CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL No. 4/84

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Ross, J.A.

RAUL GONZALEZ & FREDDIE SUAREZ v. R.

Mr. D. Muirhead, Q.C., and Mr. W.K. Chin See, Q.C.
for 1st appellant.

Mr. W.K. Chin See, Q.C. (Amicus Curiae)
for 2nd appellant.

Mr. T. Kendall and Mr. T. Scarborough for the Crown.

June 20 - 22, 27 - 28; &
November 26, 1984

PRESIDENT:

On June 28, 1984, this appeal was allowed. The convictions were quashed and sentences set aside. A new trial was ordered. We promised to put our reasons into writing and this we now do.

This is an appeal from the Grand Court Judge sitting in his appellate jurisdiction.

The appellants were charged jointly in the Magistrates' Court for the following offences:

(1) Conspiracy to export cocaine hydrochloride.

(2) Conspiracy to import cocaine hydrochloride.

(3) Possession of 31 kilograms of cocaine hydrochloride.

The first appellant Gonzalez was charged on a separate charge of possession of cocaine and another charge of offering to sell cocaine.

The trial resulted in a conviction of the first appellant on all the charges. The appellant Suarez was convicted on two charges:

(a) Conspiracy to export.

(b) Possession of 31 kilograms of cocaine.

The appeal before the Grand Court was in respect of all convictions. In the result the Grand Court allowed the appeals against all convictions with the exception of the joint charge of possession of 31 kilograms of cocaine. This appeal, therefore, is in respect of only one conviction, that of possession of 31 kilograms of cocaine.

On this charge the appellant Gonzalez was sentenced to 12 years imprisonment and a fine of $30,000 and in default 6 months. The appellant Suarez was sentenced to a term of 6 years imprisonment and a fine of $10,000 and in default 6 months.

This case has a history which should be briefly stated. There was a previous trial which commenced on April 20, 1983. There were then six accused. The two appellants were charged jointly with possession of cocaine; the first appellant was charged on a separate charge of possession of cocaine and another charge of offering to sell cocaine. There were two other charges charging all six accused with conspiracy to import cocaine and conspiracy to export cocaine.

On May 4, 1983, the prosecution offered no further evidence against three of the accused. On May 6, 1983, the learned Magistrate disqualified himself from continuing with the trial because of what he expressed to be the likely prejudicial effect on the trial of a statement broadcast by Radio Cayman at the instance of the Commissioner of Police.

The retrial commenced before a different Magistrate on July 11, 1983, with the two appellants and a third accused before the Court. The third accused was dismissed on a no case submission. The two appellants were convicted as stated above.

This case was plagued with errors being committed. At the commencement of the retrial the two appellants and the third accused were pleaded only on the two conspiracy charges. The retrial commenced with only these two charges before the Court.

As will be discussed later, it will be seen that these offences are what is known in the Cayman Law as category B offences. These offences are triable on indictment, but with the consent of the accused and the prosecution they may be tried summarily. Their consent to these two charges being tried summarily was neither sought nor given. In fact the question of consent was not adverted to at all. The retrial, therefore, proceeded as if the learned Magistrate had jurisdiction to hear the cases.

At the commencement of the proceeding on the second day, July 12, 1983, the Magistrate announced that he proposed to implead the appellants on further charges. No doubt during the overnight adjournment the Magistrate must have realised that the appellants had not been pleaded on all the charges due for re-trial. The first witness, Hugo Zuiderant, had already completed his examination-in-chief but had not yet been cross-examined. Objection was taken by counsel for both appellants and after hearing arguments the Magistrate proceeded to implead the appellants. There were three further charges which affected the first appellant but only one which affected the second appellant.

The first additional charge related to the first appellant and charged him with unlawful possession of cocaine hydrochloride. The amount was not stated in the charge but during the trial it transpired that the amount was 3 grams.

The second additional charge related to the first appellant and charged him with unlawfully offering to sell cocaine hydrochloride. Again the amount was not stated in the charge but it transpired to be 70 kilograms.

The third additional charge charged both appellants with unlawful possession of cocaine hydrochloride. Once again the amount was not stated in the charge but was later disclosed during the trial as being 31 kilograms. Indeed, at the hearing of the appeal the Crown conceded that the amount for which the two appellants were convicted was 31 kilograms.

It appears that freshly made out charges had been laid for the retrial but they were substantially the same as the corresponding charges in the earlier trial. The earlier charges were finally withdrawn after the appellants were further impleaded.

The offence of unlawfully offering to sell cocaine is also a category B offence, the amount involved being over two ounces. Again the consent of the defendants and the prosecution was neither sought nor given. The Magistrate, therefore, had no jurisdiction to hear this charge.

In the case of possession and offering cocaine for sale, the quantity of cocaine ought to have been included in the informations. This was not done in either case, but it is clear from the evidence and concessions by the Crown that the amount involved was over two counces. The maximum and minimum sentences are affected accordingly. In the case of offering to sell cocaine if the amount is over two ounces then because of the maximum sentence which may be imposed, the offence would be a category B offence.

The learned Magistrate proceeded, therefore, to hear five charges together. Three of these charges, namely, the two conspiracy charges and the charge of offering to sell cocaine were clearly category B offences. He, therefore, had not jurisdiction to hear any of these three charges.

The learned Chief Justice correctly held that the trial, in so far as it related to those three charges, being category B offences, was a nullity and proceeded to quash those convictions. The learned Chief Justice also quashed the conviction relating to the unlawful possession of 3 grams of cocaine for which the first appellant was charged.

However, the learned Chief Justice further held that the learned Magistrate had jurisdiction to hear the two charges for unlawful possession. In upholding the conviction for unlawful possession of 31 kilograms of cocaine the learned Chief Justice held that the learned Magistrate had no jurisdiction to plead or hear the charges relating to the category B offences and, therefore, there was no trial on those charges. He held that the only trial was on the charges of unlawful possession for which the Magistrate had jurisdiction. There was, therefore, a valid trial with respect to the unlawful possession charge. The effect of the Chief Justice's judgment is that where a Magistrate proceeds to hear charges for which he had jurisdiction along with charges for which he had no jurisdiction; the valid charges can be severed from the invalid ones.

It is incorrect to state that there was no trial with respect to the three category B offences. What if there had been no appeal? The trial on the category B offences would not have been declared null and void. In my view there was a trial on all charges.

If the Magistrate hears indictable offences for which he has no jurisdiction together with summary offences for which he has jurisdiction, can it be said that the conviction on the summary offence can be severed and is therefore valid, or is the entire trial a nullity?

In view of the Order of the Court, I propose to deal with three grounds of appeal relating to the jurisdiction of the Court. These grounds were:

> "(1) That the learned Chief Justice was wrong in law in holding that the learned Magistrate had jurisdiction to try a charge of possession of cocaine where the quantity exceeded two ounces.
>
> (2) That the learned Chief Justice, having found that the trial was a nullity in relation to all the other charges, was wrong in law in declaring and finding

" that he could properly sever the charge of possession on the 22nd March, 1983 of 31 kilos of cocaine hydrochloride therefrom and that accordingly, there could be an adjudication in law thereon.

"(3) That the learned Chief Justice was wrong in law in ruling that the subsequently added charge of possession of 31 kilos could in law be severed and be or become valid, viz:

(a) Having correctly concluded that the trial in relation to conspiracy to import cocaine hydrochloride - the only charges preferred against the appellant at the commencement of the trial - was a nullity and accordingly, a nullity ab initio; and/or

(b) having correctly concluded that the subsequently added charge of offering to sell was likewise a nullity. "

Grounds 2 and 3 relate to the same issue and were argued together.

It was submitted by counsel on behalf of the appellants that the charge of unlawful possession of 31 kilograms of cocaine was a category B offence and therefore the learned Magistrate had no jurisdiction to hear this charge. If this submission be correct then clearly the trial on this charge would also be a nullity and the question of severance would not arise.

If, however, the offence is a category C offence and one for which the learned Magistrate has jurisdiction, then the question of severance arises. It would also be important in so far as the retrial of this offence is concerned. If a category B offence then it is a trial on indictment unless both the prosecution and the defence consent to a summary trial. If a category C offence then the learned Magistrate has jurisdiction to hear it as a summary offence.

The power of the court to try offences is laid down in s.4 of the Criminal Procedure Code which states:

"Save in the case of departmental, disciplinary and procedural offences for the disposal of which special provision is made in any law, all offences shall be tried either -

(a) upon indictment before the Grand Court; or

(b) summarily by the Summary Court. "

S. 5 (1) of the Criminal Procedure Code provides:

"For the purpose of determining the mode of trial before a court, offences shall be classified into three categories as follows:

Category A	-	offences triable upon indictment and not otherwise;
Category B	-	offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one) may be tried summarily; and
Category C	-	offences triable summarily and not otherwise. "

This section provides for a category B offence, which is an indictable offence, but which may be tried summarily, if both the prosecution and the person charged consent to such a trial. However, category C offences can only be tried summarily.

In order to consider whether the charge of unlawful possession of 31 kilograms of cocaine is a category B or C offence it is necessary to first look at s. 25 of the Misuse of Drugs (Amendment) Law 1982 which states:

"Notwithstanding the provisions of any other section, where a person is charged with any offence contrary to this Law and such person is liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years then such offence shall be deemed, for the purpose of determining the mode of trial, a Category B offence in accordance with section 5 of the Criminal Procedure Code. "

The appellants were charged with unlawful possession of cocaine, an offence contrary to s. 3 (1)(i)(k) of the Misuse of Drugs Law 1973. The penalty on conviction for unlawful possession of cocaine is determined by s. 12 (4) and Part B of the Second Schedule to the Law. Part B of the Second Schedule provides for possession of less than two ounces on a first conviction a minimum sentence of 1 year plus a fine of $1,000.00 and a maximum sentence of 7 years plus a fine of $10,000.00. For possession of two ounces or more the minimum sentence is 3 years plus a fine of $10,000 and the maximum sentence is 15 years plus a fine without limit as to amount.

The appellants' case was dealt with on the basis of a first conviction. They were, therefore, liable to a maximum sentence of 15 years imprisonment plus a fine without limit as to amount. Where a fine has been imposed by the Court provision is made in The Penal Code - Law 12/1975 for a term to be imposed for non-payment of the fine. S. 25 (1) states:

> "In the absence of express provisions in any law relating thereto the term of imprisonment ordered by a court in respect of non-payment of any sum adjudged to be paid for costs under section 29 or compensation under section 28 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale:

	Amount	Maximum period
Not exceeding	$ 10	1 month
	50	2 months
	100	4 months
Exceeding	100	6 months "

S. 25 (2) is as follows:

> "The imprisonment which is imposed in default of payment of a fine shall terminate whenever the fine is paid or levied by process of law. "

In the event the appellant were each given a term of 6 months in default of payment of the fines imposed on them.

For the appellants it was argued that having regard to the provisions of the law the appellants could have been liable to serve a term of imprisonment of 15 years and 6 months. It is submitted that the maximum sentence of 15 years could have been imposed plus a fine and in default a period of imprisonment of 6 months. This would amount to an imprisonment of 15 years and 6 months, the term of imprisonment in default of payment of the fine being additional to the sentence imposed.

It is further submitted that having regard to s. 25 of the Misuse of Drugs (Amendment) Law 10/1982, if the appellants were liable to be imprisoned for a term exceeding 15 years, the offence would be a categoy B offence. The learned Magistrate would in the circumstances have no jurisdiction to hear the charge.

Counsel for the appellants have relied on a passage in Regina v. Emil Savundra [1968] 52 C.A.R. 637 in support of their argument that the term of imprisonment fixed in default of payment of the fine is to be added to the custodial sentence to arrive at the sentence which the court may impose.

