

**REPUBLIC OF MALAWI**



**IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT  
MULUNGUZI  
CRIMINAL CASE NUMBER 118 OF 2021**

**THE STATE**

**V**

**JACK LUSEWA**

**AND**

**STEVEN PAHUWA**

**Coram: Michongwe R. S., Senior Resident Magistrate**

Makiyi and Chigawa for the State

Twea and Makanje for the Accused

Singo, Court Clerk/Official interpreter

Alima, Marshal

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**Ruling**

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## **1. Introduction**

**1.1.**In this matter, the accused persons are Steven Pahuwa, 28 years old and Jack Lusewa, 39 years old. They are appearing before this court charged with three counts of Murder contrary to section 209 of the Penal Code.

**1.2.**In the first count, the State is alleging that

*Steven Pahuwa and Jack Lusewa on the 13th day of February, 2021 at Lingoni Fishing Dock in Lake Chirwa in the District of Zomba with malice aforethought caused the death of Leonard Chitimbe.*

**1.3.**In the second count, the State is alleging that

*Steven Pahuwa and Jack Lusewa at the same time and place as stated in first count with malice aforethought caused the death of Lameck Chatha.*

**1.4.**In the third count, the State is alleging that

*Steven Pahuwa and Jack Lusewa at the same time and place as stated in first count with malice aforethought caused the death of Charles Ligomba.*

**1.5.**Both accused persons appeared before this court and all the three charges were duly read and explained to each one of them. **Since this court has no jurisdiction over murder cases, both accused persons did not take a plea.**

**1.6.**The State applied for the preliminary enquiry under section 263 of the Criminal Procedure and Evidence Code so that this court establishes whether the accused persons must be committed to the High Court for trial or not.

## **2. Background.**

**2.1.**As required under Part VIII of the Criminal Procedure and Evidence Code, on the committal of the accused persons for trial before the High Court, the Court granted the application on preliminary enquiry since it has jurisdiction under this part.

### **2.2.The Prosecution's case**

**2.3.**The first to testify was the Officer in charge at Kachulu police Unit. He told the court that the fisheries department approached the Unit looking for police officers on their mission to inspect or patrol the lake which is in its off season. Every year, the lake is on off season from 1 December to 1 March. During this time any fishing activity is prohibited. The police help to enforce this ban yearly. It is a lawful activity discharged by police officers. There are legally instituted Beach Village Committees (BVCs) to enforce this ban. The police help these BVCs with security of its members. Two police officers, now the accused persons, were authorised by the

Officer in Charge (OC) of the Kachulu Police Unit to go on this patrol. The OC issued two rifles, one for each officer. One was K2C and the other one was Mark 4. He issued these rifles for their protection with the BVC group members. They left at 8pm. On the following day, at around 8am the OC was informed by the 2<sup>nd</sup> accused persons that they were attacked by the notorious fishermen in the lake and that they were looking for more manpower to beef up them. The Kachulu Police Unit failed doing this due to the faulty police boat they have and that at the Unit, there are insufficient manpower against the policing area. The 2<sup>nd</sup> accused person called the OC again at around 9am informing him that the fracas was severe and that bullets were released. The OC referred the matter to Zomba Police Station. Nothing happened to go and rescue the officers. At around 11am, the OC heard that 3 men were severely injured. Around 12 noon, three dead bodies were brought to the Unit by the community. Inquiries were made on whether the two officers on duty, the accused persons herein, were safe and they confirmed that they were hiding somewhere with the members of the BVC. The dead bodies were taken to Zomba Central Hospital for postmortem. The officers were later rescued at around 3pm. He told the court that his experience is that during off season, fishermen resist the intervention of police officers in patrols. When they see police officers, they severely harass them. The two accused persons went there on duty to discharge police business that they were employed for. What they did was what they were employed for. They did what they did, for their own safety and protection. The OC further said that he authorised them to use the rifles when and where necessary. He told the court that he could have done the same in the situation of the accused officers to disperse the illegal angry and notorious fishermen in order to disable them and effect an arrest. What the officers did are the standard operating procedures and any officer could act in that way. He signed for his statements before the court.

