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

Kamanga, the official court interpreter

Katemana, court reporter,

Mwaungulu, J.

ORDER

On 8th December, 2003 when this Court found a case to answer against the two defendants, Shabir Suleman (first defendant) and Aslam Osman (second defendant), the legal practitioner for the first defendant, Mr. Banda, SC, notified the Court that he was appealing against the finding or order. This Court's immediate reaction, based on many decisions including some the legal practitioners cited yester afternoon, was that no appeal to the Supreme Court lay from the order made. The legal practitioners were, however,

allowed to address the Court on the matter. On the decisions of this Court, the Supreme Court and English Courts, no appeal lies to the Supreme Court against this Court's finding that the defendant has a case to answer.

The three cases cited to this Court do not deal with the situation concerning this Court in the application made on behalf of the first defendant. The statement by Lord Justice Goddard, C.J., in R v Abbott [1955] 2 QB 497 at 503 raised in aid of the appeal by the first defendant is correct. It is not, however, about the situation this Court is considering. In R v Abbott the trial court ruled, though the prosecution had not established a case to answer, that there was a case to answer. The trial court allowed the defendants to make a defence. Evidence was received where a co-defendant incriminated the other. The jury found both of them guilty. On an appeal the prosecution urged, relying on R v Power [1919] 1 K B 572, that, notwithstanding the trial justice erroneous finding, the conviction to stand because the trial judge was entitled to look at the whole evidence. The Court of Appeal followed R v Cohen and Bateman (1909) 2 Cr.App.R. 197 and rejected the suggestion.

The Court of Appeal thought, correctly in my judgment, that if there was no case to answer, the Court of Appeal would interfere with the conviction notwithstanding that there was incriminating evidence arising subsequently. Lord Goddard, C.J., after distinguishing R v Power, made the statement relied on by the first defendant:

"In our opinion the judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant Abbott, and therefore he was wrong in law in giving the decision he did."

There is nothing in the Lord Chief Justice's statement for thinking an appeal lays to the Court of Appeal, in our case, the Supreme Court, against a trial court's finding of a case to answer. The statement of Channell, J., in R v Cohen and Bateman the Lord Chief Justice suggests that the Court of Appeal, where the trial court erroneously finds a case to answer, will interfere on appeal after the trial court concludes the case. R v Abbott, therefore, does not support the first defendant's position. This Court's decisions in Harold v R (1923-61) 1 ALR (Mal) 538 and Rep. v Dzaipa [1975-77] 8 MLR 307, also cited in the first defendant's behalf, instance where appeals were made after the defendants made defences. The passages cited should be read in that context.

The Supreme Court under section 11(1) of the Supreme Court Act only hears appeals from this Court's final orders or judgments:

"Subject to the other provisions of this section, any person aggrieved by a final judgment of the High Court in its original jurisdiction may appeal to the Court."

I can only refer to two decisions of the Supreme Court on this matter: Abraham v R (1968-70) 5 ALR (Mal) 187; and Chihana v Rep [1992] MLR 71. Both decisions did not deal with an appeal against an order of a case to answer: Abraham v R covered an order for separate trials; Chihana v Rep covered jurisdiction of a court. In the latest decision of the Supreme Court of Appeal, Kara v Rep MSCA Criminal Appeal No. 20 of 2003, delivered on 28th November, 2003, the Supreme Court of Appeal purported to overrule its decision in Abraham v Rep (1968-70) ALR (Mal) 187 to the extent that the decision seemed to allow an appeal on an interlocutory order. The Supreme Court was referring to this statement by Bolt JA at 198:

"Having said this, we are of the opinion that the present cross-appeal might well have been entertainable had it been brought before the commencement of the trial proper."

Abraham v Rep was correctly decided. It was based on section 12 of the Malawi Supreme Court of Appeal Ordinance, 1963. That section allowed the Director of Public Prosecutions to appeal "against any judgment of the High Court if he is dissatisfied with such judgment upon a point of law." That section remains in the same wording in section 11(3) of the Supreme Court of Appeal Act. The important thing is that, unlike in section 11(1) where the Act speaks of "final judgment", the Supreme Court of Appeal Ordinance and the Supreme Court of Appeal Act, mention "judgment" concerning an appeal by the Director of Public Prosecution. Justice Bolt however observed that the word "judgment" in the Supreme Court of Appeal Ordinance could not be easily substituted by the definition in section 2 of the Ordinance to include "decree, order, sentence and decision." He said:

"Sub-section (3) of section 12 of the Malawi Supreme Court of Appeal Ordinance, 1963 does give the Director of Public Prosecutions the right of appeal "against any judgment of the High Court if he is dissatisfied with such judgment upon a point of law." [Emphasis supplied.] Moreover, although "judgment" is defined in section 2 as including "decree, order, sentence and decision," nevertheless being merely an inclusive definition in our opinion it is not permissible on each and every occasion where one finds the word "judgment" in the Malawi Supreme Court of Appeal Ordinance to substitute decree, order, sentence or decision. In other words, such substitution can be made only where it is clear from the context that it is applicable. As Mr. McCalla rightly observed, it would be absurd, for example, in a criminal matter to substitute for "judgment" the word "decree."

The Justice of Appeal was, therefore, apprehensive to entertain the interlocutory matter. The statement quoted earlier should not be understood as raising the possibility that the Supreme Court will entertain an interlocutory application. If it does, it only applies to

appeals by the Director of Public Prosecution. Section 11 of the Supreme Court Act under which the first defendant appeals raises the right only in relation to a final judgment.

The test adopted for determining whether an order or judgment is final applies to this case. The Supreme Court of Appeal adopted the definition of 'final' in Order 59 of the Rules of the Supreme Court:

"A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it."

This definition covers an order of a trial court for a case to answer. This Court discussed the matter in an appeal from courts subordinate to it in Mlashi and Others Cr.App. Cas No 31 of 1998 and, after considering many decisions held that no appeal lay against a trial courts finding of a case to answer until after the trail court concludes the matter. In that case I found the Lord Acting Chief Justice Wilson's in Mabruk v R (1948) 1 T.L.R. 311 at 312 and Lord Justice Denning's remarks in R v Smith (Martin) [1974] apposite. I only repeat Lord Denning's:

"He can appeal after he is convicted, but not before. It seems that there is no appeal against an interlocutory order: see Reg v Collin [1970] 1 Q.B. 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, 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 away, there is no appeal to the Court of Appeal against an interlocutory order."

This Court, for purposes of an order of a case to answer, however, remarked:

"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 for quashing the conviction on appeal (Abraham v Republic (1968-70) 5 ALR (Mal) 187). In this respect, our law is not different from the law in England … There cannot be an appeal at this stage."

These principles apply here. Senior Counsel suggests that, because the prosecution can appeal against a judgment wrong in law, the defence should have analogous powers. The prosecution's right, as all the decisions show, only arises after final orders. Section 11(1) on which the first defendant relies on is to the same effect. The first defendant,

therefore, has analogous powers only that, like the prosecution, the powers are involved after final judgment. No appeal lies to the Supreme Court at this stage.

Made in Open Court this 10th Day of December, 2003

D F Mwaungulu

JUDGE