IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL APPEAL CASE NO. 31 OF 1998

PATRICK MLASHI

DUMISANI MBULUMA

GLORIA BANDA

EMMANUEL MBISA

FLORENCE KAPESI

AND

MALINGAMOYO MWANYAMA

VERSUS

REPUBLIC

In the First Grade Magistrate Court sitting at Balaka Criminal case No. 111 of 1997

CORAM: MWAUNGULU, J.

Mpando, Legal Practitioner, for the Appellants

Manyungwa, Principal State Advocate, for the Respondent

Ngwata, the Official Interpreter

Chamangwana, the Recording Officer

MWAUNGULU, J.

JUDGMENT

This is an appeal from the decision of the First Grade Magistrate sitting at Balaka. That Court, at the end of the prosecution case, ruled that there was a case to answer against the five appellants. The appellants, Patrick Mlashi, Dumisani Mbuluma, Gloria Banda, Emmanuel Mbisa, Florence Kapesi and Malingamoyo Mwanyama, were charged in that

court with the offences of malicious damage and common assault. These are offences contrary, respectively, to sections 344(1) and 253 of the Penal code. The appeal is against the order of that court to the effect that the appellants have a case to answer.

I think it is unnecessary to go into the detailed arguments put by counsel for the appellants and counsel for the respondents in view of the course I want to pursue in the matter. It may be necessary to do so only if the matter should proceed to the Supreme Court. If it did proceed to the Supreme Court, I would then be required to determine the question whether there was a prima facie case before the court below. It is hoped the Supreme Court would proceed under section 16(d) of the Supreme Court of Appeal Act.

It is important here to decide whether there is jurisdiction for this court to entertain the appeal. I have to decide whether an appeal does lie against the order of a trial court that there is a case to answer against the prisoner. This matter never crossed counsels' mind. It certainly did not cross the mind of the Supreme Court in Katuli v. Republic, (1990) MSCA Crim. App.No. 7. Then the Supreme Court was dealing with an appeal from the decision of this court dismissing the appellant's appeal to the High Court against a lower court's decision that the appellant had a case to answer. The High court could dismiss such an appeal summarily under section 351 of the Criminal Procedure and Evidence Code. Since the appeal from the subordinate court was dismissed summarily, the reasons for the decision can only be conjecture. It could very well be that the High court thought on the merits the appeal was vexatious or frivolous or raised no sufficient grounds to enable the appeal to succeed. It could very well have been for the reason that I have to consider here whether the appeal was competent. The Supreme Court assumed, I think, that there was jurisdiction to entertain the appeal in the High Court in the first place.

The Supreme Court has had to deal with the matter in relation to its own jurisdiction. The earliest decision is Abraham v. R, (1968-70) 5 ALR (M) 187. It was decided then that the Director of Public Prosecutions right to appeal against any criminal matter from the High Court is limited to a final order or final judgment. The latest decision being Chihana v. Republic, MSCA, Crim. App. Ca. No. 7 of 1992. Then Chatsika, J.A., delivering the judgment of that Court, relied on the English case of Jefferies v. R, [1969] 1 Q.B. 120. Section 11 of the Supreme Court of Appeal Act, much like section 246(1) Of the Criminal Procedure and Evidence Code, does not refer to interlocutory appeals in criminal proceedings. This is much like the provision in relation to the Court of Appeal in England that attracted this remark from Lord Justice Widgery, C.J., in Re Central Funds Costs Order, [1975] 1 WLR 1227, 1232: "... it was held that this court had an inherent power to deal with interlocutory appeals of this kind. The Act of 1968 does not refer to such interlocutory appeals. Therefore, there is no power to conduct them." More condign are the remarks of Lord Denning, M.R., in R. v. Smith(Martin), [1974] 2 ALR 495, 499:

"He can appeal after he is convicted, but not before. It seems that there is no appeal against an interlocutory order: see Reg. v. Collins, [1970] 1 QB 710. This may, at first sight, seem surprising, but on consideration there is much to be said for it. The trial judge should have the final word on such matters as adjournments, joint or several trials, bail, particulars, and so forth. The only remedy is this: in case the trial judge should make a mistake on an interlocutory matter, such as to cause injustice, a man can appeal against

his conviction and it will be taken into account at that stage ... But save in this way, there is no appeal to the Court of Appeal against an interlocutory order."

In the Chihana case Chatsika, J.A., said:

"It is clear from the section that an appeal from the High Court in its original jurisdiction may only be made to this court against a final judgment of that court. In order for this court to have jurisdiction to hear the appeal ... we must be satisfied that it is against the final judgment of that court. ... Having regard to section 11(1) of the Supreme Court Act, this court would have no jurisdiction to hear an appeal based on such matters which are interlocutory."