**2.4.**The second witness was a BVC member. He told the court that BVCs were established to protect the fish in the lake during off seasons. He confirmed to have hired police officers to help them in the enforcement of the ban because fishermen are dangerous people during this period. The two officers, the accused persons accompanied them. They did not use engine boats but paddling boats. They patrolled the whole night from Chisi Island to Lingoni and in the morning of the following day it is when this incident took place. It was around 6am when they arrived at Lingoni. They found fishermen fishing and they confiscated their fishing nets. When they proceeded, they met other fishermen at the other Chimbowela, fishing illegally.

They found many people there. Others were coming to join their friends upon seeing that who came were the BVC. The people started shouting at them saying BVC yanuyi yatha lero bola ngati mwasanzika kwa azikazanu. They started taking spears, pangas and stones. The group enclosed or surrounded them and they were overpowered. They were throwing stones and glowing firewood. The first accused person fired the rifle in the air to scare them. People shouted, chaombedwacho ndi Kombola sichingaphe munthu. Zipolopolo zathamo zimakhalamo folo (4) basi”. Then he shot again on the boat. The fishermen were still approaching this enforcement group. The witness told this court that if it were not for the gun shot, the group could have perished. After this gun shot, people were scared and started running away. The 1<sup>st</sup> accused person got injured in the process by the thrown stones. The witness signed for his statements.

**2.5.**The third witness, was a fisherman who is again a member of the BVC. He told the court that he was among the enforcing group on that day and that they were nine in total. His evidence was similar to the second witness. The witness signed for his statements.

**2.6.**The fourth witness was one of the illegal fisherman who also lost his son in the fracas. He told the court that there were about 25 boats at that chimbowera. Each boat had 5 or 6 people and there were approximately 150 plus people. They went to the lake for the illegal fishing. They met the BVC. He confirmed to know the months of off season. He also confirmed that they know that the BVC exists to enforce the ban and that they are accompanied by the fisheries and police personnel. He confirmed that he knew that what he was doing was illegal. He said he started negotiating with the BVC and in no time he heard from his son “bambo ndafa.” His son was shot. He tried to take him to hospital but he died on the way. He told the court that it was one officer who used the rifle. Other two persons also died. He told the court that there must be a reason why the police officers used the rifles since they could not use it anyhow. He said in his experience officers do not use rifles anyhow. The witness signed for his statements.

**2.7.**The fifth witness was also an illegal fisherman. He confirmed of the period of off season. He had fishing net at that chimbowera. The enforcers approached them and in no time he heard a gunshot. He said he saw two people being shot and the two died. He said he could not recognize who opened the firearm. He said he heard the gunshots six times. He said he was at the mbowera in a large group. He told the court that non took spears, pedals or stones. They did not attack the enforcing group. If

they had done so, the enforcing group could have been overpowered. He said that there is always resistance of the fishermen during off season. Although they know why the lake is on off season, the go ahead fishing due to poverty and fishermen feel interrupted when the police and the fisheries follow them in the lake. The witness signed for his statements.

**2.8.**The last witness was the investigator of the case. He tendered in court the postmortem reports and the caution statements. He told the court that he did not charge the accused persons with murder because their conduct did not amount to murder. They were within their duties in the circumstances.

### **3. Defence**

**3.1.**In defence, counsel for the accused waved the right to defend the accused persons and applied to the court that it must use the evidence on record in making its ruling. The court granted the application by counsel for the accused persons.

### **4. Issue to be decided by this court**

**4.1.**This court is tasked to determine whether the evidence presented by the prosecution is sufficient to warrant the committal of the accused persons for trial to the High Court on a charge of Murder contrary to section 209 of the Penal Code.

### **5. The Applicable Law.**

**5.1.**The court would wish to state that it will use only the legally relevant facts and the prescriptions of the law in this ruling (***Section 9 of the Constitution***). The ruling will be dictated by the analysis of the facts and the law of preliminary inquiry. The court would wish to acknowledge the good work that was done in the submissions by counsel for the accused persons and the arguments by the State. The court has used the arguments from both parties in coming up with this ruling.

