A

AMINIASI

v.

REGINAM

[COURT OF APPEAL, 1967 (Gould V.P., Marsack J.A., Bodilly J.A.), 4th, 18th July] B

Criminal Jurisdiction

Criminal law—sentence—attempt to break and enter—misdemeanour—in absence of other specific provision maximum punishment imprisonment for two years with or without fine—Penal Code (Cap. 8) ss.41, 328(b), 409, 410—Criminal Procedure Code (Cap. 9) ss.7, 211A—Criminal Procedure Code (Amendment) (No. 2) Ordinance 1957—Court of Appeal Ordinance (Cap. 3) ss.18(3), 27(5). C

An attempt to break and enter a house contrary to section 328 (b) of the Penal Code is by virtue of section 409 of the Code declared to be a misdemeanour. No other punishment therefor being specifically provided, the offence falls to be dealt with under section 41 of the Penal Code under which the maximum term of imprisonment which may be imposed (with or without a fine) is two years. A sentence of three years' imprisonment imposed for this offence was therefore unlawful. D

Appeal against sentence passed by the Supreme Court.

Appellant in person. E

T. U. Tuivaga for the respondent.

The court having allowed the appeal at the conclusion of the hearing the reasons for its judgment were read by Gould V.P. : [18th July 1967]—

The appellant was convicted by a Magistrate's Court of the first class at Lautoka of the offence of "Attempted housebreaking with intent to commit a felony therein", contrary to sections 328 (b) and 409 of the Penal Code of Fiji. A magistrate's court of the first class is empowered by section 7 of the Criminal Procedure Code, in cases when such a sentence is authorized by law, to pass a sentence of three years' imprisonment. Instead of passing sentence upon the appellant, the learned Magistrate committed him to the next sessions of the Supreme Court for sentence. The power of a magistrate to make such an order is contained in section 211 A of the Criminal Procedure Code which was enacted by the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1957, and it is to be inferred that, within the terms of that section, the learned Magistrate, having obtained information as to the character and antecedents of the appellant, was of opinion that the case was an appropriate one for greater punishment than he had power to inflict. The appellant in fact had a very bad record of previous convictions. F G H

When the appellant duly came before the Supreme Court for sentence the learned Judge gave the case careful attention and, having taken into

consideration the fact that the appellant had then been in custody for several months, sentenced him to three years' imprisonment. Against
A that sentence the appellant appealed to this Court.

At the hearing Crown Counsel very properly drew our attention to the fact that the three year sentence which was passed by the Supreme Court appeared to be in excess of jurisdiction, and it is of course axiomatic that no court may pass any sentence which is not authorized by law. Section 328 (b) of the Penal Code, authorizes a punishment of seven
B years' imprisonment, but that relates to the full offence of breaking and entering a dwelling house with intent to commit a felony therein. Here the appellant was charged only with an attempt to commit that offence and this, under section 409 of the Penal Code, is declared to be a misdemeanour, unless otherwise stated. By section 410 an attempt to commit a felony of such a kind that a person convicted of it would be liable to the punishment of death or not less than fourteen years' imprisonment,
C is itself declared to be a felony punishable by imprisonment for seven years; that section does not, however, apply to an offence under section 328 (b) for which seven years' imprisonment is the prescribed maximum. It is clear therefore, that an attempt to commit an offence against section 328 (b) is a misdemeanour, and there being no other punishment specifically provided, it falls to be dealt with under section 41 of the Penal Code, which provides for a punishment of imprisonment for a term not exceeding
D two years, or a fine, or both imprisonment and fine. In England the like offence could have been punished by imprisonment for any term which was not inordinate and which did not exceed the term which could have been imposed for the full offence — there is no statutory limit: *Archbold's Criminal Pleading, Evidence and Practice* (36th Editon) Paragraph 4111.

In these circumstances, it being clear that the sentence of three years'
E imprisonment passed upon the appellant was unlawful, it was open to this Court under section 18 (3) of the Court of Appeal Ordinance (Cap. 3) to pass such other sentence as was warranted by law.

Accordingly at the conclusion of the appeal we quashed the sentence of three years imposed by the Supreme Court and passed sentence upon the appellant of two years' imprisonment. Having regard to the gravity
F of the offence committed and to the appellant's record of previous convictions there were no merits in his case to warrant any sentence less than the maximum and indeed, had the three year sentence passed by the Supreme Court been a lawful one we would have sustained it. In conformity with section 27 (5) of the Court of Appeal Ordinance the sentence will run from the time when it would have begun if passed by the Supreme Court in the proceedings below.