In reviewing the sentence imposed in the Savundra case, Salmon, L.J. at p. 646 stated:

> "This was fraud on an enormous scale. Moreover, this appellant did not stop short of uttering forged certificates for over £500,000 of stock on one occasion and over £800,000 worth of shares on another for the purpose of covering up his defalcations. Having regard to the gravity of these offences, this Court does not consider that a sentence of ten years' imprisonment would have been any too long. The learned judge sentenced this appellant to eight years imprisonment and he fined him in all £50,000 and in default of paying that £50,000 he sentenced him to a further two years' imprisonment."

The sentence of two years is dependent on the fine not being paid. I do not understand Salmon L.J. to be saying that the custodial sentence imposed was in fact ten years. If the fine was paid then the custodial sentence would have been one of eight years. The reference to ten years imprisonment appears to have been made because the appellant deponed on oath for the purpose of

the appeal on the question of the sentence in so far as the fine was concerned that his assets were now only just over £100. The appellant was indicating his inability to pay the fine.

If the appellants' contention is correct then it would not be proper for the Magistrate on a conviction to impose the maximum sentence of fifteen years if the case warranted such a sentence and in addition impose a fine with an alternative term of imprisonment. This is so because if the two terms are added together then a sentence more than the maximum would have been imposed. It could then be argued that the Magistrate had imposed a term of imprisonment which was in excess of the maximum sentence imposed by the law.

In my view, the Savundra case does not support the arguments of the appellants.

The case of R. v. Carver [1955] 1 All E.R. 413 is of assistance in considering this issue. In that case the appellant was convicted of permitting premises to be used as a brothel. This was her second conviction and the court imposed the maximum sentence of 6 months imprisonment and a fine of £200 with the alternative of a further six months imprisonment in default of payment of the fine. She appealed against sentence on the ground that the total term of imprisonment, including the period fixed in default of payment of the fine exceeded the maximum period of imprisonment allowed by the statute for the offence. The statute provided that on a second or subsequent conviction, the sentence was a fine not exceeding £250 or to imprisonment for a term not exceeding six months "or in any such case, to both fine and imprisonment." It was permissible for an alternative term of imprisonment to be ordered in default of payment of the fine. It was held that the court had the power to impose a sentence of the maximum imprisonment and of a fine not exceeding the maximum amount and might also fix a further term of imprisonment in default of payment of the fine. The appeal was accordingly dismissed.

Lord Goddard, C.J. at page 414 stated:

> "The prisoner in this case was convicted of permitting premises to be used as a brothel after a previous conviction for that offence and the court imposed the maximum sentence of six months' imprisonment and ordered her to pay a fine. When I say the 'maximum sentence', what I mean is this: the statute under which she was convicted authorises the court to impose imprisonment for six months and a fine not exceeding £250. The court imposed imprisonment of six months and, as they looked on it as a very bad case, they also imposed a fine of £200. Then the court said that in default of payment she would serve a further six months making twelve months in all.
>
> "Counsel for the appellant has contended that that sentence is not authorised by law because Parliament has provided a maximum sentence of six months and, therefore, no further sentence of imprisonment could be imposed. What the statute has said is that the sentence that can be imposed is six months plus a fine. If a person does not pay the fine obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay because it would mean that if he could afford to pay he would lose £200."

Again at p. 415 Lord Goddard, C.J. states:

> "In these circumstances, we think that the quarter sessions were entitled to make the order they did. It may be that the sheriff can still distrain on the goods. If the sheriff distrains on the goods while this woman is serving her sentence and recovers the sum of £200 by distraint, when her sentence of six months is up, there will be an end of it; but if distraint does not produce the £200 or the fine has not been paid, she will have to do a further six months. "

In the instant case under review the Magistrate had the power to impose a maximum sentence of fifteen years and a fine without limit and in default of payment of the fine a term of imprisonment. In this case it was fixed at six months.

S. 6 (2) of the Criminal Procedure Code states:

> "Subject to the express provisions of any other law a Summary Court may, in a case in which such sentence is authorised by law to be inflicted in respect of the offence for which it is imposed, pass sentences as follows -

"(i) imprisonment for a term not exceeding two years;

(ii) a fine not exceeding two hundred dollars. "

S.6 (3) states:

"Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass. "

S. 6 (4) states:

"In determining the extent of a court's jurisdiction under this Code to pass a sentence of imprisonment, the court shall be deemed to have jurisdiction to pass the full sentence of imprisonment permitted under this section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation. "

Clearly s. 6 (4) shows that if the maximum sentence of imprisonment is imposed and when added together with the term of imprisonment awarded in default of payment of a fine it exceeds the maximum custodial sentence allowed by the Code, the total sentence of imprisonment is not to be regarded as exceeding the maximum custodial sentence.

It is incorrect to state that the Magistrate could have imposed a sentence of fifteen years and in default of payment of the fine a further imprisonment of six months, and thereby exceeded the maximum sentence authorised by law. This does not make the sentence one exceeding fifteen years and make it a category B offence as provided for in s. 25 of the Misuse of Drugs Law.

It is not permissible to add the term in default of payment of the fine, to the sentence of imprisonment imposed, and then say that it exceeds the sentence authorised by law or that it is a sentence of more than fifteen years and should be deemed a category B offence as provided for in s. 25 of the Misuse of Drugs Law.

In my opinion the sentence authorised by law in the instant case can in no way be regarded as a sentence in excess of fifteen years to bring it within s.25 of the Misuse of Drugs Law. The offence is, therefore, a category C offence and is within the summary jurisdiction of the Magistrate. This ground of appeal therefore fails.

The remaining two grounds of appeal relate to the issue as to whether the learned Magistrate had jurisdiction to hear summary offences together with indictable offences and if having done so, the indictable offences are later declared a nullity, can the conviction on the summary offences be declared valid? It was submitted that the entire trial was a nullity.

The power of the Magistrate to hear charges together is statutory. As was said in Peacock v. Bell and Kendal [1668] 1 WMS. Saund. 84 at p. 87:

> "And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is expressly alleged."

The Criminal Procedure Code Law 13/1975 provides for the manner in which criminal proceedings may be instituted before a Magistrates' Court. It also provides for the manner in which complaints may be heard.

S. 13 (1) states:

> "Criminal proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without a warrant."

S. 13 (6) is as follows:

> "Every complaint shall be for one matter only, but the complainant may lay one or more complaints against the same person at the same time and the court hearing any one of such complaints may deal with one or more of the complaints together or separately as the interests of justice appear to require."

The effect of these sections is that a Magistrate may hear several complaints together if the court has jurisdiction to hear each of the complaints.

In Brangwynne v. Evans [1962] 1 All E.R. 446, three informations were heard together by the Justices and convictions were recorded on each of the three informations. S. 10 of the Summary Jurisdiction Act, 1848 provides that a defendant can only be called on to answer one charge at a time in a Justices' Court.

It was held that although a defendant may only answer one charge on an information, the court may hear two or more informations together if the defendant expressly consents to that course. The convictions on the three informations were quashed as there was no express consent to their being heard together.

This case illustrates the principle that although the Justices had jurisdiction to hear all three informations separately, if heard together without the consent of the defendant, all the convictions would be quashed.

In the case of R. v. Olivo [1942] 2 All E.R. 494, the appellant was tried simultaneously on two indictments. It was held that two indictments could not be tried together and that the whole proceedings was a complete nullity.

In Harding v. Ramjattan [1959] 1 W.I.R. 434, a case from Guyana, the appellant and one Coddette were charged indictably on one information. Both elected to be tried summarily and Coddette was dismissed of his charge. The appellant was charged with an offence which could be tried summarily with the consent of the appellant. Coddette was charged with an offence for which it was not competent for him to elect to be tried summarily. It was held that although the charge against Coddette was dismissed the joint trial of the appellant and Codette was a nullity.

At page 435, Luckhoo, J. stated:

" The indictable offences by adults which may be tried summarily are specified in the First Schedule to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 [B.G.]. Section 191 of the Criminal Law (Offences) Ordinance, Cap. 10 [B.G.] - Embezzlement by public officer - is one such offence. There is, however, no reference in that schedule to the offence of accessory after the fact to any offence. It was not competent therefore for the prosecutor to apply for the offence charged against Coddette to be dealt with summarily and therefore not competent for Coddette to elect to be tried summarily or for the magistrate to deal summarily with the offence.

"The question to be determined is, what is the effect, if any, on the summary trial of the appellant, the two charges having been heard together?

"Counsel for the appellant submitted that the hearing by the magistrate was a nullity, the magistrate having exceeded his jurisdiction in respect of the summary trial of the offence charged against the appellant. He contended that this is analogus to the trial of two indictments together by consent, which has in England been held to be a nullity.

"The procedure adopted by the magistrate in dealing with the offence charged against Coddette was wholly irregular. In our opinion the joint trial of both offences was a nullity for the reason that it was not competent for the offence charged against Coddette to be tried summarily. It is also in our opinion immaterial that the charge laid against Coddette was dismissed. "

This case suggests that where a magistrate embarks upon a trial of an offence for which he has jurisdiction with one for which he has no jurisdiction, then the entire trial is a nullity.

In Francis Bain v. Commissioner of Police [1971] 17 W.I.R. 386, a case from Grenada, two complaints were heard together. By s. 83 of the Criminal Procedure Code, Cap. 77 (Grenada), two complaints may be heard together if the defendant is informed of his right to have such complaints taken separately and he consents to then being taken together.

No consent having been given by the appellant the court held that the appel would have to be allowed on the ground that the magistrate's jurisdiction was not established. In this case a new trial was not ordered because the appeal also succeeded on other grounds and the court held that on the merits of the case the appellant would not be convicted.

This case was distinguished from the case of Emmanuel v. Cox [1967] 10 W.I.R. 560 as it was pointed out that the provisions of the St. Lucia Code were not similar to the provisions of the Grenada Code.

The learned Chief Justice in his judgment and indeed the learned counsel for the Crown relied on the case of Emmanuel v. Cox (supra) for the propositions that the charge of unlawful possession of cocaine could be severed from the other charges.

The case of Emmanuel v. Cox (supra) was a case from St. Lucia. It was decided on the provisions of the St. Lucia Criminal Code and it will be necessary to examine this case and the provisions of the St. Lucia Criminal Code.

The apellant was charged on three separate charge sheets with three offences. Another man, Marius Monclair was also charged separately on three charges on three separate charge sheets. Of the three offences charged only one, that of assaulting a police constable in the execution of his duty, was similar. All six offences were tried together and convictions followed on all charges.

The magistrate's jurisdiction was regulated by the Criminal Code and reference was made to s. 1078 (2) of the Code which reads:

> "Where there are similar separate complaints by one and the same complainant against separate defendants in respect of the same matter, the court may, if it thinks fit, hear and determine them at one and the same time."

It was held that there was no authority for the magistrate to hear all the cases together as the charges were not similar. Only the cases against the two defendants for assault on the police constable in the execution of his duty were properly heard together. The convictions on the other charges were set aside and only the convictions for assault were allowed to stand.

Presumably the magistrate had jurisdiction to hear all the cases but not together.

S. 1080 (1) of the Criminal Code of St. Lucia states:

> "It shall not be competent for any person to impeach in any proceeding or in any other manner whatever, any order made by the court on the hearing of a complaint on the ground that the court had no jurisdiction to make the order, unless such objection was taken on the hearing of the complaint before the making of the order."

It is to be observed that no cases were referred to in the judgment of Chief Justice Lewis and it is clear that the decision was based solely on the provisions of s. 1078 (2) of the St. Lucia Criminal Code.

With respect I do not consider the case of Emmanuel v. Cox as authority for saying that where a magistrate hears an indictable offence together with a summary offence, the conviction for the summary offence may be severed and remains valid.

In R. v. Rudolph Brown [1970] 12 J.L.R. 139 the court held that where a magistrate holds a joint trial of an indictable offence with a summary offence, such a trial is a nullity. The court quashed the convictions.