**5.2.****Section 263** of the Criminal Procedure and Evidence Code provides:

*“whenever a charge has been brought against a person of an offence not triable by a subordinate court or as to which the subordinate court is of the opinion that it is not suitable to be dispose of upon summary trial, a preliminary inquiry shall be held according to the provisions hereinafter contained by a subordinate court:*

*Provided that no such preliminary inquiry shall be held in any case where the certificate of the Director of Public Prosecutions is produced to a subordinate court in accordance with part IX.”*

5.3. Section 268 of the Criminal Procedure and Evidence Code also states that:

*If, after examination of the witnesses called on behalf of the prosecution, the court considers that on the evidence as it stands there **are sufficient grounds for committing the accused for trial, the magistrate shall frame a charge under his hand declaring with what offence or offences the accused is charged and shall read the charge to the accused and explain the nature thereof to him in simple language...***

5.4. Section 270 (1) of the Criminal Procedure and Evidence Code further stipulates that:

*“If, at the close of the case for the prosecution or after hearing any evidence in defence, the court considers that the evidence against the **accused is not sufficient to put him on his trial the Court shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts.**”*

5.5. Section 271 of the Criminal Procedure and Evidence Code stipulates that:

*If, at the close of the case for prosecution or hearing any evidence in defence, **the court considers the evidence sufficient to put the accused on trial, the court shall commit him for trial to the High Court ...***

5.6. The Supreme Court of California in **People v Elliot** 54 Cal 2d 498 (1960) and citing **Jaffe v Stone** (1941) 18 Cal 2d 146,150, the court said:

*“The preliminary examination is not merely a pre-trial hearing. **the purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offences, and to relieve the accused of the degradation and the expense of criminal trial. Many unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.**”*

5.6. Awich J in **Regina v Kelly** 1996 SBHC 31 had this to say about the role of the Magistrate in a preliminary inquiry:

*A fundamental principle in English common law system is that at trial on a charge of a felony, generally the more serious the offences, the accused must be made to know the serious charge against him and the facts upon which the charge is based, well before trial ... that advance knowledge is conveyed to him in proceedings known as preliminary inquiry. It might take the form of calling evidence in Magistrate Courts and having the accused cross-examine the witness or simply reading depositions and giving copies to the accused. **The Magistrate is required to protect the Accused by discharging him if the magistrate does not find sufficient evidence upon which to commit the accused to the High Court on the serious charge for trial there. That process protects the accused from baseless serious charges.***

5.7. The High Court of Australia in **Barton v The Queen** [1980] HCA 48, the joint judgement of Gibbs and Mason JJ stated as follows:

*‘Lord Devlin in the Criminal Prosecution in England was able to describe committal proceedings as “an essential safeguard against wanton and misconceived prosecutions” ... This comment reflects the nature of proceedings and the protection which they give the accused.’*

5.8. The Supreme Court of California in **People v Uhlemann** 8 Cal 3d 348, 105 (1972) the Court discussed the test to be applied as follows:

*“The jury must be convinced to a moral certainty and beyond a reasonable doubt of the existence of the crime charged in the information and of every essential element of that crime. **But a magistrate conducting a preliminary examination must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused ... in other words evidence that will justify a prosecution need not be sufficient to support a conviction.**” Moreover, it is clear that it is the responsibility of a committing magistrate to weigh the evidence, resolve the conflicts and give or withhold credence to a particular witness ...”*

5.9. It was further held in **Uhlemann** case that:

*“Nevertheless, occasions will arise when the evidence before the Magistrate points convincingly to the conclusion that the charges against*

*the defendant are totally groundless and should be dismissed without prejudice.”*

5.10. My brother magistrate His Worship Pemba, as he was then, in the **Republic v John Nkumbira** Criminal Case Number 83 of 2017, making a ruling on a preliminary inquiry, **which I am not bound to his ruling**, said:

*“In view of this, this court is in agreement with Defense Counsel, and is of the view that Manslaughter is a very serious offence and the facts don’t reveal such a serious offence. The state therefore clearly overcharged the accused at the expense of a more fitting charge under our laws, thus rendering the prosecution a quintessential instance of wanton and misconceived prosecution proper to be remedied by the Court.”*

