IN THE HIGH COURT OF MALAWI
SITTING AT BLANTYRE

CRIMINAL CASE NO 49 OF 2012

THE REPUBLIC

AND

MURALD PHILLIPS

Coram: **Hon. Justice R. Mbvundula**
Salamba, Counsel for the State
Chipeta, Gondwe, Kara, Counsel for the Accused
Chitsulo, Chimang'anga, Official Interpreters
Gondwe, Court Reporter

JUDGMENT

The present accused, Murald Phillips was charged concurrently with two other persons, Zain Phillips and Dan Kumilamba, who were acquitted when this court found them with no case to answer at the close of the prosecution evidence.

The case for the prosecution is that the accused, at Al Pacino's club in the city of Blantyre, caused the death of Bernard Elias, who was a security guard there, in circumstances amounting to murder under the provisions of section 209 of the Penal Code.

Section 209 of the Penal Code provides as follows:

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

The evidence of the prosecution must therefore prove the following essential elements. Firstly, it must prove that it was the accused who, by his voluntary act or by his omission, caused the death of Bernard Elias. Secondly, that in doing so was of malice aforethought and acted unlawfully. Failing this the accused must be acquitted of the offence.

Malice aforethought is defined in section 212 of the Penal Code in the following terms:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

a) an intention to cause death of or to do grievous harm to any person, whether such person is the person actually killed or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may be caused;

c) an intent to commit a felony;

d) ..."

Russel on Crime 12th Ed, Vol.1 at page 466 states that in the case of murder malice aforethought is "the realisation that one's conduct may cause the death of a human being." In *Republic v Jack Bandawe* [2010] MLR 288 this court stated, *inter alia*, that malice aforethought in murder cases is comprised in the realisation that either death or grievous bodily harm may result from the conduct or omission of the accused, and that the accused ought reasonably to have appreciated that such a result might occur. Once that mental element is complemented by the unlawful act or omission which effectively causes the death of the victim the offence of murder is committed.

The prosecution bears the burden to prove the accused person's guilt beyond reasonable doubt. The statutory authority for this position is section 187 (1) of the Criminal Procedure and Evidence Code. There are also numerous case authorities covering the topic, amongst them *Woolmington v D.P.P.* [1935] A.C. 462; *Republic v Banda* 5 ALR Mal. 96. *Miller v Minister of Pensions* [1947] 2 All ER 372; *Fallid Mogra v Rep.* Crim. Appeal No. 5 of 2005 (unreported). Put in simple terms, in the trial of a person accused of a criminal offence the trial court may only convict the accused if, upon assessing the evidence of the prosecution before it, the court is satisfied or feels sure that the evidence proves that the accused committed the offence. The burden never shifts to the accused to prove his innocence; it is sufficient for him to raise a reasonable doubt as to his guilt.

The evidence shows that the accused and other persons went to Al Pacino's club on the evening of the material day and soon after their arrival, got involved in some argument. The club's security personnel approached them and asked them to stop arguing. In the course of these interventions a fight ensured between them and the guards, in the course of which one of them snatched a button stick from one of the guards, Bernard Elias, with which he inflicted on him some fatal head injuries.

The prosecution singled out Murald Phillips, the remaining accused, as the person who struck the fatal blow. The evidence of PW2, PW4, PW5 and PW6 has a bearing on this point as these witnesses were to some extent or other eye witnesses to the brawl. As regards the other witnesses, PW1 specifically stated that when the incident occurred he was inside the club building and not where the fight was taking place, PW3 stated that he did not witness the fatal blow because at that material point in time he had run to the police station to report the matter, PW6 was the medical officer who carried out the post-mortem examination, whilst PW7 was a police officer who carried out investigations after the incident.

The defence evidence of the accused amounted to a total denial of the allegation that he was the one who struck the fatal blow. His evidence centred to a large extent on the issue of his identification as the person who struck the fatal blow, alleging it to be erroneous. He singled out, in particular, the lighting at the time of the incident as having been poor, and the fact that no identification parade was conducted. He

further claimed that even during the trial the witnesses who alleged it was him who hit the deceased pointed out at a different person. His contention is that taking into account these factors, in main, the allegation that he is the one who struck the fatal blow is wrong.

