putting undue weight on procedure and technicalities. The paperwork was amended as by procedure required and leave granted for the same to be filed out of time.

Similarly, and for the record, leave was granted allowing the Respondent to file her skeleton arguments out of time.

Alibi

The Appellant maintained that he was nowhere near the crime scene on the material day. That he could not therefore have committed the crime. In support of such claim he called upon the evidence of two police officers namely DW3 and 4. The former told the court below that he was the Operations Officer on the day in issue. He was responsible for deploying police officers. It was his evidence that he never deployed the Appellant out of Kawale Police Station on this day. That he, i.e. DW3, actually left the Appellant at the station, went out on duty and found him there when he returned. DW4 said much the same thing.

The Appellant also asked this Court to note that the Respondent failed to prove beyond reasonable doubt that his alibi was false. The alibi must therefore be taken to be true. The Appellant therefore urged us to conclude that he never, on this day left Kawale Police Station; that he never was anywhere near the scene of the crime; and that he could never therefore have fatally shot the deceased.

Identification

The Appellant argues that there was no evidence identifying beyond reasonable doubt that he is the police officer who shot the deceased on the fateful day. Of course he accepts that PW4 claims to have identified him as the shooter; to have known him before the shooting as a police officer from Kawale Police Station who, on this day, loaded his gun, showed it to the late and proceeded to shoot him dead.

Such evidence is according to the Appellant manifestly unreliable. PW4 did not, for instance know or mention him by name. And citing the case of R v Turnbull [1977] QB 224 he asked this Court to also note that the witness, i.e. PW4, did not even lay down the basis on which she could justify her ability to identify the Appellant as the shooter.

She never said how many times before this date she had encountered the Appellant. How long on this fateful day she had the Appellant under observation. She could not even say how, in view of the civil disturbances, shootings and commotion prevalent on that day, she was able to remember the shooter as the Appellant. The policeman from Kawale Police Station.

A General Want of Evidence

The Appellant also submitted that there was generally a lack of evidence putting him at the scene of the crime, with a gun/ammunition, shooting and killing the deceased. He reiterated his story that he was at all material times on duty at Kawale Police Station. He cited the testimony of DW3 and DW4 and emphasized that except for the time in the morning when he and other officers escorted PMF personnel to recover looted goods, he was never on this day deployed out of Kawale Police Station.

Secondly the Appellant said he was never on that day allocated a gun and ammunition. It was according to him only PMF officers, of which he was not one, who were issued guns and ammunition on this day. He could not therefore have shot and killed the deceased.

Thirdly the Appellant pointed out that as a general duties police officer he was on this day in a Khaki uniform. This according to him, is at variance with the evidence of PW2 who said the officer who shot the deceased was in camouflage uniform which is only allocated to PMF officers. The conclusion must thus be that he is not the officer who shot and killed the deceased.

The Appellant also had something to say about circumstantial evidence. He disagreed with the Trial Court's conclusion that the totality of the evidence before it i.e. PW 4's identification evidence, the facts that the deceased was killed by a policeman and the Appellant is a policeman led to one and only one conclusion namely that it was the Appellant who shot and killed the deceased. The Appellant was of the view that the totality of the evidence before the court below was capable of other conclusions. Especially when considered in the light of the conflicting testimony about the shooter's uniform, the alibi evidence from DW3 and DW4 and a lack of cogent evidence that he

was on this day issued with a gun and ammunition and deployed in Chilinde 1. He thought his innocence was also a possible conclusion from the evidence.

THE RESPONDENT'S

Identification

The State agrees that all PW1, 2, 3 and 5 said was that a policeman killed the deceased. That they never said that the policeman in question was actually the Appellant. It is nevertheless the State's view that PW4's evidence considered together with that of PW1, 2, 3 and 5 sufficiently connects the Appellant to the crime.

PW4 had encountered the Appellant prior to the incident the subject of these proceedings. She knew that he was a police officer at Kawale Police Station even though not by name. Considering the foregoing in the light of the fact that a police officer shot and killed the deceased; that the Appellant was at that time indeed a serving police officer at Kawale Police Station there is, the State contends, no denying the fact that the inescapable conclusion must be that the killer policeman was in fact the Appellant.

