he would not have advertised it as much as the witnesses for the petitioner suggest.

Taking the whole circumstances of the case after much scrutiny of the evidence on both sides, I have grave doubts on the issue of adultery.

I therefore hold that adultery has not been proved. The petition is dismissed and the woman named is discharged from the suit.

Petition dismissed.

COMMISSIONER OF POLICE *v.* JANNEH and SIX OTHERS

COURT OF APPEAL (Ames, P., Bankole Jones. C.J. and Dove-Edwin, J.A.): March 8th, 1965
(Cr. App. No. 40/64)

[1] **Courts—magistrates' courts—jurisdiction—criminal jurisdiction—may try arrested person for offence not that for which arrested:** A person arrested for an offence and brought before a magistrate's court may be tried on a charge of another offence (page 213, lines 26–29).

[2] **Courts — magistrates' courts — jurisdiction — criminal jurisdiction — summary conviction offences—magistrate assuming jurisdiction under Summary Conviction Offences Act (cap. 37), s.18, need not record circumstances:** Before assuming jurisdiction to try a person summarily under the Summary Conviction Offences Act (*cap.* 37), s.18, a magistrate need not record the circumstances having regard to which he assumes jurisdiction (page 210, lines 2–7).

[3] **Courts — magistrates' courts — jurisdiction — criminal jurisdiction — summary trial with accused's consent—circumstances to ground jurisdiction need not be ascertained from depositions alone:** For the proper exercise of his discretion to proceed from a preliminary investigation to a summary trial under the Criminal Procedure Act (*cap.* 39), s.110, a magistrate is not obliged to ascertain the circumstances of the case solely from what has been said in the depositions (page 211, lines 23–27).

[4] **Courts — magistrates' courts — jurisdiction — criminal jurisdiction — summary trial with accused's consent—magistrate may conclude offence triable summarily any time after starting depositions:** A magistrate's conclusion that an offence is suitable for summary trial under the Criminal Procedure Act (*cap.* 39), s.110, may be drawn at any stage after he has commenced to take down the depositions in a preliminary investigation (page 211, lines 21–26).

[5] **Courts — magistrates' courts — jurisdiction — criminal jurisdiction — summary trial with accused's consent—preliminary procedural steps need not be recorded:** A magistrate who proceeds from a preliminary investigation to a summary trial under the Criminal Procedure Act (*cap.* 39), s.110, is not required by law to make a note of the taking of any of the procedural steps referred to in s.110(2) (page 212, lines 29–40).

[6] **Courts—magistrates' courts—procedure—charges—offence other than that for which accused arrested may be charged and tried:** See [1] above.

[7] **Courts — magistrates' courts — procedure — summary conviction offences—magistrate assuming jurisdiction under Summary Conviction Offences Act (cap. 37), s.18, need not record circumstances:** See [2] above.

[8] **Courts — magistrates' courts — procedure — summary trial with accused's consent—circumstances to ground jurisdiction need not be ascertained from depositions alone:** See [3] above.

[9] **Courts — magistrates' courts — procedure — summary trial with accused's consent—magistrate may conclude offence triable summarily any time after starting depositions:** See [4] above.

[10] **Courts — magistrates' courts — procedure — summary trial with accused's consent—preliminary procedural steps need not be recorded:** See [5] above.

[11] **Criminal Procedure — appeals — appeals against conviction — fundamental defect in charge—value of damage omitted from charge under Malicious Damage Act, 1861, s.51:** A charge of malicious damage contrary to the Malicious Damage Act, 1861, s.51, which does not state the value of the damage or that it exceeds £5, is defective and cannot support a conviction (page 213, lines 33–36).

[12] **Criminal Procedure—appeals—appeals against conviction—point not taken—conviction upheld despite irregularity where point not taken on appeal or below:** An appeal court may properly uphold a conviction upon a charge which contains no reference to the enactment creating the offence if the appellant does not complain of the irregularity in the court below or in the appeal court (page 213, lines 37–39; page 214, lines 7–8).

