

**IN RE THE PEOPLE v MUNDIA SIKATANA AND IN RE A REFERENCE
UNDER S. 20 (1) OF THE SUPREME COURT ACT SUPREME COURT ACT
(1982) Z.R. 155 (S.C.)**

SUPREME COURT
GARDNER, AG.D.C.J., CULLINAN, J.S. AND MUWO, AG.J.S.
3RD, 4TH AND 9TH FEBRUARY, 1982
(S.C.Z. JUDGMENT NO.14 OF 1982)
APPEAL NO.10 OF 1982

Flynote

Civil procedure - Courts - Jurisdiction - Reference by High Court to Supreme Court - Article 29 (3) of the Constitution - Whether Supreme Court has jurisdiction to entertain.
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Headnote

The accused who was charged with treason put forward a plea of pardon under s. 227 of the Criminal Procedure Code. The High Court rejected the plea and the accused applied for leave to appeal. At the hearing of his application he chose to abandon his appeal. The learned trial judge decided to refer to the Supreme Court unclear s. 20 (1) of the Supreme Court Act, the question of whether or not there had been a pardon.

Held:

- (i) There is clear statutory provision for reference by a subordinate court to the High Court under Art. 29 (3) of the Constitution, where the issue of alleged contravention of Arts. 13 to 27 arises in subordinate court, but there is no provision enabling the High Court to make a reference to the Supreme Court.
- (ii) The Supreme Court has no jurisdiction to entertain the reference from the High Court.

Case cited:

(1) Patel v Attorney-General (1968) Z.R. 99.

Legislation referred to:

Constitution of Zambia, Cap.1, Arts. 13-27, 29 (1),(3), (6).

Criminal Procedure Code, Cap.160, ss.196, 197. 20

Supreme Court Act, No.41 of 1973, s.20 (1).

For the accused: In person.

For the People: C. Balachandran, State Advocate.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the court.

In this case the accused, who stands accused of treasons before the High Court of Zambia, when called upon to plead to that charge pleaded that he had been pardoned by His Excellency the President. S. 277 of the Criminal Procedure Code allows an accused to put forward such an argument. Article 29 (6) of the Constitution of Zambia provides that if an accused person has been

pardoned he cannot be prosecuted. The learned trial judge tried this issue and held that the accused had not been pardoned. Thereafter, the accused appealed to a single judge of the Supreme Court for leave to appeal against that decision. At the hearing of his application he chose to abandon his appeal.

The learned trial judge decided to refer to the Supreme Court, under s. 20 (1) of the Supreme Court Act, the question of whether or not there had been pardon. The Section reads as follows:

"20. (1) If, in the exercise of powers conferred upon the High Court, it thinks fit, to reserve for the consideration and determination by the Court any question decided by the High Court on any exception or objection taken to the information preferred

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against any person on trial before the High Court for any offence, the High Court shall state the question reserved and direct that the question so stated be transmitted to the Master for consideration and determination by the Court."

Of its own motion this court questioned its jurisdiction to deal with a reference from a High Court judge. Mr Balachandran, on behalf of the State, argued that the words "in the exercise of powers conferred upon the High Court" indicated that if no such powers had been conferred by other legislation there was no power for the High Court to reserve any matter for the consideration of this court.

After research, we are satisfied that there is no other legislation conceding such powers upon the High Court. It is important to note, however, that there have been in the past and are at present other statutory provisions enabling a subordinate court to reserve matters for the consideration of a High Court. Sections 196 and 197 of the Criminal Procedure Code provided that a subordinate court could, during the course of trial, reserve matters for the consideration of the High Court. These sections were repealed in 1957. Article 29 (1) of the Constitution of Zambia provides that redress may be sought from the High Court by any person who alleges that a provision of Art. 13 to 27 has been, is being or is likely to be contravened in relations to him. Where the issue of such contravention arises in a subordinate court, that court is empowered by the provisions of Art. 29 (3) to refer that issue to the High Court. There is, therefore, clearly statutory provision for reference to be made by a subordinate court to the High Court, but equally clearly there is no such provision for a reference by the High Court to the Supreme Court.