In a short judgment of the court, Shelley, J.A. at p. 140 said:

> "This appeal is from conviction by the learned acting resident magistrate for St. Mary of the offences of praedial larceny, assault at common law and breach of the Vagrancy Law, to wit, being armed with an offensive weapon.

> "Praedial larceny and assault at common law are indictable offences and were properly laid as two separate counts in one indictment, as permitted by s.6 of the Indictments Law, Cap. 158. The charge upon information for the summary offence under the Vagrancy Law was tried together with the offences charged in the indictment. There is no authority for such a procedure. There is provision in the Criminal Justice Administration Law, Cap. 83, s.22, for joint trials of summary offences in certain circumstances. There is no provision for joint trial of indictable and summary offences. This trial was therefore a nullity.

There is no provision in the Criminal Procedure Code of the Cayman Islands authorising the joint trial of summary and indictable offences. There is, however, provision in the Criminal Procedure Code of the Cayman Islands in s. 13 (6) for joint trial of summary offences in certain circumstances.

On a review of the cases referred to above I am of the view that the joint trial of an indictable offence and a summary offence would result in the entire trial being declared a nullity. To put it another way, the joint trial of a category B offence in the circumstances of the instant case with a category C offence would result in the entire trial being declared a nullity.

There is no room for severance. The learned Chief Justice was in error in holding that the offence of unlawful possession of cocaine could be severed from the category B offences and remain valid.

Accordingly the trial was a nullity and for the reasons stated above the appeal was allowed. A new trial was ordered on the charge of unlawful possession of cocaine.

KERR, J.A.

In the Summary Court at George Town before His Honour, Mr. Kipling Douglas, the appellants were charged and convicted of the following charges:

Gonzalez

(a) Possession of cocaine hydrochloride on the 17th of February, 1983 - contrary to Section 3 (1) (i) (k) of the Misuse of Drugs Law, 1975.

(b) Conspiracy with persons unknown to import cocaine - contrary to Section 293 (f) of the Penal Code and Section 3 (1) (i) (b) of the Misuse of Drugs Law, 1973.

Both Appellants:

(c) Offering to sell cocaine hydrochloride - contrary to Section 3 (1) (i) (e) of the Misuse of Drugs Law, 1973.

(d) Conspiracy to export the said drug; contrary to Section 293 (f) of the Penal Code and Section 3 (1) (i) (b) of the Misuse of Drugs Law.

(e) Possession of cocaine hydrochloride on the 22nd of March, 1983 contrary to Section 3 (1) (i) (k) of the Misuse of Drugs Law, 1975.

On appeal to the Grand Court, before Sir John Summerfield, Chief Justice, the conviction of being jointly in possession of cocaine hydrochloride on 22nd March, 1983, was affirmed. The convictions in respect of all other charges were quashed.

In his written judgment delivered March 6, 1984, the learned Chief Justice carefully summarised the arguments presented in support of the many grounds of appeal and forthrightly dealt with all the questions of law raised on appeal. It will be necessary to analytically examine the reasons for such decisions and conclusions as were challenged on appeal before this Court. It is enough at this stage to say that the learned Chief Justice in effect held that the trial was a nullity in respect of the offences of conspiracy to export and import and offering to sell cocaine hydrochloride as in the absence of

the requisite consents to summary trial, the Magistrate had no jurisdiction to try those offences and in respect to the charge of possession on February 17, 1983 there was insufficient evidence to support the convictions. He, however, held that in respect to the joint charge of possession on the 22nd of March, that offence was within the jurisdiction of the Magistrate and in the particular circumstances the trial of this offence was severable and there was sufficiently cogent evidence to support the convictions.

Now the first question raised on appeal was that in respect to those convictions, the learned Chief Justice erred in holding that possession of a hard drug, namely, the cocaine hydrochloride to an amount exceeding two ounces, was a summary offence triable by the learned Magistrate. In fairness it must be said that this question was never raised before the learned Chief Justice. Notwithstanding it is a question of jurisdiction and it was perfectly proper for the appellants' counsel to argue it on appeal.

Offences in the Cayman Islands are classified by the Criminal Procedure Code, Law 13 of 1975 - and in that regard the following provisions are directly relevant:

> Section 4:
>
> "Save in the case of departmental, disciplinary and procedural offences for the disposal of which special provision is made in any other law, all offences shall be tried either -
>
> (a) upon indictment before the Grand Court; or
>
> (b) summarily by the Summary Court."
>
> Section 5(1):
>
> "(1) For the purpose of determining the mode of trial before a court, offences shall be classified into three categories as follows:
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> Category A - offences triable upon indictment and not otherwise;
>
> Category B - offences triable upon indictment which, with the consent of the

" prosecution and the person charged (or all of the persons charged if there be more than one) may be tried summarily; and

Category C - offences triable summarily and not otherwise."

Section 81:

"Whenever any charge has been brought in a Summary Court against any person in respect of an offence -

(a) not triable summarily; or

(b) which may be tried either summarily or on indictment and which the prosecution or the accused person desires to have tried on indictment.

the court shall hold a preliminary inquiry subject to the provisions of this Code and of the Evidence Law."

Before dealing with this well argued Ground of Appeal I feel constrained to make the following observations. Category B - or hybrid offences as they are sometimes called are helpful to the administration of justice in countries like England, where in general the sentencing powers of Summary Courts in relation to custodial sentence are limited to imprisonment not exceeding three months. In such cases an accused may be moved to consent to summary trial to avoid the risks of substantially greater punishment if convicted on indictment in the higher jurisdiction. The State enjoys in such cases the compensatory advantages of inexpensive and expeditious trial by summary procedure. On the other hand in the Cayman Islands where on the Magistrate is conferred the power to impose custodial sentences of great length, it is highly improbable that an accused in cases like the present would willingly surrender his right to trial by jury. It is conceivable that in relation to certain offences, depending upon the gravity in the commission or the antecedents of the accused, it may be desirable to confer on the Summary

Court concurrent jurisdiction with the Grand Court. This, however, could be achieved by clear unambiguous provisions and free from the impediment of requiring consents from the prosecution and defence.

The Jamaican Legislation in respect to the Resident Magistrate's jurisdiction on indictment provides an example of concurrent jurisdiction.

From this digression I return to deal with the categories under which the offences in breach of the Misuse of Drugs Law fall and for which the appellants were convicted by the Magistrate.

Section 25 of the Misuse of Drugs Law (Law 13 of 1973) (Revised), (hereafter referred to as the Law) reads:

> "Notwithstanding the provisions of any other section, where a person is charged with any offence contrary to this Law and such person is liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years then such offence shall be deemed for the purpose of determining the mode of trial, a category B offence in accordance with section 5 of the Criminal Procedure Code."

Section 3 (1) and (2) of the Law creates the various offences and paragraph (k) of Section 3 (1), the offence of possession of drugs.

Subsection (1) of Section 12 provides a general penalty for breaches of Section 3 (1) and (2) on summary conviction and subsection (4) of that Section reads:

> "Notwithstanding to the provisions of subsection (1), where a person is convicted of any offence that -
>
> (a) is contrary to any provision of this Law; and
>
> (b) is in relation to a controlled drug that is a hard drug,
>
> the sentence shall on summary conviction include a term of imprisonment and a fine in accordance with the provisions of Part B of the Second Schedule."

Cocaine hydrochloride is a hard drug - see Section 2 and the First Schedule of the Act. The Second Schedule of the Law so far as is relevant is structured thus:

" PART B

SENTENCES RELATING TO OFFENCES CONTRARY TO SECTION 3(1) WHICH RELATE TO A CONTROLLED DRUG THAT IS A HARD DRUG.

OFFENCE	AMOUNT OF HARD DRUG	PENALTY			
		FIRST CONVICTION		SECOND OR SUBSEQUENT CONVICTION	
		Minimum	Maximum	Minimum	Maximum
Buying Consuming Possessing Attempting, etc.	less than 2 ounces	1 year + $1,000	7 years + $10,000	2 years + $4,000	15 years + $20,000
Buying Consuming Possessing Attempting, etc.	2 ounces or more	3 years + $10,000	15 years + a fine without limit as to amount	5 years + $50,000	20 years + a fine without limit as to amount
Selling Dealing in Distributing Supplying Dispensing Storing Issue a prescription for Administering Importing Exporting Producing Attempting, etc.	less than 2 ounces	3 years + $10,000	15 years + a fine without limit as to amount	10 years + $50,000	20 years + a fine without limit as to amount
Selling Dealing in Distributing Supplying Dispensing Storing Issue a prescription for Administering Importing Exporting Producing Attempting, etc.	2 ounces or more	5 years + $20,000	20 years + a fine without limit as to amount	10 years + $100,000	30 years + a fine without limit as to amount

"

This method of categorising the various offences under the Law although it lightens the labours of the draughtsman by necessitating cross-references it adds to the task of interpretation and provides material for arguments such as those so astutely presented by the appellants' counsel.

Mr. Muirhead in support of this ground submitted that the Law mandatorily required the Magistrate to impose in addition to any term of imprisonment a fine with imprisonment up to six months for default of payment of the fine. Accordingly, in the light of Section 25, the offence of possession of cocaine hydrochloride of an amount of two ounces or more is a Category B offence and in the absence of the requisite consents is beyond the Magistrate's jurisdiction. He sought support for his argument in the judgment in R. v. Boosby (1909) 1 K. B. 849.

The Headnote of that case reads:

> " By s. 17, sub-s. 1, of the Summary Jurisdiction Act. 1879, 'A person when charged before a Court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months ..... may, on appearing before the Court, and before the charge is gone into but not afterwards, claim to be tried by a jury.'
>
> Sub-s. 2: 'A Court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him' to the effect in the section set out, and ask him if he desires to be tried by a jury.
>
> A woman was charged before justices with an offence in respect of which, if it was a first offence, she was liable on summary conviction to be imprisoned for a term not exceeding three months. In the course of the hearing evidence was given by the prosecution that the defendant had been previously convicted of a like offence, and thereupon she became liable on conviction to be imprisoned for a term exceeding three months. The justices, without giving her the option prescribed by the above section, convicted the defendant and sentenced her to three months' imprisonment:"

In his dissenting judgment Lord Alverstone, C.J. considered the special circumstances of the trial and then said at p. 854:

> "It seems quite clear that it was intended by that section that the information as to the right of trial by jury should be given to the defendant before the charge was gone into at all. But then it is contended that when the justices, who had no reason to suppose the case was one to which the section applied, have heard the case and are about to consider what punishment shall be inflicted, if it is brought to the notice of the Court (I am not going to draw any distinction between sworn and unsworn evidence - I will treat this case as if the statement was upon oath) that the defendant has been previously convicted, all the proceedings are to be of no effect, and the justices must begin over again, and they must give the defendant the option of letting the case go for trial. I cannot think that that was what the statute meant. If it did it would lead to the consequence, from which Mr. Avory does not shrink, that a person may take his chance of acquittal before the magistrates, knowing perfectly well that he has been previously convicted, and then, when he has been convicted, say 'I have been previously convicted, no option of trial by jury was given to me, and the whole proceedings are therefore bad.' That seems to me a most unreasonable conclusion. I quite agree that it does not matter at what stage the fact of the previous conviction comes to the knowledge of the justices if they do in fact entertain the charge of the greater offence. I agree that, although it is not so charged in the information, if the prosecution orally charged, or the justices deal with the accused on the basis of the graver offence, the proceedings would be bad. But at least the defendant must stand charged in one way or another with an offence for which he can be sentenced to more than three months' imprisonment. If he has never been so charged, in my opinion the section was not intended to limit the well-known power of magistrates to make inquiries after conviction as to the character of the defendant with a view to passing the appropriate sentence. In the present case it is clear that the defendants were never charged at any stage of the proceedings with having committed the offence after a previous conviction; and in my opinion the mere disclosure of a previous conviction cannot turn a charge of a first offence into a charge of a second offence."