Alibi

The State's argument is simple enough. The defence of alibi cannot stand in the light of PW4's identification evidence and the Appellant's inability/reluctance to do more than just say he was not, at the relevant time, at the crime of scene. Or that he was that time at Kawale Police Station.

About the evidence of DW3 and DW4 the State argues it is worth noting that the times mentioned by the witness are other than the times when the crime was committed. Their evidence cannot, to that extent, therefore exonerate the Appellant. It would have been otherwise if their evidence was to the effect that the Appellant was at the Station at or about the time the crime was committed.

From a different perspective the State contends that DW3 and DW4 are not witnesses of truth. The evasive nature of their testimony clearly shows that they were bent on

protecting the Appellant and obstructing justice. The conclusion in the circumstances must be that the defence of alibi is not available to the Appellant.

A General Want of Evidence

While the State agrees that the evidence of PW4 is crucial it also urged us to consider the evidence before us holistically. Looked at thus there is no doubt that a policeman shot and killed the deceased at Chilinde 1. A policeman who was identified as the Appellant[himself a policeman] by PW4. The sum total of the evidence, according to the State, places the Appellant at the scene of the crime as the policeman who shot and killed the deceased.

The same evidence, according to the State, does away with the suggested alibi. It also relegates into insignificance questions about what kind of uniform the shooter was wearing, whether or not the Appellant was on this day deployed into Chilinde 1 with a gun and ammunition indeed whether he fired the gun. Leaving the Court with the significant and proven facts that a policeman shot and killed the deceased and that the policeman was identified as the Appellant who is indeed a policeman.

The State therefore submits that there is no substance to the Appellant's argument that there is a no evidence generally to sustain the conviction. It prays that the conviction and sentence be sustained.

THE TRIAL COURT'S

Identification

The Court below accepted PW4's identification evidence. The said Court placed emphasis on the witness' demeanor and the fact that there was nothing to negatively impact on the witness' ability to identify the killer policeman from a previous encounter. High on the list of such considerations were the facts that there was sufficient light [the sun was up], that there was nothing blocking the line of vision between her vantage point and where the shooting took place, and finally that the distance from where the witness was spectating and where the shooting actually took place was short namely 30 to 35 meters.

About identification parades, the lack of which was condemned in **Chimwala v R** MSCA Criminal Appeal No 5 of 2000[unrep] the Court below thought, much like this Court in that same case, that not every want of an identification parade should be fatal to a conviction. The question should still be asked whether, the lack of an identification parade notwithstanding, there is sufficient evidence of identification. In the instant case the Trial Court answered such question in the positive.

THIS COURT'S CONSIDERATION OF THE ISSUES, EVIDENCE AND LAW

On the evidence there is no doubt that a person died in circumstances amounting to murder. The question therefore is who committed the murder? The State contends that it is the Appellant. The Appellant contends the opposite.
Our duty is to resolve the above variance. And we propose to do that by looking at the issues raised above specifically questions of identification, alibi, an alleged lack of evidence and circumstantial evidence in the light of the law, evidence and arguments before us. We will do this while remembering at all times that it is for the State to prove the Appellant's guilt beyond reasonable doubt.

Identification

The question is whether or not there is evidence proving beyond doubt that it is the Appellant who fatally shot the deceased.
In so far as case law is concerned there is the oft cited case of **R v Turnbull** [supra]. It deals with identification by dock recognition. It exhorts Trial Courts to exercise caution before convicting an accused on the basis of a dock identification. Specifically, it asks courts to consider:

I. the circumstances in which the identification by the witness came to be made;
II. how long the witness had the accused under observation; at what distance; in what light;
III. whether or not the observation was in any way impeded by for instance passing traffic or a press of people;

IV. whether the witness had ever seen the accused before if yes how often;
V. whether there was any special reason for the witness to remember the accused;
VI. the time between the original observation and the subsequent identification to the police; and
VII. whether there was any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance.