The guiding legal principles regarding the reliability of identification evidence are well stated in *R v Turnbull and others* [1977] QB 224, in particular, at pages 228-231, and emphasise the importance of the trial court to warn itself of the special need of caution before convicting on the correctness of identification. This duty, it is stated, arises when it is clear that the case is based wholly or substantially on the identification of the defendant which the defence says was erroneous. The trial court must note that an apparently convincing witness may well be mistaken, and that a number of witnesses could be mistaken too. And if, in the judge's own opinion, the quality of identification is poor, the judge should not rely on that evidence, unless there is other evidence which supports the correctness of the identification. *Mkagula v Kumwenda and another* [1996] MLR 192 is a case in point.

The trial court is further cautioned to take some time to weigh and consider the circumstances in which the identification was made, taking into account, for example, the time of observation, the distance from which the witness observed the incident and persons allegedly involved, the amount and quality of illumination, obstructions, if any, whether the defendant was seen or known by the witness, reasons for remembering the recognition, and any other material factors.

Concerning the desirability of holding an identification parade the Supreme Court of Appeal in *Chimwala v The Republic* [2000–2001] MLR 89 stated as follows:

> "It is to be observed that although dock identification in which a witness makes his or her identification of an accused for the first time only in court is legally admissible, it is generally considered to be a most unsatisfactory method of proof. Indeed, the whole question of visual identification of suspects by witnesses has for many years been acknowledged as problematic and potentially unreliable, considering, among other things, that visual memory may fade with passage of time, and the possibility of a genuine mistake: see *Bentley* (1991) Crim LR 620."

In *Rep v Themba* [1997] 2 MLR 42 the High Court, referring to the principle in *Chimwala* (above), cited the following passage from *Cross on Evidence* 1974 4th Ed at 49, as encompassing the grounds underlying the principle:

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

In *Rep v Sopondo and another* [1997] 1 MLR 470, the court, whilst acknowledging the risk of a miscarriage of justice which convictions based on visual identification carry, made the point that the law is not that no conviction can be had on such evidence but that the requirement of the law is met by a rule that requires a warning as was stated in *Turnbull*. The Supreme Court of Appeal in the case of *Chimwala* (cited above) upheld the conviction of an accused whose identification did not involve an identification parade because the conviction was well grounded on the prosecution evidence.

This court proceeds fully cautioned on the danger in issue.

Reverting to the evidence of the four prosecution witnesses, that is, PW2, PW4, PW5 and PW6, whose direct evidence relates to the identification of the person who struck the deceased on the head, the following is the court's analysis.

PW2, a guard at the club, told this court that he remained some metres away from where the fight was taking place, and that from where he stood he did not have full view of everything that was happening. He conceded that he could have been wrong in singling out the present accused as the person who struck the fatal blow, notwithstanding that he did hold the view that the present accused was that person.

In his assessment, although there were lights all over, they were not very bright. It is the finding of this court, in view of the foregoing, that PW2's observation may not be entirely reliable.

The evidence of PW4 was that the then 1st and 3rd accused (Zain Phillips and Dan Kumilamba) were fighting. The guards, including himself, tried to stop the fight. He got hold of Dan in order to evict him from the premises and that that was when the accused persons turned on the guards, and in the course of that, Murald, the present accused, snatched a button stick and hit the deceased, who immediately collapsed. PW4 said he was right on the spot where this was happening and that the place was lit with electric lights. He said, to an answer in cross examination, that although one could not "see everything on the premises", one was able "to see things around them". He said further that only one person assaulted the deceased on the head and that he was absolutely sure that that person was the present accused, and completely ruled out that it was someone else who assaulted the deceased. When asked to single out from the dock the person who assaulted the deceased, he pointed at the present accused, saying: "it is the man sitting in the middle who assaulted him". Throughout the trial it was the present accused who sat in the middle.

This court observes and notes in particular the open nature of the question put to PW4, which was not in the nature of or akin to "Is that the man?" question contemplated in *Cross on Evidence* (supra) which is in the nature of a leading question and could directly influence a witness to single out a particular accused. This court is of the view and finds that PW4's close proximity to the events in the circumstances described by him enabled him to observe the events with sufficient particularity.

PW5, a customer who witnessed part of the fracas, said he struggled for some moments with Zain, the then first accused, whom he said head-butted him in the mouth, on account of which he left the scene for the washroom to cleanse himself as he was bleeding in the mouth. After that, he said, he headed off the premises to a waiting taxi, and that although he noticed that the accused persons were trying to snatch a baton stick from a guard, he could not identify the specific person who snatched it, as he was concerned more about his injury. Concerning, therefore,

whether or not it was the present accused who hit the deceased on the head, the evidence of PW5 comes to nothing.