This case is distinguishable in that it was accepted without argument that a previous conviction took the offence beyond the jurisdiction of the Justices of the Peace. The

point in argument was whether in the particular circumstances it could be said that in the absence of being so specifically charged or there being no disclosure of the previous conviction during the trial, it could be said she was being tried for the graver offence.

Nothing said in the judgment of the other two judges met the points raised by the learned Chief Justice in the passage quoted above. They could show no good reason for departing from the earlier case - R. v. Fowler, 64 L.J. (M.C.) 9. Indeed Walton, J. admitted the cases were indistinguishable. There is so much to commend the practical and common-sense approach of Lord Alverstone, that in the light of the deficiencies in the reasoning of the majority, were it necessary, I would prefer the judgment of the learned Chief Justice.

Mr. Kendall in reply submitted that the difference between possession of an amount under two ounces and possession of two ounces and over of a hard drug was purely a question of sentence. In Section 25 of the Law, the punishment in contemplation as defining jurisdiction was a custodial sentence. As he fittingly observed the interpretation sought by Mr. Muirhead would involve the assessing of the fine and alternative imprisonment and then in anticipation of the fine not being paid deduct the alternative term of imprisonment from the maximum so as to keep within a defined jurisdiction.

He cited in support of his submission - R. v. Carver (1955) 1 All E.R. p. 413, the Headnote of which reads:

> "The appellant was convicted at quarter sessions of permitting premises to be used as a brothel contrary to s. 13(2) of the Criminal Law Amendment Act, 1885. She had a previous conviction of the same offence and was sentenced to six months' imprisonment and a fine of £200, and, in default of payment of the fine, to a further six months' imprisonment, making twelve months in all. Section 3 of the Criminal Law Amendment Act, 1922, which amends the penalties for offences against s. 13 of the Act of 1885, provides

" '..... (b) on a second or subsequent conviction, to a fine not exceeding £250 or to imprisonment .... for a term not exceeding six months; or, in any such case, to both fine and imprisonment.' The appellant appealed against the sentence."

In delivering the judgment of the Court, Lord Goddard said at pages 414-415:

" The prisoner in this case was convicted of permitting premises to be used as a brothel after a previous conviction for that offence and the court imposed the maximum sentence of six months' imprisonment and ordered her to pay a fine. When I say the 'maximum sentence', what I mean is this: the statute under which she was convicted authorises the court to impose imprisonment for six months and a fine not exceeding £250. The court imposed the imprisonment of six months and, as they looked on it as a very bad case, they also imposed a fine of £200. Then the court said that in default of payment she would serve a further six months making twelve months in all.

Counsel for the appellant has contended that that sentence is not authorised by law because Parliament has provided a maximum sentence of six months and, therefore, no further sentence of imprisonment could be imposed. What the statute has said is that the sentence that can be imposed is six months plus a fine. If a person does not pay the fine obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay because it would mean that if he could afford to pay he would lose £200.

It is necessary to consider what are the powers of the court under the Criminal Justice Act, 1948, which made very considerable changes in the law in regard to the recovery of fines. In R. v. Brook, by which we are bound, this court said that an entirely new procedure was introduced by the Criminal Justice Act, 1948, with regard to the payment of fines and, although neither the Levy of Fines Act, 1822, nor the Queen's Remembrancer Act, 1859, was repealed, with the result that certain matters of machinery still had to be carried out, as for instance, entry of the fine on the estreat roll and the return to the sheriff, we have now to consider simply the provisions of s. 14(1). That says:

' 'Subject to the provisions of this section, where a fine is imposed by, or a recognizance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section. .....'

"That seems to me to apply to any fine. Fines have always been enforced before courts of summary jurisdiction by means of a sentence of imprisonment being imposed in default of payment or in default of distress. There is a short code of the length of imprisonment that can be imposed according to the size of the fine. The maximum sentence that can be imposed by a court of summary jurisdiction is three months for non-payment of a fine, but it has always been the policy of the legislature, certainly when the proceedings are before magistrates' courts, to deal with the question of non-payment of fines by a sentence of imprisonment. A considerable change was introduced into the law by the Criminal Justice Act, 1948. Among other things, courts before whom prisoners were convicted on indictment were given powers to impose fines for felony. They always had power to impose a fine for misdemeanours and s. 14(1) says 'where a fine is imposed'; its application is not limited to cases where a fine but no sentence of imprisonment is imposed. It says:

> '... where a fine is imposed by ..... a court of assize or quarter sessions, an order may be made .... (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered. ....'

In these circumstances, we think that the quarter sessions were entitled to make the order they did. It may be that the sheriff can still distrain on the goods. If the sheriff distrains on the goods while this woman is serving her sentence and recovers the sum of £200 by distraint, when her sentence of six months is up, there will be an end of it; but if distraint does not produce the £200 or the fine has not been paid, she will have to do a further six months. In all these circumstances the appeal is dismissed."

I am in agreement with Mr. Kendall. The confines of jurisdiction must be defined with certainty. It is true that the imposition of a fine in addition to the custodial sentence is mandatory. However, Section 78 of the Criminal Procedure Code empowers methods alternative to imprisonment for the recovery of the fine while Section 25(1) of the Penal Code provides for a scale of imprisonment commensurate with the amount of the fine - the maximum at the relevant time being six months. This Section has now been amended to increase the alternative to five years.

Accordingly, notwithstanding the power conferred to impose imprisonment in default of payment of a fine, the penalty remains a pecuniary one. I have no note or recollection of any reference in argument to Section 6 of the Criminal Procedure Code, the relevant provisions of which read:

> "(2) Subject to the express provisions of any other law a Summary Court may, in a case in which such sentence is authorised by law to be inflicted in respect of the offence for which it is imposed, pass sentences as follows -
>
> (i) imprisonment for a term not exceeding two years;
>
> (ii) a fine not exceeding two hundred dollars.
>
> (3) Any court may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.
>
> (4) In determining the extent of a court's jurisdiction under this Code to pass a sentence of imprisonment, the court shall be deemed to have jurisdiction to pass the full sentence of imprisonment permitted under this section in addition to any term of imprisonment which may be awarded in default of payment of a fine, costs or compensation."

Notwithstanding, the generality of these provisions, they indubitably indicate the legislative intent that jurisdiction should be determined on the basis of the custodial sentence which the inferior Court is empowered to impose and independent of any pecuniary fine. These provisions were clearly in anticipation and intended to preclude arguments such as those advanced in the instant case.

For these reasons I concurred in holding that the possession of the cocaine hydrochloride to the amount exceeding two ounces was a Category C offence.

I now turn to Mr. Muirhead's alternative submissions based upon the following grounds:

> "1. That the Learned Chief Justice was wrong in law in holding that the whole trial or proceedings was not a nullity.
>
> 2. That the Learned Chief Justice, having found that the trial was a nullity in

" relation to all the other charges, was wrong in law in declaring and finding that he could properly sever the charge of possession on the 22nd March 1983 of 31 kilos of cocaine hydrochloride therefrom and that accordingly, there could be an adjudication in law thereon.

3. That the Learned Chief Justice was wrong in law in ruling that the subsequently added charge of possession of 31 kilos could in law be severed and be or become valid, viz:

(A) Having correctly concluded that the trial in relation to conspiracy to import cocaine hydrochloride and conspiracy to export cocaine hydrochloride -- the only charges preferred against the Appellant at the commencement of the trial -- was a nullity and accordingly a nullity ab initio; and/or

(B) Having correctly concluded that the subsequently added charge of offering to sell was likewise a nullity.

4. .....

5. That the Learned Chief Justice was wrong in law in holding that the Learned Magistrate was not in the course of a trial when the Appellant was impleaded on the charges on the second day's hearing as:

(A) A trial on charges of conspiracy (declared by the Learned Chief Justice to be a nullity) had already begun.

(B) Section 70 of the Criminal Procedure Code, the only basis upon which the Learned Magistrate added the additional charges, was not applicable.

(C) The charges in (B) above were additional and not in substitution of the original/ initial charges and the trial continued.

(D) Section 64 of the Criminal Procedure Code was never adverted to and accordingly, was never the subject of consideration, inquiry, or examination by the Learned Trial Judge or the prosecution or defence.

(E) The "additional" charges included an admitted Schedule "B" offence, which, in the absence of consent, the Learned Magistrate had no jurisdiction to try and purported to try same jointly with all the other charges."

To deal with these grounds and the arguments in support of the history of the proceedings is relevant. Unblushingly I take advantage of the learned Chief Justice's excellent summary, the relevant parts of which read, (p. 188):

> " The first trial, which was aborted, commenced on 20th April 1983 before another Magistrate. There were then six accused persons. The two appellants were charged jointly with possession of cocaine; the first appellant was charged on a separate charge of possession of cocaine and another charge of offering to sell cocaine; and there were two other charges charging all six accused with conspiracy to import cocaine and conspiracy to export cocaine."
>
> " There is nothing on the record of the first trial to indicate that the accused had consented to summary trial on the cateogry B offence and it was stated from the Bar in the course of this appeal that no such consent was sought or given. The trial, nevertheless, proceeded as a summary trial as if consent had been given."
>
> Page 189:
>
> " On the 4th May the prosecution told the Court that it proposed to offer no further evidence against three of the accused and conceded that a prima facie case had not been made out against them. Those three accused were thereupon discharged.
>
> On the 6th May the learned Magistrate disqualified himself from continuing with the trial because of what he expressed to be the likely prejudicial effect on the trial of a statement broadcast by Radio Cayman at the instance of the Commissioner of Police. He stopped the trial and ordered that it be commenced de novo before another Magistrate.
>
> The retrial commenced on 11th July 1983 and resulted in the conviction of the two appellants. The third accused was dismissed on a no case submission. This appeal is against those convictions and the sentences imposed.
>
> At the commencement of the retrial the learned Magistrate impleaded the two appellants and the third accused who was later discharged on two conspiracy charges. The one charged that the three had conspired together and with others unknown to import cocaine hydrochloride. The other charged that the three had conspired together and with others unknown to export cocaine hydrochloride. The charges were substantially the same as the two conspiracy charges at the first trial with the amendments put forward except for the number of accused persons."

Pages 190-191:

"The appellants and the third accused pleaded not guilty to the two conspiracy charges. Their consent to these two charges being tried summarily was neither sought nor given. The question of consent was not adverted to at all. It may be that the learned trial Magistrate thought that the necessary consents had been given at the earlier trial and that those consents continued to operate. No objection or query was raised by the defence and the trial proceeded as if there were no irregularity and the trial Magistrate were properly seized of the matter.

No doubt during the overnight adjournment the learned Magistrate realised that he had not impleaded the appellants on all the charges due for retrial. At the commencement of the proceedings on 12th July he announced that he proposed to implead the appellants on further charges. The first witness, Zuiderant, had by then completed his examination in chief. Objection was taken by counsel for both appellants but, after argument, the learned Magistrate decided to implead them. There were three further charges all of which affected the first appellant. Only one affected the second appellant. The charges were put. On the advice of counsel both appellants declined to plead and pleas of not guilty were entered in relation to the three charges.

The first additional charge charged the first appellant with unlawful possession of cocaine hydrochloride on 17th February 1983. No indication of the amount involved was given at the time but it later transpired that this charge related to 3 grammes of cocaine hydrochloride.

The second additional charge charged the first appellant with unlawfully offering to sell cocaine hydrochloride on 22nd March 1983. The amount involved was not set out in the charge but the amount the prosecution proposed to prove in relation to this charge was 70 kilogrammes.

