IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Criminal Case Number 144 of 2003

THE REPUBLIC

Versus

SHABIR SULEMAN

And

ASLAM OSMAN

CORAM: D F MWAUNGULU (JUDGE)

Kaliwo, Legal Practitioner, for the State

Kanyenda, State Advocate, for the State

Banda, SC, Legal Practitioner, for the first defendant

Dokali, Legal Practitioner, for the second defendant

Kaphale, Legal Practitioner, for the second defendant

Kamanga, the official court interpreter

Katemana, court reporter,

Mwaungulu, J.

ORDER

In this matter, the defendants, Shabir Sulemani (the first defendant) and Shabir Sulemani and Aslam Osman (the second defendant) submit that there is no case to answer on charges against them under the Corrupt Practices Act. The State charged the defendants with the offence of corrupt practices with a public officer. Corrupt practices with a public officer is an offence

under section 24 (2) of the Corrupt Practices Act. Mr. Suleman answers three counts. On the first count the State alleges Mr. Suleman between the 1st June and 31st December 2002 here in Blantyre corruptly offered to his Honour Mr. Justice Maxon Mkandawire gratification in the form of very low rent as an inducement for the Honourable Mr. Justice Mkandawire to rule in Mr. Suleman's favour a case which the said Justice Maxon Mkandawire was presiding. On second count, concerning the same matter before the Honourable Mr. Justice Maxon Mkandawire, the State alleges that in around November 2002 Mr. Suleman corruptly promised to give the Honourable Mr. Justice Maxon Mkandawire gratification in the form of a poultry division of I Conforzi Limited valued at over US$ 500, 000 (Five thousand United States dollars) as an inducement for the Honourable Mr. Justice Maxon Mkandawire to rule in favour of Mr. Osman. In the third count the State charges Mr. Suleman, in conjunction with Mr. Osman, between 1st June and 31st December 2002, again concerning the same case, at Greenland Feed in Limbe, for corruptly offering gratification amounting to K1, 000, 000 for the Honourable Mr. Justice Maxon Mkandawire to rule in Mr. Osman's favour. The second defendant, therefore, only answers the third count where the State alleges he worked in conjunction with Mr. Osman. Legal Practitioners from both sides argued eruditely on the practice and procedure on the defendant's submission, in a criminal case, of course, of no case to answer, arguments, I must confess, I found extremely helpful in resolving whether or not to uphold the defendants' submission in this Court.

The common law recognised, in civil or criminal proceedings, the defendant's right, at any stage of the proceedings, to submit there was no case for her to answer. Section 254 (1) of the Criminal Procedure and Evidence Code, however, creates, in relation to Magistrate Courts, a duty on the Court to determine in every case whether there is a case to answer before the defendant enters defence:

"If, upon taking all the evidence referred to in section 253 and any evidence which the court may decide to call at that stage of the trial under section 201, the court is of opinion that no case is made out against the accused sufficiently to required him to make a defence, the court shall deliver a judgment in the manner provided for in sections 139 and 140 acquitting the accused."

Section 254 (2) creates quite some wide powers, including amendment or substitution, where evidence points to some other crime:

"If, when the evidence referred to in subsection (1) has been taken, the court is of the opinion that a case is made out against the accused sufficiently to require him to make a defence in respect of the offence charged or some other offence which such court is competent to try and in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same, subject to section 151."

The section only creates a duty for the court to so determine. The section does not remove the defendant's right to submit at any stage that in fact and in law there is no case to answer. There

are two possible scenarios. First, the court, without the defendant submitting, has under section 254 (1) of the Criminal Procedure and Evidence Code, to consider the matter. The defendant can address the court as it considers the question. This might be the prudent thing rather than letting the court determine the question without the defendant submitting. Nothing in law or principle, however, prevents the defendant making the submission, without appealing, after the courts determination of the question. Secondly, the defendant may so submit before the court considers the question. The court would be duty bound to consider the question. Section 254 (1) therefore only creates a duty for the court to determine the question. The section does not affect the defendant's right to submit to the court that there is no case to answer against her.

