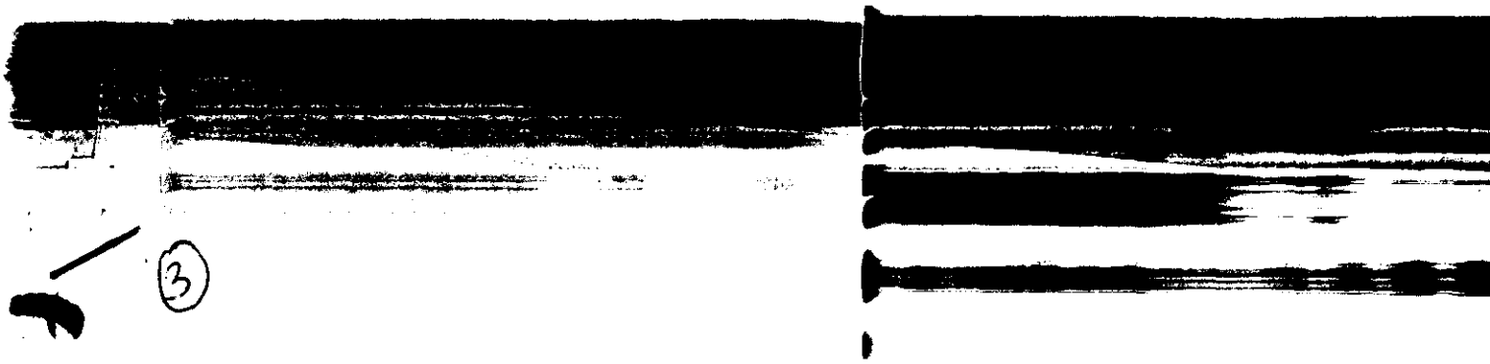

IN THE SEYCHELLES COURT OF APPEAL

TREFFLE FINESSE

V.

THE REPUBLIC

Criminal Appeal No. 1 of 1995

(Before H. Goburdhun, P., A. Silungwe, E.O., Ayoola, JJA.)

Mr. F. Bonte for the appellant
Mr. S. Fernando for the respondent

JUDGMENT OF THE COURT

The two questions which arise for consideration on this appeal are (i) whether the appellant, Treffle Finesse, has a right of appeal and (ii) if he does, whether the learned Chief Justice is right in his decision that a case was made out sufficiently to require the appellant to make a defence.

In the Supreme Court the appellant was charged in two counts with the offences of entering a dwelling house with intent to commit felony contrary to section 290 of the Penal Code in the first count and theft contrary to section 260 of the Penal Code in the second count. At the close of the prosecution case counsel on behalf of the appellant made a no case submission. The learned Chief Justice being of the view that there had been sufficient evidence adduced by the prosecution ruled that there has been sufficient evidence led to establish a prima facie case in respect of those counts and called upon the appellant to make a defence. From that decision the appellant has appealed to this court complaining in the main that the learned Chief Justice was wrong in holding that there had been sufficient evidence led to establish a prima facie case.

At the hearing of the appeal, counsel on behalf of the Republic raised a preliminary objection to the hearing of the appeal on the ground -

> "That there is no provision in the law for a person to appeal to the Court of Appeal from an interlocutory order of the Supreme Court before the trial in the Supreme Court is concluded."

Mr. S. Fernando, counsel on behalf of the Republic, argued that section 342(1) of the Criminal Procedure Code (Cap. 54) which makes provisions for appeals from the Supreme Court to the Court of Appeal only gives a right of appeal to a "person convicted". He argued that although the Criminal Procedure Code has not specifically excluded a right of appeal by a person who has not been convicted, Article 120(2) of the Constitution of the Republic of Seychelles read in the light of S.342(1) of the Code should be construed in such a way to exclude a right of appeal by a person who is not a "person convicted". Mr. Bonte, counsel on behalf of the appellant, relied on Article 120(2) for the right of appeal exercised by the appellant.

