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WATISONI BAINIVANUA

v.

REGINAM

[COURT OF APPEAL, Speight, V. P., Roper, J. A., Mishra, J. A.]

B

Criminal Jurisdiction

Date of Hearing: 26 June, 1986.

Delivery of Judgment: 18 July, 1986.

C

(Criminal Law—Power of Supreme Court and Court of Appeal to vary sentences imposed in Magistrate's Court—Supreme Court may not impose a greater sentence than maximum the Magistrate could have imposed—Court of Appeal may only interfere if sentence is wrong in law—then may not impose a sentence but may remit to Supreme Court or Magistrate's Court for rehearing.)

Appellant—In Person.

D

M. D. Scott (Director of Public Prosecutions) for the Respondent.

Watisoni Bainivanua appealed against a decision of the Supreme Court whereby certain sentences which had been imposed on him in the Magistrate's Court were increased.

E

The Supreme Court increased the sentence on the gravest offence to imprisonment for 12 years and made other lesser increases on other charges.

The question which now had arisen was whether the appellant did have a right of appeal from the Supreme Court to the Court of Appeal. Section 22 of the Court of Appeal Act (Cap. 12) stated—

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“22.—(1) Any party to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):

G

Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a magistrate's court.”

The Court observed that the maximum imprisonment for the totality of the present offences in the Magistrate's Court was ten years. Accordingly that maximum applied in the Supreme Court.

H

See *D.P.P. v. Jay Singh* (F.C.A. Cr. App. 2/78) which held that the Supreme Court on appeal is limited in the imposition of sentence to the maximum applicable in the Magistrate's Court for the particular offences. See section 319(2) of the C.P.C.

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S.22(3) of the Court of Appeal Act stated:—

"On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the magistrate's court or of the Supreme Court should be set aside or varied on the ground of a wrong decision of any question of law, make any order which the magistrate's court or the Supreme Court could have made, or may remit the case, together with its judgment or order thereon, to the magistrate's court or to the Supreme Court (for determination, whether or not by way of trial de novo or rehearing, with such directions as the Court of Appeal may think necessary:

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Provided that, in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not (save as provided in subsection 4), increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the magistrate's court or by the Supreme Court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper."

D

Held: S.23(1) gives a right of appeal in cases of unlawful sentence but it was difficult to see where this could be remedied. The proviso authorised variation of sentence in some situations, but only on an appeal against conviction. S.22(1) where it applies but does not state specifically where the power of remedy may be applied.

E

The intention of the Act must be given effect if there is an interpretation which will permit it. Pursuant to s.22(3) the decision of the Supreme Court on sentence was set aside as a wrong decision on a question of law.

Appeal upheld. Case remitted to the Supreme Court for rehearing as to sentences.

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S.22 ought be amended to render the deficiencies in the proviso to s.(3) by allowing the Court of Appeal itself to vary sentences passed in excess of jurisdiction.

Cases referred to:

D.P.P. v. Gaj Raj Singh (24 FLR 43).

G

SPEIGHT, V. P.

Judgment of the Court

This appeal raises in a rather unusual way a question concerning the jurisdiction of this Court in criminal appeals pursuant to section 22 of the Court of Appeal Act (Cap. 12)—i.e. appeals from the Supreme Court in its appellate jurisdiction.

H

The appellant originally pleaded guilty in the Magistrates Court to a number of very serious charges. He had a lengthy list of previous convictions for criminal conduct. The learned magistrate imposed a number of sentences, the totality of which

- A** amounted to six years imprisonment. Against this the prosecution appealed upon the ground that the sentences imposed were manifestly inadequate, pursuant to section 308 of the Criminal Procedure Code Cap. 21.

B In the Supreme Court, the learned Judge accepted the submissions by counsel for the D.P.P. and increased the sentence in respect of the gravest offence to 12 years and made other lesser increases and the present appeal is from those sentences. Although he had not himself initiated an appeal from the Magistrate's Court, when the matter came before the Supreme Court the present appellant was entitled to be heard—section 319 of Criminal Procedure Code.

The question arises whether he has a right of appeal to this Court—if he has, it must be by virtue of section 22 above mentioned.

- C** Subsection (1) of that section reads:—

“22.—(1) Any party to an appeal from a magistrate's court to the Supreme Court may appeal, under this Part, against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):

- D** Provided that no appeal shall lie against the confirmation by the Supreme Court of a verdict of acquittal by a magistrate's court.”

Clearly the present appellant was “a party” to the appeal in the Supreme Court. But such an appeal must be:—

“On any ground of appeal which involves a question of law only (not including severity of sentence).”

- E** Now severity of sentence (as distinct from legality of sentence) is not a question of law so the determination made by the Supreme Court Judge on appeal as to quantum is prima facie final.

Although we think subsection (1) could have been more clearly worded, we accept that as the law now stands an appeal against sentence can only be advanced to this Court by the person convicted in the Magistrate's Court on the ground of excess of jurisdiction or some other error of law, and not against severity within jurisdiction.

- F** The D.P.P. has very properly drawn our attention to a decision of this Court—*D.P.P. v. Gaj Raj Singh* (24 FLR 43) where it was held that the Supreme Court on appeal is limited in the imposition of sentence to the maximum applicable in the Magistrates Court for the particular offence(s). Although the section—previously 300(2) in the Criminal Procedure Code has now become section 319(2) in the re-enacted Code, the wording is identical and the earlier decision of this Court still applies.

- G** The maximum imprisonment for the totality of the present offences in the Magistrates Court was ten years—sections 7(a) and 12(2)(b) of Criminal Procedure Code—and accordingly that maximum applied in the Supreme Court, but has been exceeded.

H What then are the powers of this Court?

Section 22(3) of the Court of Appeal Act reads:—

“On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the magistrate’s court or of the Supreme Court should be set aside or varied on the ground of a wrong decision of any question of law, make any order which the magistrate’s court or the Supreme Court could have made, or may remit the case, together with court or to the Supreme Court (for determination, whether or not by way of trial de novo or rehearing, with such directions as the Court of Appeal may think necessary: **A**

Provided that, in the case of an appeal against conviction, if the Court of appeal dismisses the appeal and confirms the conviction appealed against, it shall not (save as provided in subsection 4), increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the magistrate’s court or by the Supreme Court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper.” **B**

The first part of the subsection speaks of “making an order” or remitting for trial or re-hearing—not the usual phraseology for conferring sentencing power. **C**

The proviso authorises variation of sentence, in cases of unlawful sentences or other errors of law—but only in the case of an appeal against conviction. **D**

It seems an absurdity that, as we have construed it, subsection (1) gives a right of appeal in cases of unlawful sentence but it is difficult to see where a power to remedy is specifically spelled out.

In our view the intention of the Act must be given effect to if there is an interpretation which will permit it—and we think it is not doing too great violence to language to say that, pursuant to subsection (3) the decision of the Supreme Court on sentence should be set aside on the ground of a wrong decision on a question of law and the case is remitted to the Supreme Court for determination by way of rehearing. That subsection permits such directions as this Court may think necessary, but it would be inappropriate for us to express any view on the merits of the appeal, and we merely draw attention to the upper limits available. **E**

We would also wish to draw attention of the appropriate authority to the desirability of amending section 22 to remedy the deficiencies in the proviso to subsection (3) by allowing this Court itself to vary sentences which have been passed in excess of jurisdiction or are otherwise unlawful, and thus avoid the clumsy procedure which we feel must be followed as the law is at present expressed. **F**

In the present instance we set aside the sentence imposed in the Supreme Court and remit the case for rehearing there in accordance with the foregoing observations. **G**

Appeal allowed.

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