

NOTES AND NEWS

CRIMINAL JUSTICE IN MALAWI

Introduction

On the last day of October, 1966, the President of the Republic of Malawi, Dr. H. Kamuzu Banda, appointed a Commission to enquire into criminal justice in Malawi.

The Commission was asked to enquire into the existing practice, procedure and rules of evidence followed both in the High Court and under local customary law. Recommendations were asked for so as to simplify practice, procedure and the rules of evidence in the courts of Malawi with a view to achieving a more expeditious, efficient and uniform administration of justice, without undue regard to technicalities. The Commission was also invited to make such other recommendations for the better administration of justice as it thought desirable. The terms of reference in each case confined the Commission to the field of criminal justice.

The President appointed a very strong, experienced and distinguished Commission. The Chief Justice was Chairman, and the other members were the Attorney-General, the leader of the Nominated Members of Parliament (who is also the Chairman of the Malawi Law Society), three Chiefs, one from each of the three Regions of the country, and the Chairman of the Blantyre Local Court.

The Commission completed its enquiries and submitted its report to the President within four months of being appointed. During the early part of this period the three Chiefs and the Chairman of the Blantyre Local Court toured the country and prepared an exposition of customary law relating to criminal matters. The President's instructions to this Committee were "that they should go all over the country and find out from the people the way things were done in the old days and at the same time how things are done now, and compare the two".

The Report of the Presidential Commission was laid before Parliament¹ and a motion to accept it was unanimously carried on April 3rd, 1967.² The substance of the Report may conveniently be divided into four parts: the investigation and prosecution of cases, the courts of justice, procedure and evidence, and miscellaneous recommendations.

¹ *Report of the Presidential Commission on Criminal Justice*, February, 1967.

² *Hansard, Malawi Parliament*, Fourth Session, Fourth Meeting. April 3rd, 1967.

The Investigation and Prosecution of Cases

The Commission recognised that a shortage of police officers sufficiently trained and experienced in criminal investigation and in prosecution was leading to delay and to defective and incomplete investigation. Magistrates complained of the inexperience of some police officers in presenting evidence and in knowing which points to emphasise and which to ignore.

The Commission therefore recommended the appointment of a suitably qualified Criminal Investigation Department Training Officer, and the setting up of a specialised Fraud Squad within the C.I.D., with a director, an accountant and supporting staff. They also recommended the securing of the services of an officer qualified to speak as an expert in both ballistics and hand-writing, and of a police surgeon so as to reduce calls on the time of other medical officers.

To avoid the dangers of loss of capable officers because promotion appointments lie only within the general promotion structure of the police force, the Commission recommended that a special Prosecution Branch be established within the police force with its own promotion structure. The Director of Public Prosecutions is to organise training courses for police officers serving within the Prosecution Branch. These officers are to serve a pupillage in the Director of Public Prosecutions' department, and are, wherever practicable, to have direct access to state counsel.

The Report emphasised the need to avoid delay in bringing cases to trial, the need to recruit from outside Malawi counsel with adequate experience, and the need to continue the training of local state counsel after they have been appointed. Comment was also made on the fact that the courts "were leaning over backwards so that there should be no suggestion that they were being unduly hard on junior counsel", and the courts, especially the High Court, are encouraged to be at pains to point out errors and defects in the presentation of cases by legal practitioners. It was particularly emphasised that once a point in the prosecution's case has been sufficiently covered, no useful purpose is served by calling additional evidence to testify further to it.

The Courts of Justice

(a) *The High Court.*—With a view to avoiding delay in the administration of criminal justice, the Report recommended that a Division of the High Court be established in the Central Region, at Lilongwe, the site of the proposed new capital of Malawi, and that fixed assizes should be held at Blantyre, Lilongwe, and in the Northern Region.

The Commission considered that judgments in the High Court should be re-served only in exceptional cases, and that normally judgment should be pronounced immediately at the conclusion of the hearing; that judgments of the Supreme Court of Appeal should be embodied in a single majority judgment, dissenting judgments not being recorded; that appeal from a revision order or from a summary dismissal of a first appeal should be only by leave of the

High Court or the Supreme Court of Appeal; and that every effort should be made to expedite the hearing of appeals in capital cases.

It was emphasised that a conviction ought not to be set aside on appeal unless the Court of Appeal is satisfied that, irrespective of technical defects or omissions, the appellant was wrongly convicted; when a conviction is set aside the Appeal Court must in all cases consider whether a new trial should be ordered.

While realising that not all fraud cases can be dealt with by the High Court, the Commission recommended that all those of serious complexity should be prosecuted by state counsel and tried by the High Court.

(b) *The Magistrates' Courts.*—In the Magistrates' Courts the Commission recommended that vacancies in the establishment of Resident Magistrates be filled as quickly as possible and that only those with adequate experience of magisterial work be appointed. It was felt that local officers should have a practical grounding in the work of Local Courts, in prosecuting and defending in the Magistrates' Courts and in the High Court, before being appointed as Resident Magistrates. The Senior Resident Magistrate is to be relieved of much of his court work in order to supervise the work of other magistrates. Magistrates and Local Court chairmen are reminded of the virtues of punctuality in attendance in court.

(c) *The Local Courts.*—Having studied the exposition of customary law prepared by some of its members, the Commission concluded that defilement, indecent assault, and rape are matters which lie peculiarly within the scope of local law and custom, and that the jurisdiction of the Local Courts in these matters should be extended. The possibility of a remand for sentence in more serious cases to a superior court could be considered.

