JUDGMENT

The appellant, Steve Bihu, was charged with a total of eight offences of criminal trespass, damage and larceny arising out of four separate incidents.

He appeared before Edwin Goldsborough sitting as Senior Magistrate in Luganville on 8th February 1990, pleaded guilty and was remanded in custody to 15th February for medical reports. There is nothing on the file to say what happened on 15th February but the record shows the court sat on 15th March and remanded the accused to 22nd March for sentence. There is a medical report dated 21st March saying that the appellant did not appear to be suffering from any major mental disorder.

According to the record, the next time he appeared was on the 12th June before the learned Chief Justice where he was sentenced to a total of 12 years imprisonment.

Exactly in what capacity the Chief Justice was sitting that day is far from clear. The record in his handwriting is headed "Senior Magistrates Court, Santo" and at the end is signed "Frederic G. Cooke, Chief Justice". The "Order for Imprisonment" made the same day starts with the statement "By judgment No. 197/90 given by the Senior Magistrates Court for Northern district ...." and having listed the sentences, it then continues "Therefore the Chief Justice of Vanuatu sitting at 1st instance here commands .... "etc.

An appeal was lodged to the Supreme Court and listed for hearing on 6th September before Mr Justice Goldsborough sitting as a Supreme Court judge. As a result of an objection raised, it would appear, by the Public Prosecutor the case was further adjourned to October before a different judge. That objection was properly made. Although Mr Justice Goldsborough's part in the earlier proceedings had been

extremely limited, he could not properly hear the appeal.

It is now before me in the rather unusual form of an appeal against sentence and a request by both parties for clarification of various aspects of the earlier proceedings some of which would appear to go to the jurisdiction of the lower court in this appeal although counsel state they do not challenge jurisdiction thereby. I must deal with those matters first.

The points on which clarification is sought are set out in a letter from the Public Prosecutor dated 4th September 1990 and addressed to Mr Justice Goldsborough.

The first refers to the history of the case as I have set it out and continues -

> *"If it is in fact the case that BIHU was in custody from the 8th February 1990 to the 12th June 1990 pending sentence, it would appear on the face of it, that such remand may have been unlawful, having regard to the provisions of section 130(2) Criminal Procedure Code Act Cap 136"*

Section 130 is in Part VI of the Criminal Procedure Code Act which deals with procedure in trials before Magistrates' Courts. It gives the court the power to adjourn the case and either release the accused on bail or commit him in custody.

Subsection (2) states:-

> *"If the accused has been committed to prison, such adjournment shall be for not more than 14 clear days, the day following that on which the adjournment is made being counted as the first day."*

Those terms are perfectly clear. Whenever an accused man is committed in custody at an adjournment of the hearing, he must be brought back to the court at intervals not exceeding 14 clear days. The record should clearly show all such appearances and further adjournments should be to a date within the allowable period. At each such remand hearing the

court must allow and consider any further representations on bail and record both those and the reasons for continuing the refusal of bail if that be the case. The conditions of section 66 of the Criminal Procedure Code Act will also apply at each refusal and compliance with the section should also be recorded.

This is an extremely important protection for an unconvicted man and must be observed meticulously by the courts. It clearly was not in this case and was a serious omission.

The second point raised in the Public Prosecutor's letter is as follows:-

> *"Having regard to the provision of the Courts Act Cap 122 section 4, the Magistrates Court Northern Division would require an order under seal from the Supreme Court in accordance with the provisions of section 4 (3) Court Act, in order to deal with this case, both from the purposes of taking pleas on the 8th February 1990 and passing sentence on the 12th June 1990. I have not seen a copy of such order under seal, in relation to either hearing.*
>
> *If in fact such an order was in existence, and signed by the Chief Justice to allow your good self to hear the case on the 8th February 1990, this nevertheless raises an interesting question, as to whether or not the Chief Justice can authorise himself to deal with this matter as a Senior Magistrate."*

This raises two questions.

The first is the authority of the magistrate to hear these offences. By section 4(1) of the Courts Act every Magistrates' Court has jurisdiction to try summarily any criminal offence for which the maximum punishment does not exceed 2 years.

Subsections (2) and (3) provide as follows:-

> *"(2) Notwithstanding the provisions of subsection (1), a Magistrate's Court may when presided over by a Senior Magistrate and at the discretion of the prosecutor, or if there is no prosecutor at the discretion of the Court, try summarily any criminal proceedings for an offence for which the maximum punishment prescribed by law does not exceed imprisonment for a term exceeding 5 years but shall not be empowered in the case of a conviction to impose any punishment in excess of the punishment prescribed in subsection*

(1)(a).

(3) Notwithstanding the provisions of subsection (1) or of any other law, the Supreme Court, may, in respect of a particular class of proceedings or a particular case, by order under its seal invest a Magistrate's Court with jurisdiction to try any proceedings which would otherwise be beyond its jurisdiction."