In the instant case the State paraded six witness. With respect PW1 was not terribly relevant in so far as identification is concerned. We therefore concern ourselves with the testimony of PW2 to 6 inclusive.

PW2 was a landlord to PW3 and 4. In examination in chief he told the Court that he was at the material time standing next to the deceased discussing some piece work which the deceased was doing for him. He was shocked to see the late falling down. He had been shot in the mouth. He saw the shooter. He was wearing a police uniform. A camouflage type usually worn by PMF officers. He was however not able to identify him. Not even as the Appellant.

PW3 also claims to have witnessed the shooting. She told the Court below that she saw a police officer running after a boy who run and hid in her house. Because the police officer was threatening to burn the house if the boy did not come out she, out of fear of getting herself and her kids killed, asked the boy to come out. As he did so, PW3 claims to have seen the police officer beat the boy with the gun, load it and fire at him. He missed. The shot instead killed a person in the neighbor's compound. Just like PW2 she could not identify the police officer either as the Appellant or any other.

PW4 told the Court below that she saw a policeman with a gun. The policeman came up to the deceased, showed him the gun and fired. The deceased fell to the ground and later died. About the shooter's identity she said she only knew him by face. Not by name. He was a policeman at Kawale Police Station. She pointed at the Appellant as the shooter and therefore the killer.

In cross-examination she admitted that PW2 was standing next to the late. In her view he should have seen what she saw. She was adamant that the police officer, who was putting on a grey police uniform, pointed the gun at the late and fired.

PW5 was the police investigator. His testimony is in our view hearsay in so far as it related to police operations generally at Kawale Police Station and in Chilinde 1 on this fateful day. He nevertheless told the Court below that he, in the course of investigating this matter, interviewed *inter alia* police officers who were responsible for deployment and the issuance of weapons at Kawale Police Station on this day. The Deployment Officer's duty was to decide which police officers went where when. The Weapons Issuance Officer's function was to issue weapons, ammunition to these officers. PW5 did not identify by name who these officers were. He did say however that these officers gave him neither the deployment nor the weapons/ammunitions distribution lists for the day in issue.

PW6 testified around the cause of death. We do not think his testimony of much importance/relevance. There is no issue about whether the late is dead, how or when he died.

The Appellant called four witnesses. He also testified in his defence.

In examination in chief he told the Court that he reported for duties at Kawale Police Station at 5 am. Later he with others were detailed to go to Biwi Auctioneers where people were burning shops. They went in a PMF vehicle. They dispersed the people using teargas. Thereafter they returned to the office where the vehicle used was handed over to a Mr. Chimombo who was the Operations Officer.

After 30 to 40 minutes he was part of another team that went to houses that were just behind Kawale Police Station. They went to recover goods that had been stolen from Chipiku Stores and PTC shops. All general duties police officers, of which he was one, were putting on khaki uniforms. Some officers were carrying teargas canisters. He did not carry any. PMF officers were on the other hand in camouflage uniforms. They were also the only officers carrying guns. They retrieved the stolen items and returned to the office at around 1130 am. It was at this point that news came in that someone had

been shot at Chilinde next to Kamuzu Barracks. Later a Malawi Police Service [MPS] motor vehicle for Kawale Police Station registration number MP2056, white in colour, brought two dead bodies.

The Appellant insisted that he was, apart from the above two instances, always at the police Station. That his superiors could vouch for the same. It was also his testimony that he was on this day never issued with any gun and /or ammunition and could not therefore have shot and killed deceased.

In cross-examination the Appellant set out some of the operating procedures at the station. On page 67 of the record he said on reporting for duties one registers their name at the counter. If you are going on patrols a senior officers records your name and destination. On knocking off you sign off.

He also stated that police officers sign for each and every piece of equipment i.e. guns, ammunitions and tear gas canisters issued to them. He was not on this day issued with any gun or ammunition. He did not and could not therefore have carried any. Neither did he expect his name to appear on any list of officers who has been issued with guns, ammunitions or teargas canisters for operation on this day.

