The trial was adjourned until the next day when the judge gave judgment and found the appellant guilty of manslaughter.

In his summing-up to the assessors, of which we have before us only his notes and not the full summing up, there is this note, and it is the only note about self-defence: " No evidence of self-defence, not for consideration."

As the matter of self-defence was thus withdrawn from the assessors, the summing-up contained nothing as to what can amount to self-defence, or as to where lies the onus of its disproof or proof or as to how that onus can be discharged.

In his judgment the judge said:

> " I was of the opinion that there was no evidence on which the assessors could form the opinion that the accused might have acted in self-defence and I withdrew the matter from them. I put the case to the assessors as one in which, assuming they were satisfied that accused by his act caused the death of deceased, the only question was whether the prosecution had or had not established that the accused had acted with malice aforethought."

The judge may have thought the evidence as to self-defence of insufficient weight to merit consideration. But there was such evidence. That elicited under cross-examination to which the judge referred in his ruling at the close of the case for the prosecution, and that given by the appellant himself. Moreover, his having been struck over the head with a stick was relevant not only to the question of whether the appellant acted under provocation but also as to whether he acted in self-defence. Consequently there was a lack of direction of the assessors on a vital point, and the learned judge thereby (to use the words of Lord Denning in *Bharat, Son of Dorsamy* v. *Regina* [1959] 3 All E.R. 292 at 294) " disabled the assessors from giving him the aid which they should have given; and thus, in turn, disabled himself from taking their opinions into account as he should have done."

The last point is whether the assessors would necessarily have come to the same opinion if the question of self-defence had not been withdrawn from them and they had been directed as to it. We think that although this case may be near the borderline, it cannot be certain that they would have. We therefore quash the conviction of the appellant and set aside the sentence, and order that a finding of not guilty be entered on the record.

Freetown
April 4,
1961

Ames P.
Marke J.
Bankole
Jones J.

[COURT OF APPEAL]

ABDUL BAI KAMARA . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Cr. App. 45/60]

Criminal Law—Appeal—Appeal from magistrate's court to Supreme Court—Appeal against conviction but not against sentence—Whether Supreme Court can increase sentence—Appeals from Magistrates Ordinance (Cap. 14, Laws of Sierra Leone, 1946) ss. 3, 4, 5, 9, 18)*—Magistrate's failure to call for statement of prosecution witness.*

Appellant was convicted of four offences at the magistrate's court at Port Loko. The magistrate imposed sentences of three months' imprisonment on each of the first three counts to run consecutively, and cautioned and discharged appellant on the fourth count. Appellant appealed to the Supreme Court against the four convictions, but did not appeal against the sentences. The Supreme Court quashed the convictions and sentences on the first and second counts, and upheld the convictions on the third and fourth counts. The court then confirmed the sentence of three months on the third count and substituted a sentence of six months on the fourth count instead of "the sentence of cautioned and discharged." The court ordered that the three months and the six months run consecutively. Appellant appealed against the court's imposition of a sentence of six months on the fourth count.

Appellant also appealed on the ground "that the learned appellate judge erred in holding that the trial magistrate's failure to call for the statement of the fourth prosecution witness at the trial and/or in any other way to test his evidence when such evidence was given or at any time thereafter before the end of the prosecution case could not affect the said trial magistrate's consideration of the whole case."

Held, allowing the appeal against sentence, (1) that, since appellant had not appealed against his sentence, the Supreme Court had no power to increase the sentence under section 18 of the Appeals from Magistrates Ordinance (Cap. 14, Laws of Sierra Leone, 1946); and

(2) that even if the magistrate should have called for the statement of the fourth prosecution witness, his failure to do so did not prejudice appellant's case.

Case referred to: *Regina* v. *Fraser* (1956) 40 Cr.App.R. 160.

Berthan Macaulay for the appellant.
Gershon B. O. Collier for the respondent.

AMES P. This appeal is against a decision of the Supreme Court given on appeal to that court from a magistrate's court. Owing to the date at which the appeal to the Supreme Court was made it fell, by virtue of section 30 (2) of the Courts (Appeal) Ordinance, No. 18 of 1960, to be decided under the provisions of the Appeals from Magistrates Ordinance, Cap. 14, notwithstanding that the latter had been repealed by the former.