## 6. Murder

6.1. Section 209 of the Penal Code provides:

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

6.2. Per Section 212 of the Penal Code **malice aforethought** is deemed established in the following circumstances:

- a) *“An **intention** to cause death of or to do grievous bodily harm to any person, whether such person is the person 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 actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or a wish that it may not be caused.”*
- c) *An **intent** to commit a felon.*

6.3. 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 cannot 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.”*

**6.4.**In the case of **Republic v Salivasio and Another** (Homicide Cause No 127 of 2011)

[2018] MWHC (Malawilii) Kalembera J held as follows

*“In order for the state to prove its case against the accused persons, it must therefore be established that **the accused person had the requisite intention to cause the death of the deceased or to do him grievous harm.** This can be established by direct or indirect evidence (circumstantial evidence).”* See **Shaba v Republic** ((MSCA Criminal Appeal 12 of 2002)) [2003] MWSC 1

**6.5.**Per Justice R. Mbvundula, in **Republic v Phillips** (Criminal Case No 49 of 20212)

[2018] MWHC 725 (Malawilii)

*“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 the*

*omission of the accused, and that the accused ought reasonably to have appreciated that such result might occur. Once that mental element is completed by the unlawful act or omission which effectively causes the death of the victim the offence is committed.”*

6.6. Mzikamanda J, in **Republic v Kefa** (68 of 2008) [2009] MWHC 48 (Malawili) said as follows:

*“The charge against the accused is that he by an unlawful act or omission caused the death of Mkhutamadzi. The duty placed on the prosecution therefore was to establish that; (i) the accused caused the death of Peter Mkhutamadzi and that (ii) the accused caused the said death by an unlawful act or omission*

6.7. Most on point and relevant to the foregoing is **Republic v Cheuka and others** (Criminal Case Number 73 of 2008) [2009] MWHC 49 where the same Mzikamanda J said:

*“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 the firearm .... 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 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 ...”*

6.8. Later in the judgement his Lordship held that:

*“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 defense of another against imminent threat of death or serious injury at the hands of Yusufu Abdullah.”*

## **7. The analysis of the facts and the law before this court**

7.1. The following facts are not in dispute, that is:

- a. That the accused persons were at all material times police officers.

- b. That on the 12<sup>th</sup> and 13<sup>th</sup> of February 2021 the accused persons were on official police business assigned to them by their OC, and to discharge this assignment, they were given fire arms.
- c. In terms of section 30 of the Police Act the accused persons are permitted to use their firearms provided the situation should be deemed to warrant such use.
- d. The 1<sup>st</sup> accused person fired his gun and as a consequence three (3) lives were lost.
- e. For the avoidance of doubt, the 2<sup>nd</sup> accused person did not fire his gun, although he had one. The firearm developed a fault that he could not use it. He did not cause death of the three lives that were lost.

## 7.2. What is in dispute?

7.3. What is in dispute is whether, the 1<sup>st</sup> accused person in firing his weapon:

- a. The accused persons and members of the BVC were under attack from the illegal fishermen.
- b. The 1<sup>st</sup> accused person did so with malice aforethought.
- c. It was an unlawful act.

7.4. The **third question** is easy to answer, in that the firing could not have been unlawful as the same was authorised under section 30 of the Police Act **albeit advisedly**. The accused persons were on a lawful mission as it was during off season of the lake. They were enforcing a lawful ban. They were hired lawfully. They were lawfully ordered to discharge their lawful duties by the OC. The firearms were duly issued by the OC. They did not steal them at all.

7.5. As to the **first question**, six (6) witnesses testified in this inquiry. Of the six, PW1, 2 and 3 told the Court unequivocally that the accused persons and the BVC members were under attack this was an *imminent threat of death or serious injury*. PW2 told the Court that if it were not for the 1<sup>st</sup> accused person firing his weapon the accused persons and the BVC members could have been killed.

7.6. PW 1 further told the Court that officers are usually attacked on lake patrol missions and sometimes they are thrown over-board and fishermen confiscate their guns. On the other hand, PW5, who was with the fishermen, testified that on the material day the presence of the BVC and the police trying to enforce the ban did not go down well with the fishermen.