The Criminal Procedure and Evidence Code, in relation to the High Court, creates no such duty for trials in the High Court save, of course, in the circumstances obtaining in this case, where under section 294 the Minister declares that the particular case or certain class of cases be tried without a jury. The Criminal Procedure and Evidence Code does not, however, remove the common law right for a defendant in the High Court to submit that there is no case to answer. Mr. Banda, SC, correctly in my judgment, asked this Court to proceed as under Part VII of the Criminal Procedure and Evidence Code, providing for procedure in magistrate courts, precisely, I suppose, because in the part prescribing procedure in this Court, Part X, there is no equivalent section 254. Previous legislation provided for such a course of action in the High Court. This situation leads many to think that there can be no submission of any case to answer in the High Court. Other theories reinforce this position. First, that proceedings in the High Court are normally preceded by a preliminary enquiry under Parts VIII and IX that settle the question. This thesis is untenable under Part IX where the decision is the Director of Public Prosecution's. More importantly, more clear words are needed to remove a common law principle and right. The second bases on the reading of section 313 of the Criminal Procedure and Evidence Code:

"When the case for the prosecution is closed and upon hearing any evidence which the High Court may decide to call at that stage of the trial under section 201 the High Court shall forthwith call on the accused to enter upon his defence."

On this aspect, the conclusion premises on that the Criminal procedure and Evidence Code, unlike its predecessor Criminal Procedure Code, omitted the matter all together and that the wording in section 313 and 254 (1) is the same except for the duty it creates for magistrate courts.

In my judgment the Criminal Procedure Code, on this aspect, was a codifying statute, codifying the common law right. Its repeal had no effect on the common law right on a submission of no case to answer. Moreover the wording of section 313 is inadequate, in my judgment, to displace a common law right or principle. No doubt under our Constitution and at common law statues rank higher in validity. It is a principle of Common law and statutory interpretation that Parliament must use clear words to affect the common law. The omission of the duty in section 313 seen in section 254 (1) only relates to the duty of the court to consider the question. Neither section 254 (1) nor section 313 expressly or implicitly affect a defendant's right to submit to the

court in criminal proceedings that there is no case to answer against her. Even if there was no such power, the High Court, under section 11 (b) of the Courts Act, without prejudice to any jurisdiction conferred on it by any other written law, shall have all jurisdiction and powers, civil or criminal, which belong and are exercisable by any subordinate court. This includes the power exercised by subordinate courts under section 254 (1) of the Criminal Procedure and Evidence Code. The High Court can therefore entertain a submission of no case to answer if made to it and has, where the Minister directs for a trial without a jury, to proceed under section 254 (1) of the Criminal Procedure and Evidence Code.

Many decisions cited by Banda, SC, illustrate the incidence and stringency of the duty on a court considering the defendant's submission or complying with a statutory duty under section 254 (1) of the Criminal Procedure and Evidence Code. Since the decision of Spenser-Wilkinson, CJ, in R v Damson (1923-61) 1 ALR (Mal) 526, all trial courts below this court know the peremptory nature of the requirements under the section discussed. The Chief Justice said:

"This section provides that if at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

In a case like the present the Lord Chief Justices advice for time for circumspection in Harold v R (1923-61) 1 ALR (Mal) 538 at 541 is important:

"If a magistrate has followed the evidence for the prosecution, as he should, with any eye to the charge and has noted, as the case proceeds, which of the various elements which go to make up the charge have been proved, he will, in straightforward case, have no difficulty in deciding at the close of the case whether or not such a case has been made out as would justify proceeding under s.204. Except in the clearest of cases, however, he should always pause for a moment at that stage and consider whether the case falls under s.203 or under s.204. Indeed, in a case of real difficulty he would do well to adjourn for a short time at the conclusion of the prosecution case in order to satisfy himself that the accused person really has a case to meet and will not be called upon on the chance that he will convict himself ."

In principle this court, as Republic v Dzaipa [1975-77] MLR 307; and Mphande v Republic Cr. App.Cas. No. 46 of 1996, unreported, show, is guided by the Practice Direction (Submission of no Case) issued by Lord Parker, CJ [1962] 1 WLR at 227:

"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence, (b) when the evidence adduced by the prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from there two situation a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it, If, however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that state convict or acquit but whether the evidence is such that a reasonable tribunal might convict if a reasonable tribunal might convict, if a reasonable tribunal might convict on the evidence so for laid before it, there is a case to answer."