It is surprising that the question of law, concerning the interpretation of section 18 of Chapter 14 (as we will call it) which arises in this appeal, has not been before the West African Court of Appeal or this court, at any time during the life of Chapter 14, until now that its life has already come to an end by its repeal in August of last year. The question has now become academic, for everyone except this appellant.

The question is posed in the first ground of appeal, which is as follows:

> "1. That the learned appellate judge erred in exercising his powers under section 18 of Cap. 14 relating to sentence when the appellant had not entered any appeal against sentence pursuant to section 5 of Cap. 14, nor had any sentence contrary to law been passed on the fourth count nor any punishment been imposed on the appellant on the said fourth count."

The appellant was convicted of four offences in the magistrate's court at Port Loko. Their nature is immaterial for the purposes of this judgment. The magistrate imposed sentences of three months' imprisonment with hard labour in respect of each of the first three counts to run consecutively and cautioned and discharged the appellant in respect of the fourth.

The appellant appealed to the Supreme Court against the four convictions, and without appealing against the sentences. The Supreme Court quashed the convictions and sentences of the first and second counts and upheld and confirmed the convictions on the third and fourth counts. The learned Chief Justice then called for argument as to whether or not the Supreme Court, qua appeal court, could " increase, or pass a more severe sentence than that passed by a magistrate, in a matter in which the appellant has not appealed to this court against his sentence," and having heard argument and considered the question, he held that the court could do so, being of opinion that section 18 of Chapter 14 was clear and decisive on the point. The learned Chief Justice thereupon confirmed the sentence of three months on the third count and substituted a sentence of six months on the fourth count instead of " the sentence of cautioned and discharged " which sentence (if it is proper so to call it, as did the learned Chief Justice) he quashed, and he ordered the three months and the six months to run consecutively.

With all respect to the learned Chief Justice, we disagree with his interpretation of section 18 of Chapter 14. In our opinion that section set out and conferred upon the Supreme Court the powers which it needed, in order to enable it to determine justly every kind of appeal which could come before it.

Let us examine the Ordinance as a whole.

Its long title was " An Ordinance to make Provision for Appeals from the Decisions of Magistrates."

Unfortunately it did not define what " decision " meant but left it to be inferred.

Its section 3 gave a right of appeal to any person " dissatisfied with a decision of a magistrate." It was " a decision," and so any decision, or anything which comes within the meaning of " decision."

Its section 4 was as follows:

> " 4. No appeal shall be had in the case of any accused person who has pleaded guilty and has been convicted on such plea by a court of summary jurisdiction, except as to the extent or legality of the sentence: Provided that there shall be no appeal against a sentence of imprisonment passed by such court in default of the payment of a fine, when no substantive sentence of imprisonment has also been passed unless such sentence in default is an unlawful one."

This section inferred, necessarily, that the passing of a sentence is a " decision " within the meaning of the Ordinance, otherwise there was no need to have excluded from the general right of appeal created by section 3 the particular passings of sentence which were excluded by this section.

Section 5 provided that " every appeal against any judgment, decision, order or sentence of a magistrate's court " had to be entered within fifteen days in the Colony and within thirty days in the Protectorate. Each of these words must refer to " a decision."

Sections 6, 7 and 8 were procedural. So was section 9; which, however, began: " If the magistrate's decision be for the payment of a fine or money. . . ." So the imposing of a fine was a decision within the meaning of the Ordinance.

The long and the short of it appears to us to be that the passing of a sentence was a decision of its own within the meaning of the Ordinance against which a dissatisfied person could appeal, if he wished to. In this particular

appeal the appellant appealed against his conviction, which was one decision within the meaning of the Ordinance, with which he was dissatisfied, and not against his sentence, which was another decision within the meaning of the Ordinance. Consequently, there was no appeal before the Supreme Court in which the power of increasing a punishment conferred on the court by section 14 could be exercised.

The argument put forward on behalf of the Crown was that the references in the Ordinance to an appeal against sentence apply where a person appealed only against his sentence, but that when a person appealed against a conviction, it included ipso facto an appeal against sentence, on the theory that "judgment" included both conviction and sentence. With all respect, this construction of the Ordinance does not commend itself to us. It would mean that the Ordinance foisted, willy nilly, an appeal upon a person who was not "dissatisfied," to use the word of section 3. If this were so, we would have expected it to be very clearly said.