He confirmed that PMF officers carried guns while some of his general duties colleagues carried teargas canisters. He could not say however whether those with guns or canisters signed for such weapons/equipment. As a junior officer it was not his place to ensure that such weapons/equipment were signed for.

In re-examination he confirmed that he was not issued with a gun or ammunition on this date. That it was only PMF officers who carried guns.

DW2 was Senior Deputy Commissioner Richard Luhanga. His evidence was of a formal nature. It had nothing to do with issues raised by the parties namely identification, alibi or a want of evidence. We will not comment further on it.

DW3 was Assistant Superintendent Harry Chimombo. On the material day he was stationed at Kawale Police Station as Operations Officer. His duties were supervising and deploying junior officers. He was also responsible for issuing guns and ammunition. About deployments he spoke mainly of one early in the morning of July 21, 2011. It was meant to disperse persons who were vandalizing Vindhani's shop. A combined force of PMF and general duty police officers were sent to quell the disturbance. He issued no

guns/ammunition to these officers. He was however aware that there were guns aboard the car that ferried the officers to the hot spot. He could not say however whether the guns were used on the mission. Or if yes by who.
Later on he went on duty with other officers in the course of which he was informed that some person has been shot dead. He went to collect the dead body and brought it to the station.
He told the Court that he left the Appellant at the station when going out and found him thereat when he brought the dead body. He was however aware that the Appellant and other officers went out on a mission to collect looted goods though he could not say what transpired during that deployment.
DW4 was Senior Superintendent Don Sauteni. He was also a Deployment Officer at Kawale Police on the material day. He confirmed that the Appellant was on this day deployed at the office. To be exact no more than 100 metres from the office. That he was never deployed in Chilinde 1.

The question before us, if we might go back to it, is whether there is, on the basis of the above testimonies, evidence beyond reasonable doubt that the Appellant shot and killed the deceased.
PW4 told the Court that a policeman came up to the late, showed him the gun and shot him. The policeman was putting on a khaki uniform. And she identified that policeman as the Appellant whom she knew to be a police officer at Kawale Police Station. She never spoke however of how many times and where she had previously seen him indeed why she was able to remember him this time round. There was no mention of what description, if any, she had given to the police of the shooter. There is therefore no opportunity to ascertain whether there was/is any material discrepancy between the description given by the witness to the police of the Appellant and his actual appearance. And she was, according to pages 27 and 28 of the record anything between 10 to 35 metres away from the scene of the shooting.

Compare the above with the evidence of PW2[the landlord] and PW3.

PW2 was standing right next to the deceased. They were actually speaking to each other. He never told the Court below of a policeman coming to the deceased, showing him the gun and shooting him. Only of a shot coming from somewhere and fatally striking the deceased. He never spoke of a policeman in khaki uniform, the uniform of general duties policemen on this day, but one in camouflage. The uniform of the PMF. There clearly is a small matter to be resolved here. Who, as between PW2 and PW4, gave the correct version of the events leading to the fatal shooting of the late?

Then there is PW3. She spoke of a police officer beating a boy with a gun, loading it, firing at the boy, missing and killing some other person in a neighbor's compound. Never of the policeman coming up to the late, showing him the gun and shooting him. The same small question arises. Who, between PW4 and PW3 gave the correct version of events leading to the deceased' death?

Whatever might be said about the evidence there is no denying that PW2, 3 and 4 spectated the same events. Their stories about the circumstances regarding the shooting should therefore have been materially similar. If, for instance, and as PW3 says, the policeman loaded the gun fired at the boy, missed and ended up shooting somebody next door we expected, if we are dealing with witnesses of truth, both PW2 and 4 to say the same thing. If, as PW 2 says, the policeman was wearing a camouflaged uniform we would have expected PW4 to equally say the same thing. Similarly, if PW4 says the killer policeman was in a khaki uniform PW2 should have said the same thing. If, as PW4 says, the shooter showed the gun to the late and shot at him [and not the fleeing boy] we would have expected PW2, who was standing right next to the late to tell the same story. The same goes for PW3 who saw the policeman shoot. Instead we have three different stories. They could not all of them have been telling the truth. The questions being who was lying? Who was telling the truth?