The appellate jurisdiction of this Court is not original jurisdiction. The History of this Court has been that it has always had unlimited original jurisdiction. That jurisdiction confers on it inherent powers for the proper exercise of its judicial power. The appellate jurisdiction, however, is statutory. In relation to criminal matters, the jurisdiction is derived from the Courts Act. Section 18 of the Act provides:

"The appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts, according to the law for the time being in force relating to criminal procedure and such other appellate criminal jurisdiction as may have been or may be conferred upon the High Court by any other law."

In exercise of its appellate jurisdiction, this Court is to act "according to the law for the time being in force relating to criminal procedure." One such law is the Criminal Procedure and Evidence Code. The right to appeal is in section 346(1) of the Code:

"Save as hereinafter provided, any person aggrieved by any final judgment or order, or any sentence made or passed by any subordinate court may appeal to the High Court."

The import of the provision is that no appeal lies to this court for orders that are not final (Advanx(Blantyre) Limited v. Republic, [1981-83] 10 MLR 193; Thawi v. Republic, [1981-83] 10 MLR 260).

The question that arises is whether an order under section 254 is final?

There is, I think, only one instance when such a decision is final. This is when the Court has decided that there is no case to answer. The effect of such an order is that the proceedings end. A right of appeal arises then for the Director of Public Prosecutions and the defendant touching any orders that accompany such a decision. The situation is very different when the Court decides that there is a case to answer. The proceedings have not come to an end. The defendant may, if he chooses, lead evidence in his defence. The Court however is not functus officio. The Court has not finished with the matter yet. In that sense, it cannot be said that there is a final order, let alone a final judgment.

Many things could happen after the court has ruled that there is a case to answer. The defendant could exercise his right to silence under the Constitution (The Director of Public Prosecutions v. Tembo and others,(1995) MSCA Cr. App. No. 21). The court has to decide on the evidence, without evidence from the defence, whether the case has been established against the defendant beyond reasonable doubt. The defendant could nonetheless lead evidence in his defence. The court again has to be satisfied beyond

reasonable doubt that the defendant is guilty of the offence. The difficult scenario is where the court rules that there is a case to answer where there is none.

The decision of no case to answer has legal consequences. If there is no such case there is no requirement that the defendant proceed with his defence. The court need not waste its time nor the defence expend its energies in the hope that case could be made out by the defendant. That would run counter to the notion against self-incrimination. There is therefore room for the thought that then the defendant should be allowed to go to the next court if there is a perception that the decision on the matter is wrong. The logical objection to that is that many cases would have to pend at first instances while defendants pursue their rights of appeal. The appellate courts would be inundated with such appeals with a further appeal in case of conviction or acquittal. Of course if the Criminal Procedure and Evidence Code provided for such appeals, these difficulties would have to be tolerated. It does not. Section 346(1) of the Criminal Procedure and Evidence Code allows appeals against a final judgment or order. Southworth, Ag.C.J., in In Re Osman Brothers (No2) (1923-61) 1ALR (M) 361, 370, approved of this statement on interlocutory appeals from the judgment of the High Court of Tanzania by Wilson, Ag.C.J., in Mabruk v. R. (1948) 1 TLR 311, 312:

“A determined litigant by the exercise of a little ingenuity could prolong a criminal trial almost indefinitely or at any rate for very much longer than is desirable in the public interest, for such undue protraction would bring the administration of justice into contempt.

“The three matters mentioned above which have been made the subject of this kind of interlocutory appeal are matters which might properly form grounds of appeal, and very substantial ones at that, against a conviction in a criminal trial in which such irregularities or illegalities could be shown to have occurred.”

The question whether a case to answer has been made out at the close of the prosecution case is a question of law (R. V. Abbott [1955] 2 Q.B.497). If there is an error on a point of law, that is a valid ground of appeal and for quashing the conviction on appeal (Abraham v. Republic, (1968-70) 5 ALR (M) 187,MSCA). In this respect, our law is not different from the law in England (R. V. Abbott [1955] 2 Q.B.497; R. V. Garside, 52 Cr.App.R. 85; R. V. Worsell, 53 Cr.App.R. 322: R. V. Richards, [1974] Q.B. 776). There cannot be an appeal at this stage.

I would therefore dismiss the appeal. I appreciate the anxiety of counsel for the defence. I would direct that in case of conviction the court below should proceed under section 355 of the Criminal Procedure and Evidence Code. The Court should stay the execution of the sentence or order the defendants to be on bail pending appeal or confirmation.

Made in open court this 11th Day of April 1998.

D.F. Mwaungulu

JUDGE