The sentence of six months' imprisonment with hard labour imposed by the learned Chief Justice is set aside, and quashed, and instead the magistrate's "order" (if order it be) of "cautioned and discharged" is to be restored in the record book.

This being so it becomes unnecessary to consider Mr. Berthan Macaulay's argument on the second ground of appeal, which was that a caution and discharge was not a "punishment" within the meaning of section 14 and so could not have been varied.

The other ground of appeal is:

> "3. That the learned appellate judge erred in holding that the trial magistrate's failure to call for the statement of the fourth prosecution witness at the trial and/or in any other way to test his evidence when such evidence was given or at any time thereafter before the end of the prosecution case could not affect the said trial magistrate's consideration of the whole case."

Mr. Berthan Macaulay's argument on this ground of appeal relies largely on what was said by the Court of Criminal Appeal in the case of *Fraser* (1956) 40 Cr.App.R. 160.

The fourth prosecution witness gave evidence which was unfavourable to the prosecution and favourable to the defence. Apparently he had made a statement to the police. We do not know whether that agreed with his evidence in court or whether it was otherwise. The magistrate disbelieved the witness's evidence. Now supposing he had called for this previous statement, which Mr. Berthan Macaulay argued that he should have done, what would have been the position? If the statement had been materially different from his evidence it would not have helped the defence. It would merely have been another reason for the magistrate to disbelieve the witness. Supposing it had been materially the same as his evidence in court, this would not have assisted the defence. Proof that a man has said the same thing on more than one occasion is not proof that what he says is the truth. It should be noted that this witness was cross-examined by the defence counsel, although not at any great length, no doubt because his evidence had favoured the defence.

This case is different from that of *Fraser*. In *Fraser's* case the witness gave evidence which was hostile to the prosecution and favourable to the defence, as counsel for the prosecution must have known, because he had, or should have

had, in his possession a statement of the witness, which was materially different. Counsel did not ask to treat the witness as hostile and he did not show the statement to counsel for the defence. By chance the existence of this previous statement came to the notice of the trial judge, who called for it and questioned the witness about it. This may well have affected the result of the case because, of course, this witness to that extent was discredited. But, be it noted, any effect which this had was in favour of the prosecution and not of the defence.

Even supposing that the magistrate should have called for this statement, we do not think that it would have had any effect whatever in favour of the defence. We find no substance in this ground of appeal and the appeal against conviction is dismissed.

Freetown
April 4,
1961

Ames P.
Benka-Coker
C.J.
Marke J.

[COURT OF APPEAL]

LANSANA KPAYENGE . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Cr. App. 49/60]

Criminal Law—Trial—Time and place of trial—Case not tried at time specified by magistrate in warrant—Criminal Procedure Ordinance (Cap. 52, Laws of Sierra Leone, 1946) ss. 104, 157—*Criminal Procedure (Amendment) Ordinance, 1960—Form 26 of Second Schedule to Criminal Procedure Ordinance.*

Appellant was charged with murder. A magistrate held a preliminary investigation at Kailahun and, on May 23, 1960, committed appellant for trial. The magistrate issued a warrant of committal addressed to the Keeper of the Prisons at Kailahun in the form prescribed by Form 26 of the Second Schedule to the Criminal Procedure Ordinance. The warrant, inter alia, commanded the Keeper "safely to keep (appellant) until the sittings of the Supreme Court . . . to be holden at Kenema on the first day of August 1960 . . . and to produce him before the said court then and there to be tried." The Supreme Court sat at Kenema, starting on August 2, but appellant was not tried at that sitting. An information dated August 3 was filed on September 6 at Bo, where appellant was arraigned on September 22. The trial was then adjourned to the Kenema sessions, where appellant was convicted on November 8. He appealed on the ground that the trial was a nullity since it did not take place in accordance with the directions in the warrant issued by the magistrate.

Held, dismissing the appeal, that the general jurisdiction of the Supreme Court, referred to in section 104 of the Criminal Procedure Ordinance, was not limited by the wording of Form 26 of the Second Schedule to said Ordinance.

Case referred to: *Regina* v. *Oliver* [1958] 1 Q.B. 250.

Berthan Macaulay for the appellant.
Gershon B. O. Collier for the respondent.

AMES P. The appellant was convicted in the Supreme Court, sitting at Kenema on November 8 last year, of the murder of one Janeh Comba, a