Thus the position is that, if the offence charged carries a maximum sentence of more than 2 years and not more than 5 years imprisonment, a senior magistrate may try it only in three circumstances:

(a) when there is a prosecutor (as defined in section 1 of the Criminal Procedure Code Act) and he requests trial by the Senior Magistrate, or

(b) where there is no prosecutor and the Senior Magistrate feels it is appropriate for him to try the case, or

(c) In any case where, under subsection (3), jurisdiction has been vested in the court by an order under seal.

Thus the rather strange situation is that, apart from cases covered by subsection (3), the Senior Magistrate is given a discretion to decide the point but, once a prosecutor is present, the discretion is removed from the court and vests entirely in the prosecutor. In the latter case, if the prosecutor does not request trial by the Magistrates Court, it cannot proceed.

The offences with which Bihu was charged and the maximum sentences for each were unlawful entry contrary to section 143 of the Penal Code, maximum penalty 20 years imprisonment, damage contrary to section 133, maximum penalty 1 year imprisonment and theft contrary to section 125 (a) maximum penalty 12 years imprisonment. Thus offences were included which fell outside the provisions of subsections (1) and (2)

and so there should have been an order under seal to give the Magistrates Court jurisdiction.

The second question relates to the power of the Chief Justice to sit as a Senior Magistrate. As I have already pointed out, the record suggests some confusion as to whether he was sitting as Chief Justice or as a Senior Magistrate.

Section 10 of the Courts Act provides:

> *"No jurisdiction conferred upon any magistrate shall in any way restrict or affect the jurisdiction of any judge of the Supreme Court, who shall have in all criminal and civil proceedings an original jurisdiction concurrent with the jurisdiction of a Senior Magistrate."*

The first part of the section is clear but the passage after the comma would appear, on its face, to be superfluous. In fact, on a literal reading, it appears to be restricting the jurisdiction of the Supreme Court in all criminal and civil proceedings to that of a Senior Magistrate. Under the Constitution, the Supreme Court has an unlimited original jurisdiction in any civil or criminal proceedings and that cannot be qualified by the Courts Act. When the Supreme Court wishes to exercise its original jurisdiction in relation to a criminal case normally triable before a Magistrates Court, it will transfer the case to itself. However, that will result in a Supreme Court trial.

The use of the word "concurrent" does not help. If taken as it is generally used, it suggests a jurisdiction running parallel with that of the Senior Magistrate. I am not sure that is appropriate where the Supreme Court jurisdiction exceeds that of the Senior Magistrate. If the first part of section 10 means what it says, and the jurisdiction of a magistrate does not in any way restrict the jurisdiction of a Supreme Court judge, why is it necessary to specify jurisdiction concurrent with a Senior Magistrate because it similarly must be concurrent, so far as it goes, with that of

a magistrate and, if unrestricted, accords both.

It is noteworthy that sections 1 to 4 of the Act confer the jurisdiction not on the magistrates as such but on the Magistrates Courts. Section 4(2) again, by the presence of a Senior Magistrate, extends the jurisdiction of the court. Normally such wording means no more than that the magistrate's jurisdiction and the courts jurisdiction are one and the same thing. However, in trying to interpret section 10, I must assume the second part was included by the Legislature for a purpose. In view of the manner in which section 4 is worded, I consider it suggests the intention of the second part of section 10 is to provide that, when a Supreme Court judge sits in a Magistrates Court, he has the same effect on the court's jurisdiction as does the presence of a Senior Magistrate.

If that is the case, when a judge sits in a Magistrates Court he is restricted in the same way as would be a Senior Magistrate. If he wishes to try the case without restriction, he must order the case be transfered for trial in the Supreme Court under section 27 of the Criminal Procedure Code Act.

The difficulty in the present case is that this interpretation does not save the case. If the Chief Justice was sitting as a Senior Magistrate, the offences were such that they were not covered by section 4(2) and so he needed an order under seal giving the court jurisdiction to try these offences but he had no such order. If he was sitting as a Supreme Court judge, he could only do so, in the case of the offences triable only in the Supreme Court, after a preliminary enquiry had been held and one had not.

The capacity in which he was sitting also affects the appeal. If he was a Senior Magistrate, it lies to this Court; if a judge, to the Court of Appeal.

On balance I take the view that the intention of the

learned Chief Justice was to sit as a Senior Magistrate and as such the appeal lies to this Court.

Neither counsel ~~does not~~ challenges the jurisdiction of the lower court but simply seeks clarification of these matters. Having considered them, I feel they go to such fundamental aspects of the trial that it cannot stand and I must order the case be returned to the Magistrates Court.