The account of PW6, a waitress on duty at the club at the material time, as in the case of PW4, also specifically singled out the present as the person who was struggling with the deceased and who assaulted the deceased with the baton stick. She expressed absolute certainty that it was the present accused who took possession of the guard's baton stick, although she could not tell how he got hold of it, whether, for example, he had picked if from ground or directly snatched it from him. PW6 stated that she already knew Zain and Murald, albeit not by name, and some of their associates of that day. Consequently when she was interviewed by the police about the incident she informed them that they could trace the accused through Farid Bakali and Sameer, whom she knew by name, and who were at the club on the night in question. This fact is confirmed by the evidence of the police investigator (PW7) who informed the court that before summoning the accused, he summoned two other people, Farid and Sameer, for questioning about the incident as he had been informed that the two had been at the club during that evening, and had been singled out by the waitress (PW6) as having taken part in trying to end the fight, and further that Farid knew the accused even by their names. It turns out that it was indeed through this connection that the accused were traced and arrested. In the light of the foregoing, this court finds the evidence of PW6 as to the identity of the present accused, in and outside court, to be reliable.

PW7, admitted that no identification parade of the accused was carried out. He admitted during cross examination that the witnesses who singled out one accused as the one who assaulted the deceased could be wrong. When asked what the purpose of an identification parade was, PW7 said it was for identifying the author of a crime, but went on to say that in this case it was not necessary because there were eye witnesses who came to identify the suspects because they grew up together.

The present accused confirmed, in his evidence, being present during the brawl, but denied assaulting the deceased. His evidence in chief, in a nutshell, was that he picked a quarrel with Dan concerning an argument Dan had earlier had with the present accused's cousin. As a result, he stated, Dan agitated for a fight with him, and this led to people gathering at the scene. He stated that security personnel were

called to duty and in the pandemonium he was hit on the head and fell to the ground, and became unconscious, and later on visited Queen Elizabeth Central Hospital. In his caution statement to the police, however, the present accused narrated a different version as to what happened. That statement was made only a few days from the incident. In it he stated that as they were chatting as group at the club a person unknown to them told the guards to evict them from the premises. The guards immediately started to push one of his relatives out of the premises. When he followed to inquire why they were evicting his brother the guards hit him on the head with a baton stick. Whereas in the caution statement he was specific that it was one of the guards who hit him in the head, in his evidence in court he said he could not tell who hit him as the lighting was poor and there were too many people for him to notice the person who hit him.

The accused placed before this court what purported to be a medical report evidencing his claim that he had received hospital treatment, but later withdrew it on the ground that its author would not be available on the dates the trial was set down for the defence case. There is therefore no evidence of his claim that he was treated for head injuries sustained during the brawl, or indeed that her sustained such injuries. It is pertinent to observe that the alleged medical report is of doubtful authenticity for the reason that it bore what purported to be a stamp from the paediatric section, whereas the 2nd defence witness, Zain Phillips, told the court that he and Almateen took Murad to the emergency section of the hospital. It was well, perhaps, that the accused withdrew the document.

The 2nd defence witness, Zain Phillips, relied on a recorded statement as his evidence in chief, which contained much the same information as that of Murald Phillips. In his oral testimony in chief he said that Murald was hit in the head and fell to the ground. He said that did not know who hit him because it was dark and the lighting was not good. Under cross examination he disclosed that the statement he relied upon was prepared by defence counsel and he only signed it without knowing what he was signing for. The statement did not therefore contain what he knew about the incident but what defence counsel wanted him to tell this court.

Defence counsel must be and are hereby condemned and admonished for the unprofessional conduct of manufacturing evidence for, and spoon feeding witnesses.

In his caution statement to the police Zain, the 2nd defence witness, stated that on the material day he went to Al Pacino to drink and whilst there he saw a big group of people arguing outside. Soon thereafter he and his friends boarded his vehicle and left the place. Then a few days later he was summoned to the police. He did not mention in the caution statement either the fact that there was a confrontation between his group and the guards nor indeed that Murald was hit on the head to the point of unconsciousness and taken to hospital. He affirmed during cross examination that he was not aware that Murald was hit in the head by the guards. The impression on this court is that what he said in his oral testimony was intended to create, firstly, the impression that Murald could not have assaulted the deceased because he had been knocked unconscious, and, secondly, that the lighting was so poor that the person who allegedly assaulted the deceased was unidentifiable in the circumstances. Considering, however, his statement to the police that upon seeing the big group of people arguing outside, he soon thereafter boarded his vehicle and left the place, coupled with the fact that his evidence in chief was manufactured by defence counsel, he could not be in a position to testify as to what transpired thereafter.