(d) *Other courts.*—In order to relieve other courts of the routine work of dealing with small debts and minor traffic offences so that Magistrates and Local Court chairmen may give their time to the trial of more serious offences, it was suggested that a new Small Debts Court and a new Traffic Court be established by the City Council of Blantyre, the largest urban centre in the country.

Procedure and Evidence

Guided by the overriding principle that substantial justice should be done without undue regard to technicalities, the Commission recommended the redrafting and simplification of the Criminal Procedure Code, and particular reference was made to the view that Local Courts should be empowered to dispense with cross-examination by parties when no legal practitioner appears, but that the Local Court chairmen themselves should carry out the requisite examination.

It was also suggested that the accused, on a case to answer being found, should be a compellable witness required to give an account of his conduct and to answer relevant questions put to him by the court, complainant or prosecutor. Another suggestion was that magistrates

should not be required to record reasons for their verdicts in minor cases.

A major recommendation was that a short code setting out the rules of evidence in criminal cases should be drafted, providing that the admissibility of extra-judicial confessions shall be part of the general issue; that formal admissions by an accused person in court of facts in issue shall be permitted in criminal cases; and that documentary reports of medical officers purporting on the face of them to be authentic shall be admitted in evidence in all cases in which their contents are not in dispute.

Miscellaneous Recommendations

A number of miscellaneous observations and recommendations were made in the Report.

In dealing with prisons it was felt that the standard of subsistence provided in the prisons should be made reasonably to accord with the general measure of subsistence prevailing in the country. It was also recommended that the quantum and hours of work being performed by hard-labour prisoners should be reviewed so as to avoid prisoners being treated with undue leniency. The Commission advised that no account of periods spent in prison awaiting trial should be taken into account in assessing sentence unless remand prisoners opted for hard labour, remand prisoners to have the right so to opt. It was recommended that District Commissioners and Local Court Commissioners should join chairmen and members of Local Courts, magistrates and judges as prison visitors, but that only complaints from convicted prisoners should be heard; judges should not hear complaints from appellants whose appeal to the High Court or Supreme Court of Appeal are still pending.

The Commission recommended the introduction of legal education in the University of Malawi so as to make possible effective research into local law, practice and procedure, and so as to enable Malawians to qualify in the law inside Malawi.

The Commission was made aware of a dissatisfaction with the normal measure of sentence in manslaughter cases, and advised, in order to ascertain, as is desirable, the feelings of the deceased person's community in this matter, that before awarding sentence judges should seek the opinion of assessors as to the appropriate measure of sentence.

Under local law and custom in Malawi the question of compensation in homicide cases is of prime importance, and the Commission was of the opinion that Local Courts are the tribunals most suited to adjudicate on this matter, and that in each case of homicide the Registrar of the High Court should bring the case to the notice of the District Commissioner in whose district the family of the deceased person lives, with a view to the District Commissioner investigating the circumstances and advising as to the seeking of compensation through the Local Court.

Conclusion

It is clear from the Report of the Commission, and from statements made in Parliament, that there have been undoubted delays

and defects in the investigation, prosecution and trial of criminal cases in Malawi, and that these delays and defects were causing widespread dissatisfaction in the country.

This dissatisfaction is not attributed to a single cause, but is the result of a combination of circumstances, particularly those stemming from a shortage of appropriately qualified and experienced personnel, and those resulting from a "spate of technicalities" which "proliferated out of all sense of proportion". The shortage of staff led to a failure of proper cooperation between the courts, counsel and police, and the position was one of "everybody in the court at the time all learning together".

Behind all the recommendations made, the Commission emphasised "the need for a sound legal and judicial system, and a magistracy and judiciary that command respect and confidence", the need for a "system of criminal justice as simple and uncomplicated as possible, directed at enforcing the criminal law against guilty persons speedily and decisively, without unnecessary regard for technicalities". The recommendations were made to achieve this, "that the guilty shall be convicted speedily and properly punished (and) . . . the innocent shall be set free and that they shall also be set free quickly".

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THE AFRICAN LAW REPORTS

A new law-reporting organisation has been established for the countries of English-speaking Africa. *The African Law Reports* will operate under an editorial grant from the Ford Foundation, administered by the *Sailer* Project of the International Legal Center, New York, and will be published by Oceana Publications Inc., Dobbs Ferry, N.Y. The organisation is under the direction of Dr. Alan Milner, Fellow of Trinity College, Oxford and formerly the Dean of the Faculty of Law, Ahmadu Bello University, Zaria, Nigeria.

The Existing Law Reporting Systems

Although law reports are one of the basic tools of any common law system, many of the common law jurisdictions of Africa suffer the disadvantage of inadequate law reporting. With the exception of commercially operated series in East, South and until recently Central Africa, African law reports have normally been published under the aegis of individual colonial or independent governments. Almost without exception, they have been highly selective in their coverage, of variable editorial quality, and sporadic in their publication.

At an early stage of colonial rule, the British government sponsored the publication of individual series of reports for many of its African territories. Some ended almost before they began, as in the case of the old Sierra Leone reports (1912-1924, 1 volume); others filled only a few slender volumes over several decades (e.g. Northern Rhodesia 1931-1954, 5 volumes; Nyasaland 1922-1952, 6 volumes; Zanzibar

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