The third additional charge charged both appellants with unlawful possession of cocaine hydrochloride on 22nd March 1983. The amount involved was not disclosed but later in the trial the prosecution announced that this charge related to 31 kilogrammes of the controlled drug.

The three additional charges were substantially the same as the corresponding charges in the earlier trial with the amendments put forward. They were not, however, the same charges.

Freshly made out charges had been laid for the retrial and they had been signed by a different Justice of the Peace. This was also the case with the two conspiracy charges to which the three accused pleaded not guilty at the commencement of the retrial.

"Following the plea to the latter three substituted charges the prosecution informed the court that all the charges laid for the retrial were identical to the earlier charges as amended in court and that the Crown would not be proceeding with the earlier charges which were then formally withdrawn."

Pages 191-2:

" The position at the retrial was therefore, that the accused had to be impleaded on all the substituted charges as they affected each of the three accused. That was done in the sequence set out above. Further the necessary consents should have been sought if the charges for the category B offences were to be heard summarily. That was not done. No such consents were given .....

..... After the fourth witness had given evidence the defence called upon the prosecution to disclose the quantity of cocaine hydrochloride to which the two possession charges related. The prosecution undertook to give the weights. It is a matter of surprise that the weights were not given then and there, or, indeed, in the opening, as the prosecution must have been aware of the weight of the drug related to each possession charge. On the following day the weights were given - 3 grammes on the charge which related to 17th February on which the first appellant was charged and 31 kilogrammes on the charge which related to 22nd March on which both appellants were charged.

There were no case submissions at the close of the prosecution case which resulted in the complete acquittal of one of the accused. The two appellants gave unsworn statements from the dock and called no evidence. Their defence was a complete denial of the charges. The first appellant was convicted on all charges. The second appellant was acquitted on the charge of conspiracy to import but convicted on the charge of conspiracy to export and the charge of unlawful possession on 22nd March (31 kilogrammes)."

The learned Chief Justice then went on to hold:

Pages 198-199:

" When it comes to selling, dealing or distributing a hard drug (and related offences as set out in Part B of the Second Schedule) the 2 ounces threshold affects not only the maximum and minimum sentence but impinges also on jurisdiction by reason of section 25 of the Misuse of Drugs Law. Where the quantity is less than 2 ounces the offence is a category C offence for the purpose of section 5 of the Code. Where it is 2 ounces or more the offence is a category B offence. Perhaps it should be made clear that these offences involving less than 2 ounces and carrying the heavy penalties they do are not category C offences

> "by virtue of Schedule 1 of the Code. They are category C offences by virtue of section 12 of the Misuse of Drugs Law which expressly makes them triable summarily. It is, therefore, important that the charge should specify whether the amount alleged is under or over 2 ounces (or exactly 2 ounces, if that is the case)."

It is enough to say that flowing from my reasoning in relation to the first ground argued, I concur with the learned Chief Justice in his classification of the offences for which the appellants were convicted and also in his treatment of the absence of the requisite consents when he held, (p. 201):

> " It is perfectly clear from that that unless the prosecution and the person/s charged give their consent to a category B offence being tried summarily the Magistrate has no jurisdiction to try it summarily. He must proceed by way of preliminary enquiry. In my view that consent must be express. Mere acquiescence is not enough. Acquiescence would obviously not be sufficient where an accused person is not represented. I do not see how it can be any different if he is represented. The consent must come from both the prosecutor and the accused person/s. Without the consent of both the Magistrate has no jurisdiction to try a category B offence. Those consents must be obtained before the accused is impleaded.
>
> Further/ more those consents should be recorded so that it is plain from the record that the Magistrate had jurisdiction. That is emphasised in many of the cases cited."

In that regard the learned Chief Justice referred to the following amongst other cases: R. v. Monica Stewart (1971) 17 W.I.R. 381; R. v. Cockshott (1898) 1 Q.B.D. 582 and Stefani v. John (1947) 2 All E.R. 615.

He then went on to say, (p. 202):

> " Quite clearly the trial, in so far as it related to the three charges in respect of which the learned Magistrate had no jurisdiction, is a nullity. The verdicts on those charges, namely, the two conspiracy charges and the charge of offering to sell, are a nullity."

He however, declined to order a new trial because:

(i) He doubted whether it was appropriate so to do having regard to the judgment in R. v. Donald White (1976) 24 W.I.R. 454.

(ii) The evidence adduced would not be sufficient to support the convictions.

Re (i), above, the learned Chief Justice's attention was unfortunately not adverted to the further appeal in the Donald White case - See D.P.P. v. Donald White (1977) 3 W.L.R. 447, where in interpreting the provisions of Section 14 of the Judicature (Appellate Jurisdiction) Act [Jamaica] the Court of Appeal decision was overruled.

Lord Glaisdale at p. 451 saying:

> "If the words 'new trial' can extend to cover venire de novo, they should therefore be so construed. In their Lordships' view they can. In the instant case there was a valid trial up to the time the jury returned a premature verdict. In such circumstances it is perfectly appropriate to speak of a 'new trial'."

And in answer to a specific question submitted said at p. 452:

> "The absence of an order for a new trial after an appeal is allowed and the conviction quashed would presuppose that the Court of Appeal had ordered a verdict of acquittal to be entered."

It is this opinion of Sir John Summerfield, which no doubt prompted the prosecution to have filed a notice of appeal. However, the appeal was abandoned and, rightly so in my view, as the finding that there was insufficient evidence to support the convictions would preclude him from ordering a new trial. In any event, the questions which could be raised by cross appeal, would incidentally arise on the appellants' appeals.

Now the primary question which arose for our determination was whether or not there was a joint trial of the offences for which the Magistrate convicted the appellants.

In impleading the appellants on the 'additional' charges on the second day of the hearing and after the trial on the conspiracy charges had started, the learned Magistrate relied on the power conferred by Section 70 of the Criminal Procedure Code which reads:

"(1) Where, at any stage of a trial it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration or addition of a charge, as the court thinks necessary to meet the circumstances of the case:

Provided that where a charge is altered, added or substituted as aforesaid, the court shall thereupon call upon the accused person to plead to the altered or new charge:

Provided further that in such case the accused person shall be entitled, if he so wishes, to have the witnesses (or any of them) recalled to give evidence afresh or to be further cross-examined by the defence, and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

On this the learned Chief Justice had this to say, (p. 207):

"In taking the course he did the learned Magistrate purported to invoke the provisions of section 70 of the Code. With respect, in my view section 70 did not give the power imputed to it by him."

Page 208:

"It has to appear to the court that 'the charge (presently before the court) is defective, either in substance or in form.' There was nothing defective in the substance or form of the two conspiracy charges on which the three accused had been impleaded. The learned Magistrate did not advert to any defect. Although he had no jurisdiction to try them without consent the charges were not in themselves defective. In the circumstances as they appeared at the time section 70 was not applicable."

Before us Mr. Kendall contended that Section 70 empowered the Magistrate to do what he did; that the powers conferred on him were similar to powers of amendment in relation to indictments and accordingly "defective" in the Section should be given the same interpretation as in relation to indictments. He cited in support R. v. Fong (1976) 12 J.L.R. 121 and R. v. Johal and Ram (1972) 1 All E.R. 449.

In R v. Fong it was held that the indictment was defective for the purpose of Section 7(1) of the Indictments Law (Jamaica) since it omitted to charge an alternative offence disclosed

by the depositions and that the indictment was validly amended by adding new counts before arraignment there being no injustice to the appellant in so doing.

The judgment in R. v. Johal was to the same effect.

The words of Section 70 of the Criminal Procedure Code are plain and unambiguous. The reasonable and useful interpretation must be that the legislature intended to confer on the Magistrate a power, akin to that in relation to indictments, to add charges if such can be effected without prejudice or unfairness to the defence. This power to add is implicit in the words of the first proviso - "where a charge is altered, added or substituted," and by the right conferred on the accused by the second proviso to have the witnesses recalled for further cross-examination. To place the narrow interpretation favoured by the Learned Chief Justice would rob the section of much of its effect. Accordingly, I am of the view that during the course of a summary trial on the basis of evidence adduced or to be adduced, the Magistrate may permit the presentation of additional charges to be jointly heard with the trial of other charges then in progress provided this could be effected without prejudice or unfairness to the defence.

I was surprised that Mr. Muirhead by preliminary objection sought to preclude Mr. Kendall from preferring the Magistrate's interpretation to that of the Learned Chief Justice and eventually to have taken time out to disagree, seeing that the thrust of Mr. Muirhead's argument was that upon the appellants being impleaded on and evidence led in relation to those additional charges there was but one trial indivisible.

Now the Learned Chief Justice in holding that the trials were severable had this to say (p. 204):

> "The law sometimes frowns on the curate's egg approach but it is not the case that an irregularity in a trial, even a major one, necessarily vitiates the whole trial as an examination of the authorities will show."

He then went on to approve of the reasoning and judgment in (i) - R. v. Olivo (1942) 2 All E.R. 494 that the simultaneous trial of two indictments is a nullity and (ii) - Harding v. Ramjattan (1959) 1 W.I.R. 434, in which two defendants charged indictably on one information with different but related offences, one of which was triable summarily with consent of the defendant and the other not and although both consented to summary trial the whole was held to be a nullity. These cases the Learned Chief Justice held were distinguishable. He then sought support for severance in the case of Emmanuel v. Cox (1967) 10 W.I.R. 560 and went on to say - (pp. 205-207):

> " In principle there is no real distinction between that case and this one. So much of the trial as was within the jurisdiction of the Magistrate was held to be valid. So much of it as was outside his jurisdiction was rejected as null and void. Although that is not how it was expressed in the judgment that was the effect of the decision. With respect that seems to be a sound and acceptable approach which does not allow technicalities to defeat the merits and justice of a case.
>
> When one analyses the position under our law the approach in Emmanuel v. Cox appears to be appropriate.
>
> The proviso to subsection (3) of section 13 of the Code provides that the charges laid in this case shall be deemed to be complaints. There were five separate charges each dealing with one matter. By virtue of that proviso they became five separate complaints. Subsection (6) of that section provides:
>
> > 'Every complaint shall be for one matter only, but the complaint may lay one or more complaints against the same person at the same time and the court hearing any one of such complaints may deal with one or more of the complaints together or separately as the interests of justice appear to require.'

" The five complaints were held together, albeit that three were impleaded shortly after the trial on two had begun - an aspect which will be dealt with. Each separate complaint had to be considered separately, as a distinct entity, in relation to the evidence led and a separate verdict reached on each. There is nothing repugnant to common sense or any rule of law or to one's sense of justice in holding that so much of the trial as related to the two complaints charging unlawful possession, which were within the Magistrate's competence, was valid and so much of it as related to the complaints containing the other three charges, which were not within the Magistrate's competence, was a nullity. There was just one trial on the charges in those three complaints. In consequence the verdicts on them were null and void. If there had been an acquittal on one or both of the possession charges it could not be right, on an appeal against conviction on the other charges, to hold that the whole trial had been a nullity, thus leaving it open for a retrial to be launched on all of the charges, including those on which there had been an acquittal on the basis that the acquittal was a nullity.

In any trial where two or more complaints are heard together, some of the evidence will relate to one, some will relate to another and some will relate to two or more. Where the evidence relates to a charge within the Magistrate's competence, it can be considered in relation to that charge. Where it relates to a charge not within the Magistrate's competence, it has no effect in relation to that charge. That charge is not, in reality, being tried.

Looked at another way, it is clear that the learned Magistrate had no jurisdiction to even implead the accused on the charges charging category B offences without the necessary consents. From that point onwards, there was no trial on those charges. The only trial there was, was on the charges which were within the Magistrate's competence. The whole trial could only relate to the two possession charges."