Mr. Banda, SC, referred me to a useful statement of Roskill, L.J., in Falcon-Atlee v R (1974) 58 Cr.App.R 348 at 357:

"This court has repeatedly said in recent years that this practice should not be followed. If a judge thinks that the case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it there and then. If the judge is not prepared to stop the case on his own responsibility, it is wrong for him to try and cast the responsibility of stopping it on to the jury."

The decision stresses the duty and responsibility of a trial judge faced with such submission or acting under the duty in section 254 (1) of the Criminal Procedure and Evidence Code. The leading case, however, in the United Kingdom, and the case is highly persuasive here, is Galbraith v R [1981] 1 WLR 1039, cited by Mr. Kaphale and Mr. Dokali. I quote a passage by Lord Justice Lane, C.J., at 1042 because of Mr. Banda's submission on tenuous evidence as stated by Lord Roskill in Falcon-Atlee v R referred to earlier. The Lord Chief Justice said:

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged that has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other manners which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge. "

The later case of Shippey v R [1988] Cr. L.R. 767 illustrates the situation where the evidence was so tenuous in the words of the Lord Chief Justice in Galbraith v R.

That the court could adjourn to consider the question underscores the deliberative and determinative nature of the process. The deliberativeness premises on that section 254 (1) of the Criminal Procedure and Evidence Code and the common law require a case sufficiently to require the defendant to make a defence. Every case will not suffice; it must be such a case that sufficiently requires her to make a defence. The determinative nature of the process premises on that, if there is no such case, the defendant must be acquitted at that stage and prevented from self incrimination.

In practice all decisions on this point, including ones the legal practitioners cited, point to availability, quantity and quality of evidence sufficient to require the defendant to make a defence. The available evidence, its quantity and quality, in turn depend on the facts in issue to prove the offence. Evidence must be available to establish all the facts in issue for the crime. The available evidence must be such that, without rebuttal, a reasonable tribunal could convict. This is what **Practice Direction (Submission of no Case)** [1962] 1 W.L.R. 227 suggests. A court, therefore, faced with the duty, whether under section 254 (1) of the Criminal Procedure and Evidence Code or at common law, to decide whether a defendant in criminal proceedings has a case sufficiently to require her to make a defence must decide concerning the particular offence (a) whether there is evidence and (b) whether that evidence establishes a case sufficient for the defendant to make a defence. The answer to (a) depends on the nature of the offence. There is no case sufficiently to require the defendant to make a defence where there is no evidence to prove that the defendant's acts accounted for one element or all elements of the offence. The answer to (b) goes to the quality of evidence available to the court in (a). The answer turns on whether the available evidence is such that without more a reasonable tribunal would convict. At the close of the prosecution case, unless the court acts under section 201 of the Criminal Procedure and Evidence Code, only the prosecution evidence is available to the court. Consequently, only such evidence shorn of debilitating contradictions and inconsistencies or survives cross-examination raises a case sufficient to require the defendant to enter a defence. Evidence with mortal inconsistencies or contradictions or undermined by cross-examination does not raise a case sufficiently requiring a defendant to make a defence.

Availability: is there evidence that the defendants committed the crime?

This, as seen, depends on the nature of the offence. The offence determines the elements of the offence and, consequently, the facts in issue the prosecution must establish. Section 24 (2) of the Corrupt Practices Act, creating the offence of corrupt practices with a public officer, provides:

"Any person who by himself, or by or in conjunction with any other person, corruptly gives, promises or offers any gratification to any public officer, whether for the benefit of that public officer or of any other public officer, as inducement or reward for doing or for bearing to do anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned shall be guilty of an offence."

The elements of this offence are (a) a person by herself or through another must (b) corruptly (c) (i) give, (ii) promise or (iii) or offer gratification (d) as an inducement for the public officer to do or forbear to do something. The Corrupt Practices Act defines 'corruptly': "in relation to the

soliciting, accepting or obtaining, or to the giving, promising or offering, of a gratification, means the doing of any of the aforementioned things by way of a bribe or other personal temptation, enticement or inducement." The Corrupt Practices Act defines 'gratification': "means any payment, whether in cash or in kind, and includes any rebate, bonus, deduction or percentage, discount, commission, service, forbearance, assistance, protection or any other material gain, benefit, amenity, facility, concession or favour of any description, and any fee, reward, advantage or gift, other than a casual gift."