7.7. The court also heard the evidence of PW4 and PW5. These witnesses were evasive.

They did not tell the court the truth. Their demeanor could also testify to the same. For example, PW4 told this Court that they were on the “*chimbowela*” and not in their boats and that Lameck Chatha was shot whilst on the said “*Chimbowela*” and not the boat. This is in contradiction to the evidence of PW 5 who told the court that Lameck was shot in the ribs whilst in the boat seated. Further, PW 5 in his testimony testified that there were some warning shots fired by the 1<sup>st</sup> accused person but during cross examination PW 5 said there were no warning shots. PW4 said he was negotiating with the accused persons and suddenly he heard his son shouting ‘bambo ndafa’. One tends to wonder who then shot his son when he was with the accused persons at the same place negotiating. He told the court that he did not see who triggered the button. These are the accused persons who were busy negotiating with him. PW5 said he heard six gunshots. He was there when the accused persons were negotiating with PW4. He said he did not see any of the accused persons who opened the firearm. This is not true. PW 4 and PW 5 were not telling the court what actually happened but were crafting a new narrative to fit an agenda.

7.8. In the circumstances, it is the view of this court that the shooting was warranted in terms of section 30 of the Police Act and as applied in **R v Kefa and others** and the testimony of PW1, PW2 and PW6 was to that effect. The 1<sup>st</sup> accused person fired his firearm in self-defense and in defense of others in the face of real and imminent threat of their own deaths or serious injury which is a lawful act. These illegal fishermen were armed with pangas, spears, stones and glowing firewood. These illegal fishermen have not been happy with the off season arrangements of the lake. These illegal fishermen had plans that were existing and this day, they wanted to execute the said plans. These fishermen were about 150 plus against 9 enforcement officers of which there were only 2 police officers with one operating firearm. The court believes that in the circumstances they were, the firearms could not be for fun or for decorative purposes. The firearms were meant to protect them and the whole group. This is exactly what the 1<sup>st</sup> accused person did. Imagine the firearm of the 1<sup>st</sup> accused person had developed a fault again. They and the other members of the group would have indeed perished at that chimbowera. The accused persons before releasing the bullets, they had to inform their superiors, the OC for a rescue. There was no instant response. They could not have waited for the OC or any other superiors to come and rescue them. They had to rescue themselves. But they were two against 150 plus illegal and dangerous fishermen and these are fishermen who

knew that what they were doing was illegal and that they are not happy with the police and the BVC. They were ready more than the police officers. It was on a chimbowera far from the mainland. They were using a paddling boat. The accused persons' only rescuing mechanism was to scare them first, which they did by shooting in the air, disable the boats, which they did by shooting the boats so that the crowd should be busy with the water in the boat. But all this failed. The only last resort to rescue themselves and the members of the BVC was to disable some members. What else could they have done in this scenario? It is unfortunate that by doing so, some lives were lost. It is the view of this court that the 1<sup>st</sup> accused person followed the dictates of section 30 of the Police Act.

**7.9.** On the **second question** as to whether the 1<sup>st</sup> accused person had the requisite mental element, that is, the intention to kill or cause grievous bodily harm, the evidence presented shows that the 1<sup>st</sup> accused person, as a matter of fact, had no such intentions. The 1<sup>st</sup> accused person reasoned with the illegal fishermen, he fired in the air to disperse the illegal fishermen, then he shot at the boats intending to disable the boats so that they could not be used to complete the attacks that were already under way. The illegal fishermen surrounded the accused persons with offensive weapon, that is, the pangas, spears, stones and glowing firewood. The fracas was severe. The 1<sup>st</sup> accused person showed the court scars of his injuries in the process.