The accused alleged that prosecution witnesses were coached because there was no identification parade. That issue has already been dealt with in this judgment. He also said that the person they identified in court was in fact his brother Zain because he was the one who was sitting in the middle, that they had exchanged positions, a matter the court has also tackled. This court is absolutely certain that it was Murad who sat in the middle throughout the trial, save only to the point just after the accused took plea. The court specifically ordered the accused to sit in the order their names appeared on the court documents, with the result that the present accused, then being the 2nd accused, thereafter always took the middle position.

The accused told the court during cross examination that he had problems with his memory, and that he suffered from dementia. He said, during the cross examination, that he did not remember that one of the guards was assaulted, or that one of the guards wanted to assault one of his friends, or that the guards wanted to stop a fight. Despite his earlier assertion that he was hit to the point of unconsciousness, he said, during the cross examination that Zain was hit in the head by somebody he could not identify. He never mentioned these matters both in his evidence in chief and his

caution statement. This either confirms that the accused falsely claimed to have been unconscious or that indeed his memory fails. Either way it renders the totality of his evidence unreliable for being inconsistent and/or illogical.

It is evident that prosecution does not rely on matters of resemblance between some person and the present accused. This case does not on the facts fall within the category described in *Cross on Evidence* where the police hunt for a suspect, brings him to court and ask 'Is that the man?' and the witness believes the police have brought the right person, nor is it one where the accused was earlier described to the witness. This is a case where, among others things, the particulars of a suspect are relayed by a witness (the waitress) who is certain as to who the suspect is and how he can be found, and when he is found admits to have been present and active in the incident resulting in the crime. Equally importantly, it is to be observed that the witness in question, the waitress, all along knew and recognised the accused, hence her being able to direct the police as to how to find them, and to finally confirm him as the person he observed from close range assaulting the deceased, singling him out of from a group.

It is also the case where the evidence shows (PW4), that the lighting was such that the closer one was, the better the visibility. PW4, as did PW6, the waitress, observed the events from close range. There was no evidence of any obstructions. This court is mindful of the evidence of PW2 that the lights, which were all over, were not very bright. But being not very bright does not mean being inadequately bright. And they being security lights it is more probable than not that their purpose was to provide sufficient illumination albeit at rather short distance. This court therefore finds that from where PW4 and PW6 observed the events it was possible to sufficiently identify other people.

The record of the trial will show that these witnesses testified within four months after the incident took place and in the view of this court the visual memory of the witnesses was still fresh. They could therefore recall the incident with reasonable clarity and veracity. It is the view of this court that notwithstanding the failure to conduct an identification parade PW4 and PW6 reliably singled out the present accused, as the person who struck the deceased on the head.

The evidence of the post mortem examination shows that the cause of death was "severe head injury with extensive skull fracture". This is injury of a serious nature. "Grievous harm", earlier on mentioned as one of the elements of the crime of murder simply means serious harm. The harm described in the post mortem report is no doubt, grievous or serious in nature. In *Mbaila v Republic* 4 ALR Mal 446 the principle was stated that a person is presumed to intend the natural and probable consequences of his or her actions. In the case at hand it is this court's position that the natural and probable result of the accused striking the deceased with such force as to extensively fracture the deceased's skull was, in the least, to cause grievous harm, and not unsurprising that death resulted. It is therefore the finding of this court that the malice aforethought in murder being "the realisation that one's conduct may cause the death of a human being" has been established beyond reasonable doubt. The burden of proof has accordingly been discharged to the requisite standard. This court therefore finds the accused, Murald Phillips, guilty of the offence of murder contrary to section 209 of the Penal Code, and convicts for the said offence.

The accused, being hitherto presumed innocent, has been on bail. Having found the accused guilty the court hereby revokes his bail and orders that he shall be taken into custody pending sentence.

Pronounced in open court at Blantyre this 13th day of June 2018.

R Mbvundula
JUDGE