[13] **Criminal Procedure—charges—form of charges—malicious damage to amount exceeding £5—value of damage to be stated:** See [11] above.

[14] **Criminal Procedure—charges—form of charges—reference omitted to enactment creating offence—conviction upheld where point not taken on appeal or below:** See [12] above.

[15] Criminal Procedure—charges—preferring charges—charge of offence other than that for which accused arrested may be preferred in magistrate's court: See [1] above.

[16] Criminal Procedure—record—contents—summary trial with accused's consent—preliminary procedural steps need not be recorded: See [5] above.

[17] Criminal Procedure—record—contents—trial of summary conviction offences—magistrate assuming jurisdiction under Summary Conviction Offences Act (cap. 37), s.18, need not record circumstances: See [2] above.

[18] Criminal Procedure—summary trial—summary conviction offences—magistrate assuming jurisdiction under Summary Conviction Offences Act (cap. 37), s.18, need not record circumstances: See [2] above.

[19] Criminal Procedure—summary trial—trial with accused's consent—circumstances to ground jurisdiction need not be ascertained from depositions alone: See [3] above.

[20] Criminal Procedure—summary trial—trial with accused's consent—magistrate may conclude offence triable summarily any time after starting depositions: See [4] above.

[21] Criminal Procedure—summary trial—trial with accused's consent—preliminary procedural steps need not be recorded: See [5] above.

[22] Criminal Procedure—trial of charges—magistrate's court may try charge of offence other than that for which accused arrested: See [1] above.

[23] Evidence — presumptions — presumptions of law — omnia praesumuntur rite esse acta—summary trial with accused's consent—presumption applies in regard to preliminary steps: The presumption *omnia praesumuntur rite esse acta* applies in regard to the procedural steps referred to in the Criminal Procedure Act (*cap.* 39), s.110(2) when a magistrate proceeds from a preliminary investigation to a summary trial and therefore some evidence must be adduced by the party seeking to displace the presumption even though the magistrate may have omitted to record the taking of a particular step (page 213, lines 9–19).

The respondents were charged before the Police Magistrate, Port Loko, on three counts, the first alleging riotous assembly and assault, the second malicious damage and the third assault occasioning actual bodily harm.

They were arrested for an offence different from those with which they were charged. The second count did not state the value of the damage or that it was under £5. The third count did not contain a reference to the enactment creating the offence.

The magistrate began a preliminary investigation. He took down the deposition of a doctor who had examined the man named in the first count, the man named in the third count and two of the respondents. Without hearing any other evidence or ascertaining the value of the damage complained of, the magistrate decided to try the case summarily. He recorded his decision, the reading of the charge to the respondents, their consents to summary trial, their pleas and the fact that their counsel did not wish to cross-examine the doctor. He did not record that he had explained the difference between summary trial and a preliminary investigation. He proceeded with the trial and convicted all the respondents on each count and sentenced them to imprisonment.

They appealed to the Supreme Court, which held that the summary trial was a nullity and allowed the appeal. On a further appeal by the prosecutor the Attorney-General contended that the expression "the circumstances of the case" in s.110(1) of the Criminal Procedure Act (*cap.* 39) did not refer solely to the depositions taken. He further contended that the presumption of regularity applied to the magistrate's proceedings and it lay on the respondents to prove any irregularity. The respondents contended that the magistrate had not given the explanation which he had not noted down, so that the trial was a nullity. It was conceded that the malicious damage count was defective. No point was taken in any court as to the omission from the third count of a reference to the enactment creating the offence charged.

Case referred to:

(1) *Att.-Gen.* v. *Limba* (1963), S.L.L.R. 146, distinguished.