Mr. Muirhead in support of his contention that the entire trial was a nullity referred to the following amongst other cases - Peacock v. Bell - 1 Wms. Saund 73 and Brangwyme v. Evans (1962) 1 All E. R. 446, and submitted in effect that no summary charge can validly be tried with an indictable offence and accordingly such purported joint trial was a nullity in its entirety. Further that in respect to the case of Emmanuel v. Cox on which the Learned Chief Justice relied, that case rested on the peculiarity of the provisions of the St. Lucia Code. This was so expressed in the case of Bain v. Commissioner of Police (1971) 17 W.I.R. 386.

The Jamaican case of R. v. Olive Junior, C.A. 25/83 (unreported) judgment delivered July 20, 1983 was more applicable and correctly represented the law.

Mr. Kendall in reply and in support of severance submitted:

(i) That where as in the Cayman Islands one information must relate to one charge only and the Court has power to try more than one information together, then if the proceedings in relation to one of those charges are declared a nullity, then the proceedings in relation to the other charge can be severed.

(ii) That if the Magistrate was properly exercising his jurisdiction he can try more than one information together unless the interests of justice require otherwise.

(iii) The correct approach was to look at the special circumstances of the case to see whether the facts supporting a particular charge can be clearly severed from the facts tending to support other charges and to say whether in all the circumstances the defendant would suffer any prejudice if severance was applied.

(iv) In the instant case everything which occurred up to impleading on the possession charge was a nullity and a valid trial only started with the charges of possession.

I feel constrained to deal at once and summarily with (iv) above. Surely in the light of his submission in relation to Section 70 this must be a tongue-in-the-cheek submission. Until a Court exercising appellate jurisdiction had pronounced the trial a nullity in relation to the charges of conspiracy and offering to sell, the appellants were undergoing imprisonment based upon convictions which up to then enjoyed the presumption of validity. It is therefore unrealistic to disregard their existence and the trial which brought them into being.

I now turn to consider the other arguments in the light of the authorities cited.

In Emmanuel v. Cox (supra) the appellant was convicted on three charges - being armed with a dangerous weapon with intent to commit an unlawful act, assaulting a police constable in the execution of his duty and resisting arrest. There were three charge sheets on which he alone was charged. Another man, Marius Monclair was charged separately with three offences - assaulting police constable in the executing of his duty, wounding and using obscene language.

Application to hear the charges against both defendants together as existing out of the same incident was made by and granted to the prosecution by the Magistrate. The appellant and Monclair were convicted on all charges.

On appeal in delivering the judgment of the Court, A.M. Lewis, C.J. said (p. 561):

> "The learned magistrate's jurisdiction is, of course, regulated by the Criminal Code, and this court has asked the learned Attorney-General to refer us to some provision of that Code or indeed to any other provision by which the learned magistrate was empowered to hear all these cases together. He has referred the court to s. 1078(2) of the Criminal Code which reads:
>
> > 'Where there are similar separate complaints by one and the same complainant against separate defendants in respect of the same matter, the court may, if it thinks fit, hear and determine them at one and the same time'.
>
> The learned Attorney-General has quite frankly conceded that that section has only limited application to the circumstances of this case. Without going further into the matter, quite obviously, making use of obscene language within the public hearing is not an offence similar to assaulting a police constable in the execution of his duty. There was, therefore, no authority for the learned magistrate to hear all these cases together."

And later after reviewing the facts continued (p. 562):

> "The result of all this, as the court sees it, is that only the cases against the two defendants for assault on the police constable in the execution of his duty were properly heard together. The conviction on the first charge, that is, for being armed with a dangerous weapon to wit: a knife, with intent to commit an offence, and the third charge, resisting lawful arrest, must be set aside, and only the conviction for the assault on the police constable in the execution of his duty will stand.
>
> The learned magistrate has stated that he exercised jurisdiction under s. 1279 which deals with crimes respecting incidents arising out of one transaction, and describes the manner in which they may be punished. He said he took all the incidents into account and sentenced the appellant to six months' imprisonment to run concurrently on each charge."

In Bain v. Commissioner of Police (supra) in dealing with the question as to whether or not the appellant had consented to the charges being heard together, the Court [Lewis, A.M. C.J., Cecil Lewis and St. Bernard (JJ.A.)] allowed the appeal. Lewis, C.J. in the course of his judgment said at p. 239:

> "The provisions in the Criminal Code of St. Lucia referred to in the other case cited by learned counsel, Emmanuel v. Cox, are not similar to those of Grenada, for there, the discretion is placed entirely in the hands of the Magistrate as to whether or not the cases should be taken together. However, learned counsel cited that case because of comments made by the High Court sitting in its appellate jurisdiction about the need even under those provisions, for magistrates to record that they have asked the defendant whether he consents that the charges should be heard together, and his reply and their ruling."

Indeed certain provisions of the St. Lucia Code are unusual and interesting, e.g.:

> Section 723 (1):
>
> "If, upon the hearing of any complaint for an indictable offence, it appears to the Court that the case ought to be tried as a summary offence, all further proceedings thereon as for an indictable offence shall be stayed, and the case shall in all other respects be dealt with, as if the complaint had been originally one for a summary offence, and the magistrate's decision to try the case as a summary offence shall, subject to the attorney general's intimation to the contrary, be final."

Section 1138:

"No appeal shall be allowed on any of the following grounds -

(a) .....

(b) that illegal evidence has been admitted by the District Court, if there is sufficient legal evidence to sustain the decision after rejecting such illegal evidence;

(c) .....

(d) that the case should not have been dealt with as a summary offence."

Section 1139:

"No conviction or order made in pursuance of any proceedings for a summary conviction shall therefore be quashed for any defect or want of form, but every appeal shall be decided on the merits, and in all cases where it appears that the merits have been tried and there is evidence to support the decision and notwithstanding any objection respecting the improper admission or rejection of evidence, such conviction or order and any want, process or proceeding shall be confirmed, or shall not be quashed, as the case may be, and the Royal Court may, in any case, amend the same if necessary, or give such judgment or make such order as it considers the District Court or magistrate should have given or made in the circumstances."

Section 1140:

"In giving judgment the Royal Court may -

(a) confirm, vary, or reverse the decision, either in whole or in part;

(b) .....

(c) make such other order for disposing of the case as justice may require."

Although in Emmanuel v. Cox there was a definite statement that the Magistrate had no authority to hear all the charges together, the decision implicitly rested upon the interpretation of "same matter" in the relevant provisions. The Court equated that term to offences of "similar character." The net result is that the scope for joinder of charges was rendered

more limited than in the case of indictments where joinder is permissible "where the charges are founded on the same facts or form or are a part of offences of the same or similar character." The concession by the Attorney General apparently obviated the necessity for in-depth reasoning.

Further, it is worthy of note that all the charges were within the Magistrate's jurisdiction. Accordingly, I am of the view that this judgment is inadequate in its reasoning and decision to support the general proposition that where there is a joint trial of offences of different jurisdictional categories, severance is permissible in order to uphold the conviction on one of the charges.

In R. v. Olive Junior (supra) the appellant was convicted of malicious damage to a wall - the property of one Delbert Perrier - such damage exceeding $10.00 - contrary to Section 25 of the Malicious Injury to Property Act. The following sentence was imposed:

> "Complainant awarded compensation in the sum of $1800.
>
> Accused fined $10.
>
> Costs in the sum of $1500.
>
> All payments stayed pending appeal."

It was agreed on all sides that the offence was triable by a Resident Magistrate sitting in the Petty Sessional Division of the summary jurisdiction. The question before the Court, was whether the Resident Magistrate so sat or, in error, sat as a Resident Magistrate exercising his special statutory summary jurisdiction. Among the important differences in those jurisdictionsis that an appeal from the former is to a Judge of the Supreme Court in Chambers or on Circuit while an appeal in the latter is to the Court of Appeal. The appeal was allowed and the conviction quashed. Carey, J.A. who delivered the judgment

of the Court scholarly reviewed the peculiarities of the Jamaican summary jurisdiction and the relevant case law and having carefully considered inter alia the record of the proceedings, the sentence imposed, and the grant of a stay of execution, concluded:

> ".... we are firm in our conclusion that the learned Resident Magistrate exercised his special statutory summary jurisdiction and not his petty sessional jurisdiction. Such an order, as we have shown points in one direction only."

This case is clearly unhelpful as there was but one charge and the question of severance could not arise.

More in point is the case of Harding v. Ramjattan (1959) 1 W.I.R. 434:

> "Section 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 [B.G.], empowers a magistrate with the consent of the accused to deal summarily with an indictable offence which is specified in the First Schedule to the Ordinance if certain conditions are fulfilled. The offence of accessory after the fact to an offence is not one of the offences specified in the Schedule.
>
> The appellant H. and C. were charged indictably on one information, H. with the offence of embezzlement by public officer, contrary to s. 191 of the Criminal Law (Offences) Ordinance, Cap. 10 [B.G.], which is one of the offences specified in the Schedule to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 [B.G.], and C. with the offence of accessory after the fact to the offence with which H. was charged.
>
> On the application of the prosecutor under the provisions of s. 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 [B.G.], that both charges be dealt with by the magistrate summarily, both the appellant and C. agreeing thereto after having been duly informed of their right to trial by jury, the magistrate proceeded to hear and determine the charges together summarily. C. was found not guilty on the charge laid against him and was discharged while the appellant H. was found guilty of the charge laid against him. The appellant appealed against his conviction."

In giving the judgment of the Full Court of British Guiana - Luckhoo, J. said (p. 435):

> "The question to be determined is, what is the effect, if any, on the summary trial of the appellant, the two charges having been heard together?
>
> Counsel for the appellant submitted that the hearing by the magistrate was a nullity, the magistrate having exceeded his jurisdiction in respect of the summary trial of the offence charged against the appellant. He contended that this is analogous to the trial of two indictments together by consent, which has in England been held to be a nullity.
>
> The procedure adopted by the magistrate in dealing with the offence charged against Coddette was wholly irregular. In our opinion the joint trial of both offences was a nullity for the reason that it was not competent for the offence charged against Coddette to be tried summarily. It is also in our opinion immaterial that the charge laid against Coddette was dismissed.
>
> In view of the conclusion we have reached it is not necessary to deal with the other grounds argued by counsel for the appellant. The appeal is allowed and the conviction and sentence against the appellant must be set aside. The matter is remitted to the magistrate of the Courantyne Judicial District to be re-heard and determined.

Of all the cases cited by Counsel, this one in my view, though not entirely on all fours, was closest on the facts to the instant case. Indeed the error was concerned only with the defendant who was acquitted. Nevertheless the Court held that the entire trial was a nullity.

In the instant case at the end of the arguments judgment was reserved. In the interim, research revealed the Jamaican case of R. v. Rudolph Brown (1970) 12 J.L.R. 139. The facts and circumstances are briefly set out in the judgment of Shelly, J.A.:

> "This appeal is from conviction by the learned acting resident magistrate for St. Mary of the offences of praedial

> "larceny, assault at common law and a breach of the Vagrancy Law, to wit, being armed with an offensive weapon.
>
> Praedial larceny and assault at common law are indictable offences and were properly laid as two separate counts in one indictment, as permitted by s. 6 of the Indictments Law, Cap. 158. The charge upon information for the summary offence under the Vagrancy Law was tried together with the offences charged in the indictment. There is no authority for such a procedure. There is provision in the Criminal Justice Administration Law, Cap. 83, s. 22, for joint trials of summary offences in certain circumstances. There is no provision for joint trial of indictable and summary offences. This trial was therefore a nullity.
>
> The appeal is allowed; the convictions are quashed and sentences set aside."

The facts are fundamentally the same as in the instant case. The judgment was terse and didactic but the clear principle enunciated therein is that a joint trial of indictable and summary offences is a nullity.