Being of the view that article 120(2) of the Constitution gives a right of appeal which has not been excluded in the circumstances of this case, we overruled the preliminary objection. The need to give reasons for our decision is now being satisfied.

Article 120(1) of the Constitution prescribes the general jurisdiction on the Court of Appeal to hear and determine appeals from the Supreme Court in the following terms:

> "There shall be a Court of Appeal which shall, subject to this Constitution, have jurisdiction to hear and determine appeals from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court. ...."

Article 120(2) confers a general right of appeal. It provides:

> "Except as this Constitution or an Act otherwise provides, there shall be a right of appeal to the Court of Appeal from a judgment, direction, decision, declaration, decree, writ or order of the Supreme Court."

The general right of appeal conferred by Article 120(2) of the Constitution and the general jurisdiction of this Court to hear appeals from the Supreme Court conferred by Article 120(1) can only be restricted by the Constitution itself or by an Act which provides that there shall be no such jurisdiction or no such right. Counsel on behalf of the Republic contended that section 342(1) of the Criminal Procedure Code restricts the general right of appeal conferred by the Constitution.

Section 342(1) of the Criminal Procedure Code provides as follows:

> "Any person convicted on a trial held by the Supreme court may appeal to the Court of Appeal -
>
> (a) against his conviction x
> X X X X
>
> (b) against the sentence passed on his conviction with the leave of the Court of appeal X X X."

It is evident that while section 342(1) of the Code provides for appeal from a decision of the Supreme Court either as of right or by leave, its provisions are not at all exclusionary. The words "Except as this Constitution or an Act otherwise provides" envisage provisions which are expressly exclusionary and which exclude a right of appeal. Where the Constitution confers a right such right can only be taken away, where the Constitution so permits, by statutory provisions which are expressly and manifestly exclusionary. Section 342(2) of the Code which provides for a right of appeal cannot be interpreted as provision which excludes a

right of appeal where the Constitution has conferred such right. It would have been a different matter if the Criminal Procedure Code had provided that no appeal shall lie to the Court of Appeal from a decision of the Supreme Court in any criminal cause or matter except as provided by the Code. To achieve the result which the Republic urges on this appeal we are of the view that there will be need to amend the Criminal Procedure Code in the line suggested above. We feel no hesitation in holding as we did in the case of Durdunis v. The Republic (Cr. Appeal No. 12 of 1993) (unreported judgment of 24th March 1994) that that result will not be achieved by a strained construction of Art.124(2) of the Constitution or reading into section 342(2) of the Code what it does not contain. We seize this opportunity to re-iterate the view we held in Durdunis Case that :

> "... the wider right of liberty to appeal granted by Article 120(2) cannot by implication be circumscribed by the provisions of the Criminal Procedure Code, and of section 329 (now section 342) thereof in particular. Exclusion of the right of appeal is permitted by the Constitution but such exclusion must be by express statutory provision."

We feel that there is urgent need to amend the Criminal Procedure Code to specify expressly and beyond per-adventure circumstances in which rights of appeal in criminal cases and matters are excluded. Be that as it may, for the reasons which we have stated we were of the view that the preliminary objection to the hearing of the appeal should not be upheld. We overruled the objection accordingly.

We now turn to the substantive appeal on summary, the evidence led by the prosecution was that the house of one Pranlal Jivan was broken into between the night of 18th February 1994 and the morning of 19th February 1994 and items of jewellery stolen therefrom. There was no eyewitness to the act of breaking in or theft. However, upon investigation of the incident by the police a finger print

found on a metal shelf in the room of the said Jivan was lifted and compared with the finger and palm prints taken from the appellant. The finger print expert who was a witness for the prosecution found sixteen points of similarity between the finger print lifted at the scene and the finger print taken from the appellant. Apparently, the fingerprint was the only evidence linking the appellant with the offence.