Statutes construed:

Summary Conviction Offences Act (Laws of Sierra Leone, 1960, *cap.* 37), s.18:

> "The Magistrate shall have jurisdiction, if, having regard to the circumstances of the case, he shall consider it expedient so to do, to try summarily any person charged with unlawful and malicious wounding, or inflicting bodily harm, not amounting to felony, which may, in his opinion, be adequately punished by a sentence of imprisonment . . . for a period not exceeding six months, or by a fine, not exceeding twenty pounds."

Criminal Procedure Act (Laws of Sierra Leone, 1960, *cap.* 39), s.110:

(1) The relevant terms of this sub-section are set out at page 210, lines 27–37.

"(2) The Court before asking, in pursuance of this section, the accused whether he consents to the case being heard and finally determined summarily, shall explain to him the difference between the case being dealt with summarily and in the usual course. In the event of the accused then giving his consent to the case being dealt with summarily, the Court shall call upon him to plead to the charge, and forthwith inform him of his right to recall all or any of the witnesses for the prosecution, who shall have been heard, and to subject them to any further cross-examination as if such witnesses had not previously been cross-examined. Upon taking these steps the Court shall proceed to hear and finally determine the matter. . . ."

Malicious Damage Act, 1861 (24 & 25 Vict., c.97), s.51:

"Whosoever shall unlawfully and maliciously commit any damage, injury or spoil to or upon any real or personal property whatsover, . . . for which no punishment is herein-before provided, the damage, injury or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, . . . to be imprisoned for any term not exceeding two years. . . ."

B. Macaulay, Q.C., Att.-Gen. and *D. M. A. Macaulay, Sol.-Gen.*, for the appellant;
E. L. Luke for the respondents.

AMES, P., delivering the judgment of the court:

This is a prosecutor's appeal. The respondents came before the Police Magistrate's Court at Port Loko on a charge containing three counts, namely: (a) riotous assembly and assault, (b) malicious damage contrary to s.51 of the Malicious Damage Act, 1861, and (c) assault occasioning actual bodily harm.

The learned magistrate started to hold a preliminary investigation into the charge, under Part III of the Criminal Procedure Act (*cap.* 39). He had not gone at all far when he changed the proceedings into a summary trial, which can be done under the provisions of s.110 of the Act. At the end of the trial, he found all respondents guilty on each count, and sentenced each to 12 months' imprisonment on each count concurrently.

They appealed to the Supreme Court. There the learned judge held that the summary trial before the magistrate was a nullity, allowed the appeal and discharged the respondents. Against that decision the appellant has made this appeal.

This appeal, consequently, is concerned with the interpretation and the provisions of s.110 of the Criminal Procedure Act. During the argument, much was said about the recent decision of this court in the appeal of *Att.-Gen.* v. *Baimba Limba* (1). That was

concerned with s.18 of the Summary Conviction Offences Act (*cap.* 37). In his argument in the court below, Mr. Livesley Luke, for the respondents, submitted that in *Baimba Limba's* appeal this court held that before a magistrate could assume jurisdiction under s.18, he must know and record "the circumstances," and he repeated the argument before us. Well, he certainly must know them, but this court did not hold that he must record them, although he could if he liked. That appeal was dismissed because "there was absolutely nothing in the record (and there should be something) to show" that the magistrate's court, which was constituted by two justices of the peace, applied their minds to the conditions to which they have to apply them before they can try summarily the offences mentioned in the section. It begins in this way—"18. The Magistrate shall have jurisdiction if" and so on, and that means not otherwise.

In the instant appeal there is something in the record; and the very nature of a change from a preliminary investigation to a summary trial would usually result in there being something. That is, unless the magistrate is such a stickler for the letter of the Criminal Procedure Act, rather than for the common sense of it, as—say—to explain the difference between the two, take a plea, obtain accused's consent, hear witnesses and so on, all because the Act requires him to do so, and yet to record none of it, because nowhere does the Act require him to record these particular matters.