In the instant case, the learned Chief Justice in deciding whether severence was proper in the particular circumstances, erred, not in the progress of his reasoning, but in his approach. He clearly approached the question as one concerned with whether in the end there was a miscarriage of justice. With due deference to his careful reasoning, one can only arrive at that position, if there was in fact a valid trial. It is a misconception to consider the complaints under these grounds as falling under the category of a "miscarriage of justice." In my view, the proper category is "a wrong decision in Law" resulting in the trial being a nullity. In D.P.P. v. White (supra) the Privy Council had to consider the broad categories of the grounds on which an appeal may be allowed under Section 14 of the Judicature (Appellate Jurisdiction) Act of Jamaica - Section 14 which reads:

> "(1) The court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having

> "regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> (2) Subject to the provisions of this Act the court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit."

In that case:

> "The defendant was charged on indictment with shooting with intent to do grievous bodily harm and illegal possession of a firearm. The jury gave a majority verdict before the time required by the Jury Act and that irregularity appeared on the face of the record. The Court of Appeal quashed the convictions but, since the trial was a nullity, the court held that it had no power to order a new trial under section 14 of the Judicature (Appellate Jurisdiction) Act."

In delivering the judgment of the Board, Lord Simon of Glaisdale said, (452):

> "In their Lordships' view both subsections (1) and (2) of section 14 are exhaustive. The defendant's convictions were rightly set aside, but by reason of a wrong decision of a question of law within the meaning of section 14 (1) of the Judicature (Appellate Jurisdiction) Act - viz., that a majority decision of the jury could properly be taken before the lapse of one hour. An error on the face of the record means an error in law. (Alternatively, it could be considered as a miscarriage of justice)."

In this case there had been a valid and proper trial to the entry of verdict but a wrong decision in law in accepting an invalid verdict rendered the trial a nullity.

Just like the clear waters of a brook when they join the muddy flow of the main stream the resultant confluence is no longer limpid, so in like manner when the new Category C offences were joined in trial to the Category B offences the whole proceedings continued as a nullity.

In every sense of the word there was a joint trial of indictable offences with summary offences and in my view the whole trial became inseparably tainted. Indeed, the facts in the instant case render the position of the prosecution more indefensible than in R. v. Brown. In that case it was the same judicial personnel, the Resident Magistrate, albeit that he was competent to sit in two distinct and different jurisdictions. The procedure for indictment was summary in the sense that it was a voluntary bill. Here in the instant case indictable offences are triable in the Grand Court before the Chief Justice and a jury after a proper committal on a preliminary examination.

The decision in the Jamaican case of R. v. Brown is in accord with good sense and with the principle that a person in the absence of statutory authority cannot be simultaneously tried in two different jurisdictions; a fortiori when, as here, the procedures are so entirely different. The decision in R. v. Brown is clear, authoritative and applicable.

For these reasons I concurred in holding that there was a joint trial of the defendants and that trial was a nullity.

Because of my decision on this question of nullity, it is unnecessary to deal with the grounds of appeal founded on dicta in R. v. Spencer and McLeish (1966) 10 W.I.R. 115, that the evidence led in respect of those offences beyond the magistrate's jurisdiction and which would be inadmissible on the charges of possession would be so prejudicial as to deny the appellants a fair trial.

With respect to those grounds argued by Mr. Chin-See criticising the procedure adopted by the learned magistrate with regard to the filing of his reasons for judgment and the complaint that the reasons delivered in Court materially differed from those which were eventually filed, it is enough to say that those questions were raised before the learned Chief Justice and fairly

and adequately dealt with by him in his judgment. In any event it is unnecessary to deal with them here having regard to the judgment and order for a new trial made herein.

In addition to the grounds of general applicability, Mr. Chin-See for Suarez submitted in effect that the verdict was unreasonable having regard to the evidence. He contended that the evidence against the applicant Suarez in its totality was insufficient to prove joint possession with Gonzalez and that the evidence if accepted was to the effect that ownership and possession were exclusively in Gonzalez. Mr. Chin-See industriously adverted attention to the bits of evidence involving Suarez. As there is an order for a new trial it would be impolitic to indulge in any assessment of the evidence or indicate the inferences that may be drawn. It is enough to say that the adducible evidence is such that in the end the critical question for the Magistrate will be whether a sure inference could be drawn that both appellants were in joint possession of the drug - see R. v. Miller & Wright (1973) 12 J.L.R. 1263.

Finally, Mr. Chin-See urged that assuming the Court had power to order a new trial on the charges of possession of the cocaine hydrochloride they ought to decline having regard to the circumstances of the case. In that regard he adverted to the fact that it would be the "third ordeal" for the appellants; the first trial had commenced on 20th April, 1983, and was aborted on 6th May 1983 through no fault of the appellants. The re-trial commenced on 11th July, 1983 and ended August 5, 1983 - and the appellants were in custody since then. Further, Suarez in particular, would be unlikely to meet the costs of representation if a new trial was ordered.

Mr. Chin-See then referred to the Privy Council case of Reid v. R. (1978) 27 W.I.R. p. 254 (an appeal from the Jamaican Court of Appeal) wherein certain principles or guidelines in deciding whether a new trial should be ordered were formulated.

In ordering a new trial this Court has good reason to be mindful of the judgment in Reid v. R. While due consideration must be given to the factors urged by Mr. Chin-See, regard must also be had to the following important factor identified in Reid v. R. and applicable to the instant case:

> "(i) .....
>
> (ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury".

For these reasons I concurred in the appeal being allowed and a new trial ordered in respect of the charge of possession of cocaine on March 22, 1983.

ROSS, J.A.

On the 27th June, 1984, we allowed the appeals, quashed the convictions, set aside the sentences and ordered a new trial before a different Magistrate. We promised then to put our reasons in writing and now do so.

The first trial of the two appellants, which was aborted, commenced on 20th April, 1983, before a Magistrate. There were then six accused persons before the Court. The two appellants were charged jointly with possession of cocaine; the first appellant was charged on a separate charge of possession of cocaine and another charge of offering to sell cocaine; there were two other charges charging all six accused with conspiracy to import cocaine and conspiracy to export cocaine. On 4th May the prosecution told the Court that it proposed to offer no further evidence against three of the accused and conceded that a prima facie case had not been made out against them - those three accused were then discharged. On 6th May the learned Magistrate disqualified himself from continuing with the trial because of what he said was the likely prejudicial effect on the trial of a statement broadcast by Radio Cayman at the instance of the Commissioner of Police. He stopped the trial and ordered that it be commenced de novo before another Magistrate.

The retrial of the two appellants and one Cario Oswaldo Hernandez commenced on 11th July, 1983, before another Magistrate and resulted in the conviction of the two appellants on the charges for which they were before the Court. The third accused was dismissed on a no case submission.

On appeal to the Grand Court the learned Chief Justice on 6th March, 1984, allowed the appeal and quashed the conviction in respect of the charges of conspiracy to import, conspiracy to export, offering to sell cocaine and possession of cocaine hydrochloride on 17th February, 1983. The appeal against conviction and sentence in respect of the charge of possession of the drug on 22nd March, 1983, was dismissed by the learned Chief Justice, and it is against that decision that they have appealed to this Court.

Having regard to the grounds of appeal filed I will first refer to some aspects of the trial which gave rise to these grounds.

At the commencement of the retrial on 11th July, 1983, the appellants and the third accused pleaded not guilty to the two conspiracy charges which were the only charges against them. Their consent to these two charges being tried summarily was neither sought nor given; in fact, the question of consent was not adverted to at all and no objection was raised by the defence.

On the following day, 12th July, 1983, the learned Magistrate announced that he proposed to implead the appellants on further charges; by this time the first witness, Zuiderant, had completed his examination-in-chief. An objection was taken by counsel for both appellants but, after hearing arguments, the learned Magistrate decided to implead them. There were three further charges all of which affected the first appellant, but only one affected the other appellant. When the charges were put both appellants, on the advice of counsel, declined to plead and pleas of not guilty were entered in relation to the three charges.

The first additional charge charged the first appellant with unlawful possession of cocaine hydrochloride on 17th February, 1983. No indication of the amount involved was given at the time but it later transpired that this charge related to 3 grammes of cocaine hydrochloride.

The second additional charge charged the first appellant with unlawfully offering to sell cocaine hydrochloride on 22nd March, 1983; again the amount involved was not set out in the charge but it appears that the amount the prosecution hoped to prove in relation to this charge was 70 kilogrammes.

The third additional charge charged both appellants with unlawful possession of cocaine hydrochloride on 22nd March, 1983; again the amount involved was not stated but later in the trial the prosecution announced that this charge related to 31 kilogrammes of the drug.

These three additional charges were substantially the same as the corresponding charges in the earlier trial with some slight amendments. As the learned Chief Justice pointed out, these were not the same

charges as those laid for the retrial had been freshly made out and signed before a different Justice of the Peace; further the earlier charges were formally withdrawn by the prosecution after the pleas had been taken to the later three charges referred to above.

Mr. Muirhead in opening submitted that the fundamental question is that of the jurisdiction of the learned Magistrate to try the five charges, some of which he had no jurisdiction to try, and that the charge of which his client stands convicted - possession of 31 kilogrammes of cocaine hydrochloride - is one which the learned Magistrate had no jurisdiction to try. There were a number of grounds filed and he dealt first with ground 4 which reads as follows:

> "That the learned Chief Justice was wrong in law in holding that the learned Magistrate had jurisdiction to try a charge of possession of cocaine where the quantity exceeded two ounces."

He went on to refer to section 5 of the Criminal Procedure Code (Cayman Islands) which reads as follows:-

> "5 (1) For the purpose of determining the mode of trial before a court, offences shall be classified into three categories as follows;
>
> Category A - offences triable upon indictment and not otherwise;
>
> Category B - offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one) may be tried summarily; and
>
> Category C - offences triable summarily and not otherwise."

Mr. Muirhead then adopted as a correct statement of the law the statement of the learned Chief Justice at page 201 of the record:

> "It is perfectly clear from that (section 5 (1) above) that unless the prosecution and the person/s charged give their consent to a category B offence being tried

> "summarily the Magistrate has no jurisdiction to try it summarily. He must proceed by way of preliminary inquiry. In my view that consent must be express. Mere acquiescence is not enough. Acquiescence would obviously not be sufficient where an accused person is not represented. I do not see how it can be any different if he is represented. The consent must come from both the prosecutor and the accused person/s. Without the consent of both the Magistrate has no jurisdiction to try a category B offence."

He next referred to the Misuse of Drugs Law and the Misuse of Drugs (Amendment) Law, 1982 - Law 10 of 1982 - section 25 of which reads as follows:

> "Notwithstanding the provisions of any other section, where a person is charged with any offence contrary to this Law and such person is liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years then such offence shall be deemed for the purpose of determining the mode of trial, a category B offence in accordance with section 5 of the Criminal Code."

In Part B of the schedule to the Misuse of Drugs (Amendment) Law, 1982, Law 10 of 1982, there are set out various offences relating to hard drugs and the minimum and maximum sentences to be imposed on a first or subsequent conviction where the amount of the drug involved was more or less than two ounces. In this schedule it is provided that on a first conviction for the possession of more than two ounces of a hard drug, (such as cocaine) there is a minimum sentence of 3 years plus a fine of $10,000.00, and a maximum sentence of 15 years plus a fine without limit as to amount.

Section 78 of the Criminal Procedure Code sets out the powers of the Summary Court where it has adjudged a sum to be paid on a conviction and states that a "sentence of imprisonment imposed by a Summary Court for non-payment of a fine shall not exceed six months."

The conviction and sentence upheld by the Grand Court related to the charge of unlawful possession of 31 kilos of cocaine hydrochloride (a hard drug) for which under the provisions in part B of the schedule referred to above the maximum sentence was 15 years imprisonment plus a fine without limit as to amount, and if the fine was not

paid a sentence of imprisonment of up to six months could be imposed.