The charge indicates the facts in issue. On the first count the State alleges Mr. Suleman between the 1st June and 31st December 2002 here in Blantyre corruptly offered to his Honour Mr. Justice Maxon Mkandawire gratification in the form of very low rent as an inducement for the Honourable Mr. Justice Mkandawire to rule in Mr. Suleman's favour a case which the said Justice Maxon Mkandawire was presiding. On the second count, concerning the same matter before the Honourable Mr. Justice Maxon Mkandawire, the State alleges that in around November 2002 Mr. Suleman corruptly promised to give Mr. Justice Maxon Mkandawire gratification in the form of a poultry division of I Conforzi Limited valued at over US$ 500, 000 (Five thousand United States dollars) as an inducement for the Honourable Mr. Justice Maxon Mkandawire to rule in favour of Mr. Suleman. In the third count the State charges Mr. Suleman for, in conjunction with Mr. Aslam Osman, between 1st June and 31st December 2002, again concerning the same case, at Greenland Feed in Limbe for corruptly offering gratification amounting to K1, 000, 000 for the Honourable Mr. Justice Maxon Mkandawire to rule in Mr. Suleman's favour. This Court must at this stage decide whether there is evidence to cover all the elements of the offence and the facts in issue.

At this stage of enquiry the concern is whether there is material (evidence) to cover the elements of the offence and facts in issue. Forensic experts state that evidence is brute facts. As facts, evidence can be itemized, classified or credited. The evidence here is oral: it is the word of the Honourable Mr. Justice Mkandawire in the main and the testimony of other prosecution witnesses. We consider the quality of this evidence later. As for now there is material (evidence) to establish the prosecution theory that, to influence the Honourable Mr. Justice Mkandawire in a decision involving the first defendant, the two defendants offered gratification.

The prosecution evidence, apart from The Honourable Mr. justice Mkandawire's evidence, so far establishes the following background to the alleged crime. The first defendant is an official in Ismail Properties, a property company that let property to Gurmair Garments Ltd. Gurmair Garments Ltd was in deep financial trouble. Winding up was eminent. Gurmair Garments Ltd was in large arrears of rent. Ismail Properties distressed for rent, some K5, 000, 000. The property was sold. Ismail Properties received cash. Gurmair Garments Ltd's liquidator challenged the distress for rent before Mr. Justice Maxon Mkandawire. The effect of Gurmair Garments Ltd's challenge before the Honourable Mr. Justice Mkandawire, if successful, was that Ismail Properties would surrender the K5, 000, 000 to the Liquidator. Of course, the action before the Honourable Mr. Justice Mkandawire, due to various procedural and practical difficulties, took long. Consequently, one sees clearly why, if this is of any assistance at all, why

the Honourable Justice Mkandawire's decision concerned the first defendant.

The Honourable Mr. Justice Mkandawire's testimony, apart from the inconsistencies we see later, establishes three episodes significant to this case. I will refer to these episodes as the 'low rent', the 'I Conforzi poultry farm' and the 'Greenland'. Concerning the low rent episode, the judge testifies that the first defendant found him at the farm and offered low rent for a property at the former British African Tobacco Company Ltd at Ginnery Corner. The Honourable judge was ambivalent because he had never thought of a shop. He however a few days later visited the premises where the first defendant once again offered low rent. There was a trip to Limbe for other premises in the course of which the first defendant pointed Gurmair Garments Ltd to the judge. There, according to the judge, was when it dawned to him what all these offers were all about. The I Conforzi Ltd episode occurred, according to the judge occurred at Mwaiwathu Private Hospital. The first defendant walked over to the judge when they met at the hospital. The meeting, according to the judge, was coincidental. It was not prearranged. This time around the first defendant offered a poultry farm he was buying from I Conforzi Ltd, if only the judge would decide in the first defendant's favour. According to the judge, this was a brief encounter. The judge told the court that until the Greenland episode, he never took the matter seriously. The matter became serious, according to the judge, when the second defendant, who had been calling him for a long time, offered K1, 000, 000 if only the judge could decide for the first defendant. This time he decided to take the step, which he did, to recuse himself from the case involving the first defendant's concern and Gurmair Garments Ltd. The Anti-Corruption Bureau investigated the matter.