It is important, in trying to answer the above question to note that PW2, who was standing right next to the late, never spoke of a policeman being next to the late, showing him the gun and shooting him. He only spoke of the late being shot from some distance. That tallies with the testimony of PW3 who spoke of a policeman, clearly close to her, shooting at a boy, missing and striking someone in the next compound. Two important conclusions come out. First is that there is doubt regarding the

circumstances leading to the death of the deceased. Was the shooter in camouflage or khakis? Did the shooter come up to the late, showed him the gun and shot him? Or was he standing somewhere trying to shoot at some boy, missed and ended up killing the late?

Secondly chances are that PW4, standing some 10 to 35 metres away, was not, to put it mildly, telling the whole truth[maybe not deliberately] when she said the shooter came up to the late, showed him the gun and shot him. If it is true that the shooter came up to the late showed him the gun and shot him it is obvious that PW2 would also have said so. He was standing right next to the late. Speaking to him. What PW4 claims to have seen from 10 to 35 meters away should surely also have been visible to PW2. That he never spoke about it can only be because he never saw it. That he never saw it is because it never happened.

Further PW3 says she was next to the shooter and the boy who seems to have provoked the shooting when the killing took place. If PW4's story is true then both PW4 and the late must have been right next to PW3. Yet we know that is not true. When the policeman shot he killed someone in the next compound. We also know as a matter of undisputed fact that the late was not with PW3 at the material time. He was with PW2 in the next compound. PW4's testimony is premised on spectating a policeman go up to the late, show him a gun and shooting him. It now seems most likely that her version of events never in fact took place.

Any which way we look at the above analysis the conclusion is inescapable. There is doubt not just about events leading to the fatal shooting but also whether the shooter was indeed the Appellant.

Let us now look at the evidence of DW3, DW4, PW5 and the Appellant. All police officers. They were all agreed that in terms of police procedure deployments are recorded. There is a list of who went where, when to do what. There is also a record of what equipment i.e. guns/ammunition they take with them on such deployments. A record, if we might say so, of who got what weapons and what number/kind of ammunition.

From the record there is no evidence, written or otherwise, of the Appellant having been deployed around the scene of crime at or around the time the incident took place. Or of him having been issued with a gun and/or ammunition. Refer to the testimony of DW3 and DW4. On the contrary there is evidence from the Appellant, DW3 and DW4 that the Appellant was at all times at Kawale Police Station Offices. Or no more than a hundred metres therefrom. Deployed to protect the police station from an anticipated arson attack.

Could PW4 have seen the Appellant at the crime scene? In the absence of a deployment into Chilinde 1 and in the abundance of evidence that he was at all material times at Kawale Police Station or no more than 100 metres therefrom the answer, in our judgment, cannot be in the positive. Could, in the alternative, the Appellant have shot the deceased? The answer, in our judgment, can only be in the positive if there is evidence that the Appellant had at the material time in his possession the gun and ammunition that killed the deceased. The evidence does not show that the Appellant was issued with any gun and/or ammunition on this day. See the testimony of DW3 and 4. Again, and whereas there might not be doubt that a policeman shot and killed the deceased at Chilinde 1 there is the possibility that the said policeman was not the Appellant.

Alibi

An alibi is a form of defence in criminal proceedings where the accused attempts to prove that he or she was in some other place than the crime scene at the time the alleged offence was committed. In some jurisdictions there is a requirement that the accused discloses an alibi prior to the trial. This is an exception to the rule that a criminal defendant cannot normally be compelled to furnish information to the prosecution. Canada is an example. The defence must disclose an alibi within such time and with such particularization as will permit the authorities to meaningfully investigate the alibi. Failure to comply with the above requirements will result in the court making an adverse inference against the alibi defence though it will not result in the exclusion of the alibi defence. See **R v Cleghorn** [1975] SCR 175 at paragraph 3.

In yet other jurisdictions e.g. the United States of America [USA], judges have opined that the mandatory early disclosure of an alibi is unfair possibly even unconstitutional. See **Williams v Florida [No. 927]** 399 US decision of 22 June 1970.