Section 110 consists of two sub-sections. The first, omitting words not relevant to the questions which arise in this appeal, is as follows:

> "(1) If, during the course of a hearing in any case in which depositions are being taken down with a view to the committal for trial of the accused, the Court shall conclude that, having regard to the circumstances of the case, the offence is one which, if proved, can be suitably punished by a sentence of imprisonment for a term not exceeding two years with hard labour or a fine not exceeding two hundred pounds . . . the Court may . . . with the consent of the accused obtained before he is called upon for his defence but not otherwise, proceed to hear and finally determine the case in a summary manner. . . ."

The learned magistrate had taken down the deposition of one witness only, a doctor, when he decided to turn the preliminary investigation into a summary trial. The learned judge held that he should also have taken down the deposition of some witness

of the riot and also of some witness of the malicious damage. This is the subject matter of the first ground of appeal, which is:

> "The learned appellate judge erred in impliedly holding that the phrase 'circumstances of the case' referred to in s.110(1) of the Criminal Procedure Act (*cap.* 39) referred solely and exclusively to evidence taken in accordance with s.99 of the said Act, and therefore proceeded to hold, wrongly, that the evidence taken before the summary trial started was insufficient. In doing so, the learned appellate judge substituted his own conclusion for that of the magistrate, within whose discretion it was to conclude whether or not the offence was one which, if proved, can suitably be punished by a sentence of imprisonment for a term not exceeding two years with hard labour or a fine not exceeding two hundred pounds or both fine and imprisonment."

This has really two parts to it, which are its two sentences respectively. The complaint in the first is justified. The learned judge's judgment makes it clear that in his opinion "circumstances of the case" did refer solely and exclusively to the contents of the depositions.

There must be at least one deposition started (it need not have finished) before a magistrate can make use of the section, and of course there could be more than one, indeed any number. He can conclude at any sufficient point whether the offence is suitable for his powers of punishment having regard to the circumstances of the case. But the section does not say from what material he is to draw the conclusion, or limit him to what is said in the depositions. The learned magistrate saw before him seven accused persons; he had before him and read the charge; the doctor had examined the man named in the first count, the man named in the third count and two of the accused who complained of pain and bruises. He may well have concluded (although another might not have, at that point) in a proper exercise of his discretion that it was no serious riot requiring punishment beyond his powers. It is true that he did not then know the value of the damage to the Land Rover (which turned out to be £17); but he may have thought it an incident in the riot which did not make any difference.

As to the second part of this ground: We do not read the learned judge's judgment as substituting his own conclusion—but as meaning that there was not before the learned magistrate the material necessary to enable him to exercise his discretion. But,

as we have said, we think that the learned judge's meaning was erroneous.

The other two grounds of appeal can be considered together. They are:

"2. It is evident from the reasons for the decision, that no distinction was drawn between enactments which require an act to be done and those which make further provision for a record to be made of acts required to be done. In failing to make this distinction, the learned appellate judge erred in impliedly holding that where it is mandatory for certain procedural steps to be taken by a magistrate, it is not merely *desirable,* but also *mandatory* for the magistrate to record that such steps have been taken.

3. The learned appellate judge erred in failing to appreciate, firstly, that the presumption of regularity applied to judicial acts and, secondly, that, like all rebuttable presumptions, some evidence must be adduced by the party seeking to displace it."

When the magistrate concluded that the offence was suitable for a summary trial, he did not, at that moment, have jurisdiction to try the charge summarily. The consent of the respondents was necessary before he could have jurisdiction. They did consent, and he made a note on the record as follows:

"At this stage court decided to try the case summarily. Charge read to all accused. Each accused consents to summary trial. Each accused pleads not guilty.

Mr. Short informs court that he does not wish to cross-examine the first prosecution witness."

Section 110(2) sets out the procedure to be followed and it is conceded that its provisions are mandatory. The procedure is seen to be as follows, and in this order:

1. Explain to the accused the difference between summary trial and "the case being dealt with . . . in the usual course."
2. Ask if they consent to summary trial.
3. Upon their consenting, take their plea to the charge.
4. Tell them that they could recall the doctor for cross-examination.
5. Proceed with the matter as a summary trial.