There was fierce cross-examination on this evidence chiefly to show, at one stage, that the judge went all the way to ask for the bribe, that the judge took too long to report the crime, that the events never and could not have taken place. There was also a partly successful attempt to show lapses in the judge's recollection of events. On all questions put to the judge, he denied the suggestions and proffered evidence to show that the events occurred as he informed the court. Certainly the cross-examination was to put to the witness the defence cases, if we ever come to that. The cross-examination was certainly also intended to undermine the judge's testimony. On either front, the judge's answers, all, subject to credibility, not yielding to the defences' suggestions, are all the material we have on the matters the defence raised.

There is, in my judgment, material to support the elements of the offence of corrupt practices with a public officer and the facts in issue in the particulars of the offence. The evidence shows clearly that the defendants did not give a bribe, a point emphasized by Banda, SC. The evidence, the Honourable Mr. Justice Mkandawire's testimony, establishes that the first defendant offered gratification to the Honourable Mr. Justice Mkandawire as an inducement to the judge to decide in the first defendant's favour. Just as there is evidence that he and the second defendant offered K1, 000, 000 in the same pretext. I consider this aspect in detail later. On the first question, therefore, there is material to establish the elements of the offence and the facts in issue for the crime.

Does the evidence establish a case sufficiently to require the defendants to make a defence?

Where evidence establishes all elements of the offence and facts in issue a court should require the defendant to make a defence unless the evidence is so unreliable in itself or is undermined by cross-examination as makes it unsafe for a reasonable tribunal to convict. In relation to the low rent, and indeed on all episodes, the defendants' legal practitioners sought to downplay the judge's evidence for forgetfulness. Admittedly, the judge forgot some detail relative to time and sequence. He was, however, never wanting as to the events and the people involved. He spoke clearly of the meeting at the farm with the first defendant on the offer for low rent, subsequent visits to the premises and the Limbe tours where there was another shop. As the judge understood it and narrated it in court, the first defendant was offering lower rent to him. For purposes of the crime for which the first defendant answers it suffices if the offer was a reduction or forbearance of a benefit. It is unnecessary for the public officer to know the level of the reduction. It was suggested that lack of any suggested figure undermines the testimony. It does not, in my judgment. The judge said, and it could be that that is why the amount never arose, he was not very interested in the idea. There was also a suggestion that there was a contradiction between the judge and his servant as to whether poultry died at the farm. There was also suggestion that there was a contradiction as to whether the visitor went directly to the judge. These contradictions were irrelevant to the fact in issue. The servant was absent when the first defendant allegedly discussed the offer for lower rent with the judge. There was no contradiction on this relevant issue. All, unless contradicted, shows the judge met the first defendant at the farm and the alleged conversation occurred. The first defendant, according to the judge, offered lower rent. At that time the judge thought it was just an offer. Only later did he connect this event to the subsequent one.

The first defendant's submission on the I Conforzi Ltd episode is a little bit unclear to me. In one breath the defendant submits the episode could not have occurred at that kind of place. There were many people, it is said. The first defendant, it is said, could not have done such a grave thing at Mwaiwathu Private Hospital. The judge's evidence is that it occurred. On the face of it, that the judge could mention such a place probably shows to he might be telling the truth. If he was bent on fabrication, he would have mentioned a place more condign for the sort of conversation forming the basis of the second count.

In another breath, the defendant submits that the first defendant could have chosen a more convenient venue. After all, it is said, the first defendant could have made this offer at other places where only the first defendant and the judge were present. It is clear that on all the occasions where only the judge and the first defendant were present, on the judge's evidence, not contradicted at the moment, the first defendant was pursuing unsuccessfully the offer of the shop at Ginnery corner. At those moments, on the evidence, it had not occurred to the first defendant to offer I Conforzi Ltd. The first defendant could have been calculating when to attack.

