A **MOIDEAN**

v.

REGINAM

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.),
B 19th, 26th November]

Criminal Jurisdiction

Criminal law—practice and procedure—submission of no case to answer—considerations to be applied.

C *Appeal—Supreme Court—appeal against acquittal—no power for court to order retrial—Criminal Procedure Code (Cap.* 14) *s.* 300(1) *(b).*

Before the Magistrate's Court the appellant was charged with causing death by dangerous driving. A submission of no case to answer was allowed, and he was acquitted. On appeal by the Director of Public Prosecutions, the judge set the
D acquittal aside and directed that there should be a trial de novo before a fresh magistrate.

Counsel for both parties to the appeal agreed that the judge's order was ultra vires and contrary to Criminal Procedure Code s. 300(1) *(b).*

E *Held:* There was power under s. 300(1) supra for the court to make any order as might seem just. It would not, however, be fair to send the case back to the magistrate to continue the hearing in view of the conclusions he had already formed on the case. The only course was to allow the appeal and restore the order of acquittal.

Per curiam: 1. 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
F 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.

2. Some modification of s. 300(1) *(b)* supra might be in order in view of the circumstances of the present case.

G Practice note referred to: [1962] 1 All E.R. 448.

Appeal from the judgment of the Supreme Court in its appellate jurisdiction in which it allowed an appeal by the Director of Public Prosecutions against the acquittal of the appellant in the Magistrate's Court.

M. S. Sahu Khan & S. D. Sahu Khan for the appellant.
H *D. Adams* for the respondent.

Judgment of the Court (read by Gould V.P.) [26th November 1976]—

This is an appeal from a judgment of the Supreme Court at Lautoka in its appellate jurisdiction, in which the learned judge allowed an appeal by the Director of Public Prosecutions against the acquittal of the present appellant in the Magistrate's Court on a charge of causing death by dangerous driving.

In the Magistrate's Court it had been submitted on behalf of the appellant that he had no case to answer. The submission was upheld and he was acquitted. In the Supreme Court the learned judge took a very different view of the evidence, and as we have indicated, set aside the acquittal. He then said:

> "It would not be fair to the magistrate at this stage to direct him to admit the evidence he excluded and to reconsider the evidence in toto.
>
> I direct that there be a trial de novo before a fresh magistrate."

The appeal to this court was based on only one ground which was that the learned judge erred in law in ordering a trial de novo before a different magistrate. That this is a valid ground is plain and Crown counsel agrees that the order was ultra vires. Section 300(1) of the Criminal Procedure Code (as replaced by section 39 of the Criminal Procedure Code (Amendment) Ordinance, 1969), is in the following terms—

> "300.—(1) At the hearing of an appeal, the Supreme Court shall hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Attorney-General or his representative, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the Magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the Magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrate's court might have exercised:
>
> Provided that—
>
> *(a)* the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occured;
>
> *(b)* the Supreme Court shall not order a new trial in any appeal against an order of acquittal."

The appeal to the Supreme Court, being undoubtedly against an order of acquittal, falls within sub-paragraph 1*(b)* above, which must have been overlooked when the learned judge was making this order. The question now arises what order ought to be made by this court.

For the appellant, Mr Sahu Khan has pointed out that the learned judge substantially criticised the magistrate's judgment not only in matters of law but in his appreciation of the evidence. How far this went is indicated in this paragraph from towards the end of the Supreme Court judgment—

> "The magistrate has misdirected himself as to the standard of proof and the extent of the burden resting upon the prosecution; he misdirected himself in law by excluding evidence, he misdirected himself in law by treating the accused's statement to the police, which contained no confession or culpable admission,

A as evidence of the facts it referred to; he misdirected himself several times regarding the evidence. In the circumstances I feel that I msut allow the D.P.P's appeal against the acquittal which is set aside."

So far as the question of fact and evidence are concerned it may seem strange that occasion for such criticism should arise, as the learned magistrate had only to deal with a submission that there was no case to answer. At that stage the magistrate's task was to decide whether, or not a reasonable tribunal might con-
B vict, on the evidence so far laid before it—if so there would be a case to answer. We would repeat the very helpful practice note on this point, issued by the Queen's Bench Division in England for the benefit of justices of the peace and reported in [1962] 1 All E.R. 448. It is equally useful to magistrates:

"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of
C no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld:
D *(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 these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence
E 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 stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

F Instead of adopting this procedure the learned magistrate, wrongly in our opinion, did treat the matter as if he was compelled at that state to decide whether to acquit or convict, and therefore gave reasons for not accepting the evidence of witnesses whose testimony, if believed would, as the learned magistrate himself said, undoubtedly have established a case to answer. In the Supreme Court the learned judge gave cogent reasons for differing from the magistrate's opinion.

G The order for a new trial being beyond the powers of the Supreme Court the only power specified in section 300(1) which might be called in aid is the power to make any order as may seem just. Under this head the only possibility seems to be, having set aside the acquittal, to send the case back to be continued from the point it had reached. In some cases that result might be right and just but here, as the learned judge himself pointed out, that would not be fair to the magistrate. He would be in a position where he was being directed to make findings in accordance with the views
H of somebody else, not be it said on questions of law (for that would be an acceptable position) but on questions of fact, credibility and the weight of evidence. This would be not only unfair to the magistrate but would make a mockery of justice; for this

reason we find the suggestion of Crown counsel that this course be taken to permit another appeal from the learned magistrate's inevitable re-iterated finding of acquittal, entirely unacceptable. A

As the matter presents itself to us lack of the necessary power has rendered the otherwise appropriate order of the learned judge nugatory, and there is no other order which may be usefully substituted in the particular circumstances. Justice to the appellant requires that the matter be not left in vacuo and our only course is to allow this appeal and restore the order of acquittal of the learned magistrate. B

It would be well for those in charge of the initiation of legislation to consider the circumstances of this case with a view to some modification of the terms of section 300(1) *(b)* of the Criminal Procedure Code.

The appeal is allowed, the orders of the Supreme Court are set aside and that of the Magistrate's Court restored.

Appeal allowed; appellant acquitted. C