The magistrate is not required by the letter of the Act, as contrasted with the common sense of it, to make a note of any of this. He did, however, do so, and it is seen that his note makes no mention of item 1. That was the basis of Mr. Luke's argument

in the court below and before us. Briefly the argument is this: The provisions are for the protection of the accused. They are mandatory. The magistrate noted that he had complied with some. Therefore one must assume that he did not comply with the other. That was an irregularity, such as made the trial a nullity.

The learned judge agreed. "In this case," he said, "the irregularity is patent on the face of the record. There is no need to prove an irregularity which is so patent. . . ."

The learned Attorney-General's argument was that the maxim of "*omnia praesumuntur rite esse acta*" applies, and if the respondents alleged, as they did in the appeal to the court below, that it was not all properly done, it was for them to adduce evidence that it was not and to establish their allegation.

Many cases were cited to us during the argument. We do not find it necessary to refer to them by name. They support the Attorney-General's argument and not Mr. Luke's. In our view the learned judge was in error in holding that the maxim did not apply and that it was for the prosecutor to show that everything was properly done and not the other way round. We think that he erred in holding that the trial was a nullity.

Because, however, he did so hold, he did not have need to consider those grounds of appeal before him which concerned the merits of the conviction. There were a number of them, but most were withdrawn. We heard argument on the three which remained, and find no substance in them. The learned magistrate did adequately consider the defence of the respondents. It was open to him to try them and convict them on a charge for offences which happened not to be the offence for which the police had in the first place arrested them. Their conviction was not unreasonable or unwarranted but was supported by the evidence.

There was an appeal against sentence in the court below, but it was withdrawn.

It was conceded that the second count (of malicious damage) was defective in that it did not state the value of the damage or that it exceeded £5, and so it was right that the appeal to the court below should succeed as to that count.

The third count did not "contain a reference to the section of the enactment creating the offence," as it should have done. But no point has been taken as to this in any court from start to finish.

Being of the opinion that the decision appealed from was wrong, we make the following order:

The decision appealed from is set aside and the appeal is remitted to the court below for determination according to the following directions:

1. That the appeal of the respondents in that court be allowed as far as it concerned count 2 and that the convictions and sentences on that count be set aside; and

2. That their appeal be dismissed as far as it concerned counts 1 and 3.

Order accordingly.

BANGURA (M.) *v.* REGINAM

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): March 8th, 1965
(Cr. App. No. 39/64)

[1] **Criminal Procedure — appeals—appeals against conviction—judge's summing-up not recorded—circumstances in which omission not fatal:** An omission to record the summing-up in a jury trial is not fatal to a conviction if the verdict is unanimous and is supported by the evidence and the evidence raises no difficult questions and includes nothing in the accused's favour apart from his own unsworn statements contradicted by sworn evidence (page 215, lines 37–40; page 216, lines 11–14).

[2] **Criminal Procedure—judge's summing-up—omission to record—circumstances in which not fatal to conviction:** See [1] above.

[3] **Criminal Procedure — record—contents—summing-up not recorded—circumstances in which omission not fatal to conviction:** See [1] above.

[4] **Evidence — record — contents — summing-up not recorded — circumstances in which omission not fatal to conviction:** See [1] above.

The applicant was charged in the Supreme Court with entering a dwelling-house with intent to commit a felony therein.

He was convicted by the unanimous verdict of a jury. The only points of evidence in his favour were statements he had made denying his guilt which were put in evidence during the case for the prosecution. He did not give evidence or call witnesses and all the oral sworn evidence went to show that he was guilty and that his statements were untrue. The evidence raised no difficult questions and was ample to support the conviction.

The summing-up was not recorded. Applying for leave to appeal,