Although this makes it unnecessary to consider the appeal against sentence, I feel it may be helpful if I still consider the last question posed by Mr Baxter-Wright. The sentence ordered by the Chief Justice was three years imprisonment on each offence. As the eight charges consisted of four pairs of offences in which each pair arose out of ~~one~~ the same incident, he made the sentences in each pair concurrent with each other but consecutive to the other pairs. Mr Baxter-Wright sets out the question in this way -

"Notwithstanding the foregoing procedural considerations, the correct interpretation and application of section 4(4) Court Act requires to be considered by the Court. It seems to me, that the crucial words in section 4(4) (Courts Act) are:-

"..... In respect of two or more distinct offences arising out of the same facts,"

Having regard to the particulars circumstances of this case, the prosecution would submit that in respect of counts 1 and 2 the court could lawfully have imposed two years imprisonment and two years imprisonment consecutive, but not three years imprisonment and three years concurrent. The prosecution would submit that counts 1 and 2, 3 and 4, 5 and 6 and 7 and 8, all arise out of four different sets of facts, and in those circumstances, there is no bar to the Magistrate imposing consecutive sentences for each set of facts. If this interpretation is correct, the court could have theoretically imposed a total of 16 years imprisonment for the eight offences the subject of the Appeal, but could not lawfully arrive at the total twelve years imprisonment in the way that it did.

This proposition pre-supposes that the restriction on a Magistrates Court set out in section 4(2) when dealing with cases for an offence for which the maximum punishment prescribed does not exceed five years, and where the court is presided over by a Senior Magistrate and at the discretion of the Prosecutor, is also of application to cases which are covered by the application of section 4 (3) Courts Act (i.e. where the Supreme Court has by order under seal invested a Magistrates Court with jurisdiction to try any proceedings which would otherwise be beyond its jurisdiction).

There is nothing in section 4 of the Courts Act to explicitly state that when a Magistrates Court acting in according with the provisions of section 4 (subsection 3), that it is bound by the provisions of section 4(1) or 4(2).

It seems to me to be at least arguable, that subsection 3 of section 4 means not only that the Supreme Court may by order under its seal invest a Magistrates Court with jurisdiction to try any proceedings which would otherwise be beyond its jurisdiction, but also, to pass a sentence, that would otherwise be beyond its jurisdiction. That is to say, that subsection 3 of section 4, is not subject to subsections 1 or 2. This seems to be confirmed by the opening words of section 4(1). If I am wrong in this argument, and the Court takes the view that a Magistrates Court acting by order under seal of the Supreme Court under section 4(3) Courts Act, is bound by the sentencing constraints imposed by the rest of section 4 Courts Act, then clearly the Court could not in relation to each set of offences arising out the same facts impose concurrent sentences of three years imprisonment for each charge (although perhaps ironically, it could have imposed a sentence of two years imprisonment plus two years imprisonment consecutive, in relation to each charge arising out of the same set of facts)."

Subsection 2 of section 4 extends the jurisdiction of the Magistrates Court when presided over by a Senior Magistrate to hear cases normally outside the court's jurisdiction but specifically does not extend the power of sentence. Had such a restriction also been intended in subsection (3), it would have been included. That subsection gives the Supreme Court the discretion to invest the Magistrates Court with extra jurisdiction. Having given that discretion, it does not limit it in any way and clearly allows the Supreme Court, in its order, to impose such limitation as it feels appropriate.

Going back to the present case, the sentences were clearly wrong. The learned Chief Justice was sitting as a Senior Magistrate but, as there was no order to extend the court's jurisdiction he was bound by the sentencing limitation in section 4(1) and (2). Thus had he possessed the power to try these cases, which he had not, the maximum sentence he could have imposed for each offence was one of two years and not three.

There has been an unfortunate delay arising from my hearing of this appeal and I do not wish to prolong the matter unnecessarily. I therefore order that the case be returned to the Magistrates' Court and tried by another Senior Magistrate. I order that the court shall have jurisdiction to try these offences but that its powers of sentencing shall be limited to

those in subsections (1) and (2) of section 4 of the Courts Act. The entry of this judgment shall have the same effect as an order under seal by this Court.

As a footnote, I refer to one further point. It is assumed in Mr Baxter-Wright's letter, that a Magistrates Court has power to pass a series of consecutive sentences for offences arising out of different facts with no limit. The matter was not argued and I cannot rule on it but I feel it is a question that should be considered in the future. As the Legislature saw fit to impose a limitation on a magistrate's power to sentence for an individual offence, it seems unlikely it intended virtually unlimited powers for sentencing a series of such offences. If section 4(4) is considered in conjunction with the law as it relates to joinder of counts in section 72 of the Criminal Procedure Code Act, the use of the words "..... arising out of the same facts ....." in section 4(4) may have a different significance. The purpose of the main part of section 4(4) is to remove the need to commit for sentence to the Supreme Court under section 3 of the Criminal Procedure Code Act. The limitation on aggregate sentences is contained in the proviso. It may be instructive to consider whether the legislature would have needed to insert such a provision if, for a series of offences of the same or similar character (i.e. the only other basis on which they may be joined under section 72), it intended the court to have the power to impose an unlimited sentence by the use of consecutive terms of 2 years.

F.G.R. Ward

Judgment delivered in open court this day of 1991.

Judge