At the close of the prosecution's case counsel on behalf of the appellant made a no case submission. While conceding that, on its own, evidence of finger print may suffice to found a conviction, he contended that the quality of the print lifted at the scene of the incident was so smudged that it could not afford basis for comparison with the fingerprint taken from the appellant.

In a carefully reasoned ruling the learned Chief Justice overruled the submission. In our view he adopted a correct approach when he said:

> "At the stage that we have reached in this trial the Court has to determine whether a prima facie case has been made out in respect of the charges levelled against the accused person. In an ordinary case, the onus is on the prosecution to prove the guilt of the accused beyond reasonable doubt. At the close of the case for the prosecution the trial court may find that there is a prima facie case agaisnt the accused; that is a purely objective consideration and a step in the procedure. What the Court decides then is that the evidence adduced so far is such that a reasonable Court may - not would - convict. Whether the accused then adduces evidence or not or makes an unsworn statement from the dock, the trial Court must weigh all the evidence before it as a whole, and decide whether guilt has been proved beyond reasonable doubt."

The manner in which a trial judge should approach a submission of "no case" has been well stated in R. Galbraith (1981) 73 Cr. App. R. 124. Two possible circumstances identified in that case are of relevance to this case.

These are: (i) Where the judge concludes that the prosecution evidence, taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case. (ii) Where the prosecution evidence is one that its strength or weakness depends on the view to be taken of a witness' reliablity or other matters which are generally speaking within the jury's province and where on one possible view of the facts there is evidence on which the jury could properly conclude that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

We agree with the learned Chief Justice's conclusion which in effect is that the present case falls within the latter of the two categories stated above. The fingerprint expert who gave evidence having found the characteristics similar to the lifted fingerprint and the fingerprint of the appellant concluded on oath that the lifted fingerprint was that of the appellant. Whether his evidence was reliable or not was not a matter for the trial court to determine on a submission of "no case". It sufficed that there was evidence which if accepted could support a conviction. At that stage of the proceedings it was not for the trial judge to accept or reject evidence.

This appeal must fail but before we make an order dismissing it, it is expedient that we make some observations on the desirability or otherwise of such appeals as this from a decision of the trial court rejecting a submission of "no case". An erroneous decision rejecting a submission of no case is a decision of a question of law which may form the basis of a successful appeal against conviction. Where a submission of no case is made on behalf of the accused and is wrongly rejected by the trial court the Court of Appeal is not obliged to take into account any adverse evidence given against him after the case had been wrongly left to the jury or judge of fact. Several cases which we note but do not

need to discuss establish these principles. Some of them are R. v. Abbott (1955) 2 QB 497 and R.V. Aston and Hadley (1970) 55 Cr. App. R.48.

If follows that although the accused person may, as we have held, exercise a right of appeal from a wrong decision rejecting his submission of no case, exercise of such right may only occasion delay, in most cases to the detriment of the accused, and, in some cases to the smooth administration of criminal justice. To avoid such delay, we venture to suggest, the trial court may proceed with the matter notwithstanding the interlocutory appeal which does not ipso facto operate as a stay of proceedings. If at the end of the day the accused is acquitted his interlocutory appeal becomes a mere academic exercise. If he is convicted, he suffers no irreversible prejudice, since he can still canvass the point that the rejection of the submission of no case is erroneous in law. Hardly would the interlocutory appeal be rendered nugatory if proceedings are not stayed nor would any prejudice be occasioned the accused by not staying proceedings. It is only in very rare and deserving cases that the trial court would stay proceedings pending the determination of such appeal in a criminal case.

Having said this, we are of the view that urgent consideration should be given to the desirability of amending the Criminal Procedure Code to make provisions in line with Article 120(2) of the Constitution specifying circumstances in which appeals are excluded in criminal cases and matters.

For reasons which we have stated, we find no substance in this appeal and it is dismissed.

Delivered on the 19th day of October, 1995.

H. GOBURDHUN
PRESIDENT

A. SILUNGWE
JUSTICE OF APPEAL

E.O. AYOOLA
JUSTICE OF APPEAL