In Malawi this defence is conceptually the same as outlined above. It also arises when an accused claims to have been at a place other than the scene of the crime at the time of the crime's commission. The extent of its application however needs, the above sentiments from Canada and the USA notwithstanding, to be understood in the context of our current constitutional environment specifically of section 42(2)(a),(c), and (f)(iii) of the Constitution above mentioned and the right to silence. Because the accused has the right to silence before and during trial and cannot be compelled to give a statement he/she is not in our judgment obliged to disclose the defence of alibi to the State. Where however the accused raises such defence or the defence arises on the facts the State needs to prove beyond reasonable doubt that the said defence is not available to the accused. In other words, the State must show that the accused was, as a matter of fact, at the scene of the crime and not wherever he/she said they were. And where the accused does not disclose the defence neither the court nor the State should be permitted to make adverse comments thereon. The reasoning is simple enough in our view. To require the accused to disclose the defence would be an affront against the right to silence. To allow adverse comments would be a breach of the presumption of innocence. Both instances are unconstitutional.

In the instant case the Appellant raised the defence of alibi very early on. He always claimed that he was not at Chilinde 1 at the time the late was shot and killed. That he was at Kawale Police Station or no more than 100 meters away therefrom. The said defence is also obvious from the facts. Having so raised it or put before the prosecution and the trial court facts suggesting/establishing an alibi the obligation, in our judgment, became that of the State to not only disprove the alibi but also prove that the accused was actually at the scene of the crime i.e. at Chilinde 1. Has the State in this case discharged that burden'?

The State's evidence in the above regard is essentially the testimony of PW4. The same testimony that, as we have shown above, does not accord with the Turnbull Principles on dock identification. The same testimony that conflicts with that of PW2 and PW3

on events leading to the shooting. Testimony that is at variance with that of DW3 and DW4 as to the Appellant's whereabouts on this day namely that the accused was always at or around Kawale Police Station and was never deployed in Chilinde 1 where the incident took place. Testimony that differs from that of the Appellant who in the Court below and before made it clear that he was not at the material time at Chilinde 1 but at or around Kawale Police Station with police officers Mzumara and Jailosi.

Answering the question whether the State has succeeded in placing the Appellant at the crime scene the answer is in the negative. To begin with their star witness' testimony i.e. PW4's, is at the very most of doubtful veracity in the light of testimonies from PW2, PW3, DW3, DW4 and the Appellant. It cannot be the basis for concluding that the Appellant was at the material time at Chilinde 1 and not at or around Kawale Police Station. Secondly we find it, to say the very least, strange that the State having contended that the Appellant, DW3 and DW4 were not witnesses of truth in relation to the alibi, never brought any evidence to prove that the Appellant, DW3 AND DW4 lied in that regard. Or to prove that the Appellant was at the material time in fact at Chilinde 1. Even stranger was the State's inability to contest the evidence that police officers Mzumara and Jailosi were with the Appellant as alleged or at all which when all is considered should have been simple enough. They or some other police officer could have been called to testify and prove otherwise than the Appellant alleged. The conclusion must be that the appellant was saying the truth when he told the Court below that he was at or around Kawale Police Station on the material day at the material time. And that the State's failure to bring witnesses like Mzumara and Jailosi to disprove the alibi was for fear of adversity.

A General Want of Evidence

The Appellant's argument is also that the conviction is untenable in the light of the State's failure to prove certain crucial facts specifically whether he was on this day issued with a gun and ammunition. Further whether the gun and ammunition issued to him was the very one used to kill the deceased.

The case against the Appellant is that he on this day fatally shot the deceased at Chilinde 1. What the State needed to, at the very least, prove to secure a conviction in the Court below is clear enough in our view. It is *inter alia* that the Appellant was at the scene of crime in Chilinde 1. Secondly that he had, while there a gun and ammunition. And thirdly that he, using that very gun and ammunition, shot and killed the deceased.