What is curious though is how the judge, unless, the first defendant advertised the shops, would know about the shops. The judge never suggests reading an advertisement. The judge says that

he came to know of the shops at the BAT offices when the first defendant approached him at the farm. The advertisement theory can be true probably for property at BAT premises. Ismail Properties dealt in property. Ismail Properties cannot advertise when buying property. How would the judge know that the first defendant was buying I Conforzi Ltd.? It was suggested in argument that it is absurd that the first defendant could offer property that expensive, some US$ 500, 000, for rent valued at US$ 50, 000. It is equally absurd, I should think, that the judge would know the first defendant was buying such a property. In any case, it is possible the first defendant never knew at the time of the offer to the judge the actual price of I Conforzi Ltd. It appears there were bids at the time. The deal concluded many months after the offer to the judge.

The only way the judge would know the first defendant was buying I Conforzi Ltd was if he knew the defendant very well. The judge is adamant he met the defendant for the first time at the farm. Unlike with the second defendant, whose case I consider in a moment, there is no evidence of past dealings until this episode. The judge conceded that the first defendant could have come to his court several times. He could not recognise the first defendant. There was evidence that the first defendant appeared in chambers once or twice. It is another thing to suggest that because the first defendant had been before the judge once or twice the judge would know him when it is clear that the first defendant never testified, his evidence before the judge having only have been by affidavit. It matters less at this point that the judge knew the first defendant. It is not unusual in the affairs of men that crimes, particularly like the present, are committed in the circle of friends and relations by consanguinity or affinity. Such relationships provide an opportunity for committing crimes. Such relationships do not exclude commission of crimes. In a case like the present such relationships may be the only reason for the crime. This, on the evidence of the judge, may be the only reason the second defendant found himself in the crime in the third count.

The judge told the court that he only went to the second defendant's shop to look for feed. Albeit the judge made his own feed, there were times when he bought from other producers like the second defendant. Several years back when the judge was not manufacturing feed, he maintained an account with the second defendant. For much of the time the judge's account had extra funds to meet his needs. Once or twice the account had no funds and two cheques were dishonoured. The judge previously borrowed a book from the second defendant. The judge and the second defendant knew each other for some time. The judge informed the court that on the day in question when he went to the second defendant's shop, the second defendant informed him that the first defendant was offering the judge the sum of K1, 000, 000 for deciding in the first defendant's favour. In cross-examination the judge rejected the suggestion to him that on that date he was found in felo delicto requesting the second defendant's servant for chicken feed secrets. What we have on the record is that the second defendant offered the K1, 000, 000 in the circumstances and the reasons stated by the judge. The record also shows a rejection of the suggestion. The cross-examination did not change much of the judge's evidence on the material facts. Unless contradicted these are the brute facts on the record.

Of course, as a matter of course one would think the second defendant's inclusion of the first defendant in the statement to the judge would not hold against the first defendant. The second defendant's statement at that point was not a confession. The evidence suggests a conspiracy.

This Court deprecates inclusion of a conspiracy where the prosecution charges the defendant for the substantive crime: see Mvundula v Rep. [1978-80] MLR 320. In a conspiracy, the statement of a party to the agreement in the course of the crime is admissible against the other: Nguwo and another v Rep. [1991] MLR 384.

Of course there is much to say about the sequence of events. Much of what occurred in the course of the judge's testimony is a matter of impression. At one level the judge could not remember much of detail. Unless you are part of the crime, most crimes occur in the flimsiest of circumstances allowing very little time for registering detail. After the crime, immediately or later, victims of crime have to think backwards to recollect from memory what actually happened and reconstruct events. That is not easy. The adversarial system with its precision of examination in chief, the incisiveness of cross-examination and opportunity of re-examination helps to jog the memories of witnesses and bring out truth essential to justice. In this respect, the judge was the key witness for the prosecution and to the defence. Indeed he was subjected to rigorous cross-examination by three legal practitioners in turn. That rigorous cross-examination resulted in the judge slipping on the sequence of events. That slip was, on the face of it, mollified, as it should be, by re-examination. The judge stuck to one sequence of events. The defence suggests that this slip should affect the whole testimony to undermine it or discredit it. On this aspect I am aware of the statement of Davies, J., in Parojcic v Parojcic [1959] 1 All ER 1 at 5 – 6, cited with approval in this Court in Mahomed Nasim Sirdar v Rep. (1968-70) 5 ALR (Mal) 212 at 218:

"It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing, the remainder of their evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case."