**7.10.** The 1<sup>st</sup> accused person acted in self defence and the defence of the other members. They were overpowered and not that they intended to kill or cause grievous bodily harm. If they had intended so, the 1<sup>st</sup> accused persons would not have engaged them in the negotiations as confirmed by PW4 and PW5. He could not have fired in the air. He could not have shot the boat. He could have directly shot the illegal fishermen. This is why the enforcement group learnt about the death of the three while they were in hiding. This is why, they had to call the OC notifying him that the situation was tense. Any reasonable court would not find the 1<sup>st</sup> accused person having the intention or indeed malice aforethought as required under section 209 of the Penal Code. Section 212 of the Penal Code is not met based of the facts on record.

**7.11.** Nevertheless, this court wants to make some observations on how the whole issue was responded to by the police. The Officer in charge at Kachulu police Unit, the Zomba Police Station, the Eastern Regional Police and the police at large might

be faulted on how they responded to this incident. The evidence of the OC and the members of the BVC and also the illegal fishermen is to the effect that people resist yearly to the ban and incidences of severe harassments occurs on police officers. This is well known to the authorities of Zomba Police Station, Eastern Region Police and Police Service at large. Sending two officers in such an area was dangerous and this warranted them to use such excessive force when they were under this attack. The officers would have lost their lives. The right to life is not only to the protected ones. The protector has this right too. The two accused persons here had and have this right. It does not mean that because they are police officers, they do away with this right and focuses on the right to life of the protected only. They are human beings with rights as well. They can discharge professionally their duties only if they are safe and protected. The foreseeability of risk should be taken into account by the authorities when deploying officers in risk areas. The accused officers were rescued at 3pm when the incident was reported at around 8am. No response at all in almost seven hours. This is recklessness and negligence on the part of the employer. The boat the accused persons used was not an engine one. The fishermen had engine boats. How could they run away from this danger or risk with such boats? The OC knew about this and went ahead issuing the order knowing that the accused persons will have to comply with it. This was a disregard of the officers lives and abuse of his powers to make orders. Such orders put officers at a risk just like in this scenario. Unfortunately, officers cannot defy the orders from their superiors for fear of imminent dismissal or unwarranted transfers but the fact on the ground remains they are put in a risk situation that requires their protection. The police service, at all levels, can do better with such unreasonable orders that risks the lives of its own trusted employees. Orders from above must be reasonable. Orders from above must respect the rights of officers. They are human beings just like the one making the orders. This does not mean in any way that orders are bad, but they must be reasonable, practical and that considers the rights of the officers.

## **8. Determination**

**8.1.** This court finds that the 2<sup>nd</sup> accused person did not in any way use his rifle to cause the death of the three deceased persons. He therefore, has no offence requiring this court to commit him to the High Court.

**8.2.** This court finds that the 1<sup>st</sup> accused person indeed used his rifle excessively. He caused the death of the three deceased illegal fishermen. He used it to protect

himself, 2<sup>nd</sup> accused person and the members of the BVC from the *imminent attack, threat of death and or serious injury* from about 150 plus illegal, dangerous and notorious fishermen armed with pangas, spears, stones and glowing firewood. The rifle of the 2<sup>nd</sup> accused person developed a fault and his rifle was the only one to be used. He had no intention or malice aforethought to kill. He had no knowledge that his act would cause death or grievous harm. He had no intent to commit a felony. He had engaged in discussions or negotiations first with these illegal fishermen and then he warned the group by shooting in the air and on the boat. All this did not work out. The court is of the view that the 1<sup>st</sup> accused person's conduct was within the law in the circumstances they were in. It was more reasonable to protect themselves than waiting for a nonresponsive police officer they notified. The state therefore overcharged the accused persons at **the expense of more fitting charges under our laws**, thus rendering the prosecution a quintessential instance of wanton and misconceived prosecution proper to be remedied by the Court in this preliminary inquiry.

**8.3.**In light of the foregoing, there is no evidence or grounds to put the accused persons to trial before the High Court. I therefore, discharge the two accused persons on the charge of murder as required by section 270 of the Criminal Procedure and Evidence Code. The accused persons can be charged with other fitting charges under our laws.

**8.4.**Any aggrieved party has a right to appeal before the High Court on this decision within 30 days from date of pronouncement.

**Made in Open Court, this 4<sup>th</sup> March 2021**

**RHODRICK STEPHEN MICHONGWE**

**SENIOR RESIDENT MAGISTRATE**