Going back to the evidence on record serious questions arise as to whether or not the Appellant was at the scene of crime indeed whether the appellant could have shot and killed the late. Why because the veracity of the State's star witness' i.e. PW4, testimony has been called into question. It has not complied with the Turnbull Principles on dock identification. The combined testimony of PW2, PW3, DW3 and DW4 about the circumstances leading to and surrounding the shooting does not seem to place the appellant at Chilinde 1 shooting and killing the late. On the evidence the Appellant was on this day never issued with any gun and ammunition. Neither was he deployed at Chilinde 1.

It maybe said that the Appellant somehow got to be in possession of a gun and ammunition and used it to shoot the deceased. Maybe. But that at best is conjecture. And to be fair neither the State nor its witnesses suggested, much less said, that such was the case.

Circumstantial Evidence

The State urged us, undoubtedly on cue from the judgment appealed against, to look at the evidence herein from the sum total perspective. That if we did so we would agree that there was only one conclusion to be had from the totality of the evidence namely that it is the Appellant who shot and killed the deceased in circumstances amounting to murder.

We are unable to agree. Looking at the evidence all we have is that the late died from gunshots. Fired by a police officer. There is doubt as to the police officer's apparel. Whether he was in khakis or in camouflage. This is important because the latter was strictly for PMF officers of which the Appellant was not a member. There is evidence that the appellant was at all material times at or around Kawale Police Station. There

is on the other hand no evidence that the Appellant was issued with a gun or ammunition of the kind that was used to kill the late or that somehow he got hold of a gun and ammunition. The only conclusion from the totally of the available evidence cannot, in those circumstances, be that it is the Appellant who fatally shot the deceased. That he did not is also a strong possibility.

The Burden of Proof

We talk about this not because there is any doubt as to who in criminal matters bears the burden of proof but for purposes only of emphasis and of leaving no-one in doubt as to what that duty generally entails and entailed in this case.

While therefore it is trite that the State has a duty to prove a criminal case beyond reasonable doubt it is important to note that the extent of such duty varies from case to case. In some cases the duty equals no more than proving the *actus reus* and the *mens rea*. In other cases it goes beyond that. Where for instance the accused raises a defence or it is clear that the facts raise the possibility of one it is the duty of the State to show beyond doubt that such defence is not available to the accused.

In the instant case the Appellant said from early on that he was not at the scene of the crime. That he was at all material times at Kawale Police Station with named police officers. He also made it clear that on this day he was never issued with a gun or ammunition. That he never had a gun and ammunition at any time. The State seems to have misapprehended their duty in relation to such assertions. It seemed to believe that there was some kind of obligation on the Appellant's part to prove that he was not in Chilinde 1, or that he was at was Kawale Police Station indeed that he was never issued with or that he did not possess a gun and ammunition. With respect the State had the wrong end of the law. It was its duty to disprove such facts. Or to prove that the Appellant was indeed at Chilinde 1 with a gun and ammunition. To proceed otherwise would be equal to a reversal of the burden of proof and a breach of section 42(2)(f)(iii) of the Constitution [i.e. the right to a fair trial].

CONCLUSION/DETERMINATION

The overarching question is whether on the evidence the State has proved beyond reasonable doubt that the Appellant shot and killed the deceased. The answer is in the negative. The evidence falls short of proving beyond doubt that the policeman who shot and killed the deceased at Chilinde 1 is the Appellant. There is the possibility that the shooter could have been a policeman other than the Appellant. As the law requires of us we will resolve that doubt in favour of the Appellant by way of acquittal.

Accordingly, the conviction is hereby quashed. The sentence imposed in respect thereof is set aside. The Appellant will forthwith be set at liberty unless there are some other militations against the same.

OBSERVATIONS

Without in any way detracting from our above conclusions and the reasons therefor we wish to make some serious observations about this matter.

The incident in issue occurred on July 20, 2011. PW1, Emmanuel Chitema, a relation to the deceased went to Kawale Police Station to enquire about the deceased's death on the same day. The Station's authorities were clearly uncooperative with the result that it was only on October 11, 2012, more than a year later, when investigations into the complaint were instituted. And then only after the intervention of the Inspector General of Police and the Regional Command of the Central Region of the Malawi Police Service.