Recollecting the sequence of events of course adds much to the credibility to the evidence of a witness. It is another thing to suggest that in all cases where there is no recollection or an error the events never occurred. In the affairs of men there can be frailty of memory on the particular event or their sequence. At the end of the day, it is a matter of impression for the tribunal of fact. There are cases, and the present is not one, where the consequences of non-recollection may be detrimental and go to the root of the testimony. The judge, as I mentioned, bettered up the slip in cross-examination in re-examination. The judge was very clear on the events themselves and places where they occurred and not very sure about the sequence and dates.

The defence submits that the judge's lack of recollection as to dates and time are fatal to the prosecution case. From the legal perspective the dates when the offence was committed, depending on the nature of the defence, are not essential to conviction of a crime. If the law was otherwise, in some cases on admission, for purposes of conversation, the court would not convict because there was no stipulation of time. The law allows the prosecution to stipulate the times as was done here. The court will convict where the offence was clearly proved albeit it occurred at a different time. This Court considered this aspect in Rep. v Tenghai conf. cas. No. 558 of 1994, unreported. It approved Lord Atkins' statement in R v Dossi (1919) 13 Cr.App.R. 158:

“From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence…. Thus though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.”

Finally, the defence derided the judge’s delay to report the crime to the Anti-Corruption Bureau when the Corrupt Practices Act provides for that. The Judge was obviously oblivious to the provision. The matter is not made any worse for him because he is a judge. Lord Atkins' remarks in Evans v Bartlam [1937] 2 All ER 646 at 649 are appropriate:

“For my part, I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never had been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.”

The defence therefore suggests that a judge of considerable experience should have reported the matter earlier. I agree that may be the judge should have reported the matter earlier. It is quite another thing however to suggest that the crime was not committed because the witness did not report promptly. There could be many reasons why a victim or a witness cannot report earlier. Apart from credibility, which I consider, in a moment, I know of no principle suggesting that where a crime is proved to have been committed that the crime was not reported earlier should have the consequences suggested.

The defence therefore sought to test the matter on credibility. The suggestion is that the judge’s tarrying in reporting the matter undermines the evidence. An analogy is drawn between this matter and a complaint in sexual offences where such a complaint is excluded. The analogy is unhelpful. There the rule operates to exclude the complaint because it is not contemporaneous to the crime. A complaint contemporaneous to the offence establishes consistence. Indeed the Corrupt Practices Act requires prompt reporting. It does not suggest that tardiness of reporting or lack of reporting undermine the crime. A tardy reporter may himself be guilty of delay but the corruptor will face the law despite the tardy report.

Conclusion

The evidence before me raises a case sufficiently requiring the defendants to make a defence. The evidence so far suggests the first defendant made several offers to the judge presiding in a case where the first defendant had interest. In that case, if the first defendant was

unsuccessful, Ismail Properties would surrender the cash already received as arrears of rent from Gurmair Garments Ltd. Initially, the judge was unaware of the purposes of earlier overtures. When he knew, he was dismissive of subsequent ones. The judge however was disconcerted when the first defendant, frustrated by earlier overtures, used the second defendant to persuade the judge. The judge recused himself from the case. The evidence, in my judgment rises to the height where, without explanation, a reasonable tribunal of fact would convict. The contradictions were, in my judgment, mollified in re-examination. The judge however slipped on some details. The slips do not undermine the rest of the evidence. The judge was quite sure of the three distinct episodes the subject of the charges. On the principles in Galbraith v R the defendants ought to make a defence. Most of the defendants' objections to the testimony so far are, except in the rare case, not like the present, in Shippey v R, are ones, on the strength of Galbraith v R, that do not, as long as there is evidence on which the jury could go one way, justify the judge to withdraw the matter from the jury. The evidence covers the elements of the offence and the facts in issue. The defendants should make a defence.

Under section 254 (2) of the Criminal Procedure and Evidence Code I order, just because legal practitioners for the second defendant submitted that there were problems with the third count, amendment of the charge to reflect that the first and second defendant, as the evidence shows, committed the crime. The defendants should therefore make a defence.

Made in Open Court this 8th Day of December, 2003

D F Mwaungulu

JUDGE