It may well be that s.20 of the Supreme Court Act envisaged that the legislature intended at some future date to provide the High Court with power to refer matters to the Supreme Court, in which event it was necessary for the Supreme Court to have power to hear such matters. In the event, however, no such legislation has been enacted, no such power has been granted to the High Court and this court has no jurisdiction to entertain the reference from the learned High Court judge. It follows that the appeal by the learned Attorney-General falls away.

Judgment

CULLINAN, J.S.: I have had the advantage of reading the judgment just delivered by the learned President of the court and wish to say that I agree with all that he has said therein.

There is clear statutory provision for reference by a subordinate court to the High Court under art. 29 (3) of the Constitution, where the issue of the alleged contravention of arts. 13 to 27 arises in a subordinate court - see for example the case of *Patel v Attorney-General* (1) at p. 103. I cannot, however, in any research find any statutory provision enabling the High Court to make a reference to the Supreme Court.

When the Rhodesian Court of Appeal Act and the Ordinance by the same title were introduced in Southern and Northern Rhodesia, respectively in 1938, both enactments, whose provisions for the main

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part were identical, contained a provision enabling the Court of Appeal to request the High Court to state a question of law, that is, where an appeal before the Court of Appeal involved a question of law alone. That provision conferred powers on the Court of Appeal, not on the High Court, that is, where the Court of Appeal was already seized of a criminal appeal from the High Court. The provision was repealed under s. 21 of the Federal Supreme Court Act No. 11 of 1955, and again under s. 21 of the Court of Appeal for Northern Rhodesia Ordinance No. 52 of 1964. Section 20 of our Supreme Court Act of today was first introduced in our statute books in its present form under s. 22 of the latter Ordinance. Section 21 of that Ordinance therefore directly conferred powers upon the Court of Appeal whereas s. 22 merely referred to "the exercise of powers conferred upon the High Court". Section 21 was eventually repealed and s. 22 appears, as I have said, in its present form as s. 20 of the Supreme Court Act.

The Rhodesian Court of Appeal Act No. 33 of 1938 also contained a provision under s.28 thereof which provided that:

" . . . when in any criminal trial in the High Court any question of law has been reserved by the High Court, either of its own motion or at the request of the prosecutor, the provisions of the Administration of Justice (Appeals) Act (Cap. 10) shall apply "

The equivalent of those provisions was not to be found in the Ordinance enacted here. It may well be that those provisions formed the basis for s. 20 of our Supreme Court Act of today. It is important to stress, however, that the provisions of s. 28 above quoted did not confer any powers upon the High Court; they merely provided that s. 10 of the Administration of Justice (Appeals) Act, Cap. 10, would apply where the High Court (in the exercise of powers conferred on it) decided to reserve a question of law. The latter section in fact reads as follows:

"10. (1) If any question of law arises on the trial in the High Court of any person for any offence, that court may, of its own motion or at the request either of the prosecutor or of the accused, reserve that question for the consideration of the Court of Appeal."

The Court of Appeal there referred to, incidentally, was in fact the Appellate Division of the

Supreme Court of the Union of South Africa, so that the High Court could only refer a question of law to that court. For our purposes it is important to note, however, that s.70 directly conferred power upon the High Court to refer a question of law to the particular Court of Appeal. In my research I can find no such enabling section under the Constitution, or the High Court Act, or the Criminal Procedure Code conferring any such powers upon the High Court.

Section 9 of the High Court Act provides that the High Court shall additionally "possess and exercise all the jurisdiction, power and authorities vested in the High Court of Justice in England". I can find no power in that court to refer a question of law to the Court of Appeal in England for its decision. I agree therefore that this court has no jurisdiction to entertain this matter.

No jurisdiction, appeal falls away.