Nevertheless, and such high level intervention notwithstanding it is obvious that investigations into the complaint were strongly resisted within the Malawi Police Service.

We find the above most unfortunate. In our firm view when a sad incident such as was the subject of these proceedings happens, the Malawi Police Service should be in the forefront properly and professionally investigating it. Resisting and compromising such an investigation is tantamount to a disservice to the Nation and to the men and women in uniform who are called upon, often in very difficult circumstances, to manage civil disorder. It denies them a fair chance to have their names cleared while at the same

giving cause for the public to forever engage the police with undue suspicion. We pray and hope that what happened in this case will be treated as an aberration.

On the other hand, and while it cannot be denied that the unfortunate incidents of the morning of July 11, 2019 led to the death of an innocent citizen at the hands of the Police, the context in which this happened must be borne in mind. There was tension and civil unrest/disorder aplenty in the community. The Malawi Police Service was endeavoring to bring back law and order. The evidence clearly shows that there were skirmishes between police and criminal elements of the community. Officers and men in uniform were on operations throughout the night and part of the next morning. They were obviously working in difficult circumstances. Physically and, mentally. We would therefore most respectfully urge the powers that be to henceforth mentally and physically prepare their men and officers for events like those that led to this case.

Similarly, we would also most respectfully ask the Director of Public Prosecutions to carefully vet cases involving alleged malfeasance within the Security Services and promptly/effectively address all evidential gaps designed to deliberately weaken the prosecution of such cases. It helps strengthen the rule of law, gives the public confidence that any wrongdoing by whosoever done will be dealt with in full accordance with the law and ultimately benefits the Security Services themselves by allowing them to learn from their not so good experiences.

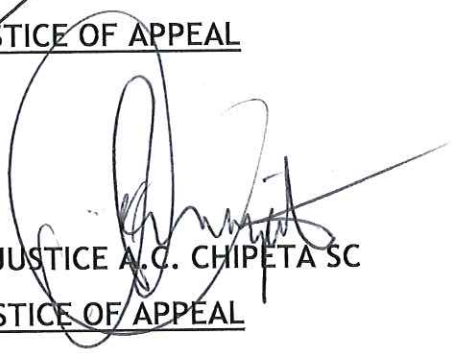
Delivered on the 12th day of February 2019 at Lilongwe.

HON. JUSTICE A.K.S. NYIRENDA SC
THE HONOURABLE THE CHIEF JUSTICE

THE HON. JUSTICE E.B. TWEA SC, JA
JUSTICE OF APPEAL

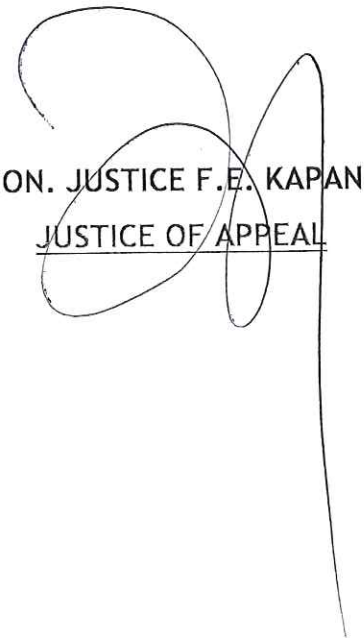
THE HON [DR.] JUSTICE J.M. ANSAH SC
JUSTICE OF APPEAL

THE HON. JUSTICE R.R. MZIKAMANDA SC
JUSTICE OF APPEAL



THE HON. JUSTICE A.C. CHIPETA SC
JUSTICE OF APPEAL

THE HON. JUSTICE L.P. CHIKOPA SC
JUSTICE OF APPEAL



THE HON. JUSTICE F.E. KAPANDA SC
JUSTICE OF APPEAL

THE HON. JUSTICE D.F. MWAUNGULU SC

JUSTICE OF APPEAL

THE HON. JUSTICE A.D. KAMANGA SC

JUSTICE OF APPEAL