On the basis of these provisions Mr. Muirhead submitted that since the maximum penalty for possessing two ounces or more of cocaine is fifteen years plus a fine without any limit as to the amount, and since the penalty for failure to pay the fine imposed is imprisonment for a period of up to six months; then the maximum period of imprisonment for possession of two ounces or more of cocaine would be fifteen years and six months; therefore, the subject matter of the appeal is a category B offence (since the maximum period of imprisonment for the offence would be in excess of fifteen years) and as such the learned Magistrate had no jurisdiction to try the case, as the consent of the accused and the prosecution were required to give the Magistrate jurisdiction - and no consents were given.

He went on to say that if a person were charged and convicted of possession of less than 2 ounces of hard drugs and after conviction his sheet shows a previous conviction the jurisdiction would no longer exist and the conviction would have to be quashed as the maximum sentence would be 15 years plus a fine, thereby making it a category B offence which could not be tried by the Magistrate without consent. In support of this submission he referred to R. v. Beesby et al (1909) 1 K.B. 849.

In this case a woman was charged before justices with an offence in respect of which, if it was a first offence, she was liable on summary conviction to be imprisoned for a term not exceeding three months. In the course of the hearing evidence was given by the prosecution that the defendant had been previously convicted of a like offence, and thereupon she became liable on conviction to be imprisoned for a term exceeding three months. The justices, without giving her the option prescribed by the relevant section of the law, convicted the defendant and sentenced her to three months imprisonment. On appeal it was held that the justices had no jurisdiction to hear the case as one of a first offence, and that, as the justices had not, upon the evidence of the previous conviction being given, asked the defendant if she wished to be tried by a jury, the conviction was bad.

Mr. Kendall for the Crown argued that this case was unhelpful and that what the Legislature is saying is that for the offence with which we are concerned the maximum custodial sentence that can be imposed is 15 years and that the provision for imprisonment for failure to pay any fine imposed is not to be taken as imposing a further sentence of imprisonment as it relates to an event which may or may not happen; if the fine is paid, no question of imprisonment over and above that imposed will arise.

In support of this submission the court was referred to R. v. Carver (1955) 1 A.E.R. 413: Here, the appellant was convicted at the County of London Sessions of permitting premises to be used as a brothel contrary to section 13(2) of the Criminal Law Amendment Act, 1885, having been convicted previously for a like offence, and was sentenced to six months imprisonment and to a fine of £200 with the alternative of a further six months imprisonment in default of payment of the fine. She appealed against sentence on the ground that the total term of imprisonment, including the period fixed in default of payment of the fine, exceeded the maximum period of imprisonment allowed by the statute for the offence; it was held that, as the enactment stated the maximum punishment for an offence to be both imprisonment not exceeding a specified duration and a fine, the Court of Quarter Sessions not only might impose a sentence of the maximum term of imprisonment and of a fine not exceeding the maximum amount but also might fix a further term of imprisonment in default of payment of a fine.

The provisions of Part B of the schedule to the Misuse of Drugs (Amendment) Law of 1982 sets out clearly that the maximum term of imprisonment to be imposed is 15 years; in addition to this term of imprisonment a fine is imposed which may be paid, may be recovered by distress or may not be recovered at all; in the latter event a sentence of imprisonment not exceeding six months is imposed by the court because, as Goddard C.J. observed in the above case:

"If a person

171

> "If a person does not pay the fine obviously it does not mean that the person with no money is to be in a better position than the person who can afford to pay because it would mean that if he could afford to pay he would lose $200."

It seems to me that the maximum term of imprisonment for possession of cocaine in an amount exceeding 2 ounces is 15 years imprisonment and therefore having regard to the provisions of section 25 referred to above, this offence is not a category B offence but a category C offence and therefore triable by a Magistrate without consent of the parties.

I would therefore hold that the learned Magistrate had jurisdiction to try the information charging the appellants with possession of cocaine hydrochloride on 22nd March, 1983.

This ground of appeal therefore fails.

Mr. Muirhead next dealt with grounds 2 and 3 which read as follows:

> "2. That the learned Chief Justice, having found that the trial was a nullity in relation to all the other charges, was wrong in law in declaring and finding that he could properly sever the charge of possession on the 22nd March, 1983, of 31 kilos of cocaine hydrochloride therefrom and that, accordingly, there could be an adjudication in law thereon.
>
> 3. That the learned Chief Justice was wrong in law in ruling that the subsequently added charge of possession of 31 kilos could in law be severed and be or become valid, viz:
>
> (a) Having correctly concluded that the trial in relation to conspiracy to import cocaine hydrochloride and conspiracy to export cocaine hydrochloride - the only charges preferred against the appellant at the commencement of the trial - was a nullity and, accordingly, a nullity ab initio; and/or
>
> (b) Having correctly concluded that the subsequently added charge of offering to sell was likewise a nullity."

In support of these grounds he pointed out that the conspiracy charges were the only charges before the Court at the commencement of the trial and the Magistrate had no jurisdiction to try them. The

proceedings therefore commenced with charges in regard to which the learned Magistrate had no jurisdiction; then in the course of the trial a further charge - offering to sell - was added although the Magistrate had no jurisdiction to try it; at the same time the two charges of possession were also added. The effect of this, according to Mr. Muirhead, was that to a proceeding which was a nullity ab initio was added three other charges: one of which the learned Chief Justice said the Magistrate had no jurisdiction to try, one the Magistrate had jurisdiction to try, and the third (in his submission) a category B offence, and so no jurisdiction in the Magistrate to try it without consent.

Several cases were cited although none were directly in point:

In Peacock v. Bell and Kendall (1668) 1 W.M.S. Saunds 73 (p. 84), it is stated that;

> "the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and on the contrary nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged."

In the instant case it was submitted that the inferior court is not empowered, expressly or at all, to embark on the trial of category C offences together with category B offences where the consents of the defence and the prosecution have not been given.

It was further submitted that the same course should have been adopted in the instant case as was adopted in the case of Brangwynne v. Evans (1962) 1 A.E.R. 446: three informations were preferred against the appellant, Brangwynne; at the trial counsel intimated that the defence desired the charges to be heard separately; the justices being of the opinion that the informations as laid were good and that they had a discretion whether to try the charges together or separately, decided to try the charges together. They heard the evidence, convicted the appellant on each charge, fined him on the first charge and ordered him to pay costs on each of the other two charges. On appeal Parker C.J. in the course of his judgment allowing the appeal (at p. 442) said:

> "it seems to me that the convictions on these three information were reached contrary to law in the sense that the procedure which the justices adopted ought never to have been adopted and, as it was contrary to law, the only course which this court can take is to quash those convictions."

The next case referred to was R. v. Olive (1942) 2 A.E.R. 495 - the appellant, who was convicted of conspiracy to defraud and also of obtaining money by false pretences, appealed against these convictions on the ground that he had been tried simultaneously on two indictments. In allowing the appeal, Tucker J. stated, inter alia,

> "if there are two indictments ....they cannot be tried together and any so-called trial at which such a procedure has been adopted is a complete nullity. There is no jurisdiction to proceed in that way at all."

Mr. Muirhead submitted that this case clearly demonstrates that where the proceedings are a nullity by virtue of something taking place with regard to which there is no jurisdiction, the so-called conviction must be quashed as there is no room for any other course.

The case of Emanuel v. Cox 10 W.I.R. 560, on which the learned Chief Justice relied, was dealt with and distinguished by Mr. Muirhead, who submitted that this case was decided on the specific statutory provisions of St. Lucia, and that the learned Chief Justice fell into error by treating this case as if the provisions were provisions of the common law or of general application. In this case in St. Lucia the appellant was convicted on three charges: one for being armed with a dangerous weapon to wit, a knife, with intent to commit an unlawful act; the second, assault on a police constable in the execution of his duty; the third, resisting lawful arrest. There were three charge sheets and he alone was charged on each of them. Another man called Marcus Montclair who was also an appellant was charged separately with three offences - assaulting a police constable in the execution of his duty, wounding, and using obscene language. The magistrate recorded in his reasons for his decision that application was made by the prosecution to hear the charges against both the defendants together as the charges arose out of the same incident, and

that this application was put to the defendants who indicated no objection to it. He proceeded to hear all six charges together and convicted the two defendants.

In response to the court's inquiry as to the authority empowering the magistrate to hear all the complaints together, the Attorney General referred to s. 1978 (2) of the Criminal Code, Cap. 250 (St. Lucia), but conceded that it had only a limited application to the circumstances of this case. Section 1078 (2) states:

> "(2) Where there are similar separate complaints by one and the same complainant against separate defendants in respect of the same matter the Court may, if it thinks fit, hear and determine them at one and the same time."

The court held: (1) making use of obscene language within the public hearing is quite obviously not an offence similar to assaulting a police constable in the execution of his duty; there was therefore no authority for the magistrate to hear all the complaints together;

(2) in the circumstances, only the two cases against the defendants for assaulting the police constable in the execution of his duty were properly heard together, accordingly the appellant's convictions on the first and third charges must be set aside but his conviction on the second charge for assault will stand.

Quoting this case with approval the learned Chief Justice said:

> "In principle there is no real distinction between that case (Emmanuel v. Cox) and this one. So much of the trial as was within the jurisdiction of the magistrate was held to be valid. So much of it as was outside his jurisdiction was rejected as null and void. Although that is not how it was expressed in the judgment that was the effect of the decision. With respect that seems to be a sound and acceptable approach which does not allow technicalities to defeat the merits and justice of a case."

Mr. Muirhead referred also to Francis Bain v. Commissioner of Police (1971) 17 W.I.R. - 386 - a case from Grenada; the appellant was charged with three offences: (1) driving a motor vehicle without a permit, to which he pleaded guilty (2) that being the owner of a motor

vehicle, he used it on the Lagoon public road without having obtained the relevant license, (3) that being the owner of the motor vehicle, he used it on the same road without having in force in relation thereto a policy of insurance under the Motor Vehicles Insurance (Third Party isks) Ordinance. He pleaded not guilty to charges (2) and (3) and the magistrate proceeded to hear them together. The appellant was unrepresented. After hearing the evidence the magistrate convicted him and imposed sentences in respect of the three charges.

On appeal it was pointed out that there was no record in the magistrate's notes that he had asked the appellant whether he consented to the charges being heard together or that the appellant consented, as required by section 82 (3) of the Criminal Procedure Code f Grenada) which provides that:

> "where two or more complaints are made by one or more parties against another party or parties and such complaints refer to the same matter such complaints may, if the court thinks fit, be heard and determined at one and the same time if each defendant is informed of his right to have such complaints taken separately and consents to their being taken together."

In his judgment, Lewis C.J. distinguished Emmanuel v. Cox and stated:

> "the provisions in the Criminal Code of St. Lucia referred to in the other case cited by learned counsel, Emmanuel v. Cox, are not similar to those of Grenada, for there, the descretion is placed entirely in the hands of the magistrate as to whether or not the cases should be taken together."

The court went on to find that the magistrate's jurisdiction had not been clearly established as the record of the proceedings did not disclose that the magistrate had asked the appellant whether he sented to the charges being heard together or that the appellant had consented and on that ground (as well as another) allowed the appeal and quashed the convictions.

Mr. Muirhead then submitted that section 5, Criminal Procedure Code of the Cayman Islands is totally different from section 1078 (2) of the Criminal Procedure Code of St. Lucia and that other

provisions of the St. Lucia Code have no counterpart in the Code of the Cayman Islands; further, the decision in Emmanuel v. Cox was based on the provisions of the Code in St. Lucia and in the light of the differences between the provisions of the Code of St. Lucia and that of the Cayman Islands no principle can be extracted from that case which would be applicable to the instant appeal, more particularly as the common law was excluded from the provisions of the Criminal Procedure Code of St. Lucia.

Another case referred to was Harding v. Ramjattan (1959) 11 W.I.R. 434, the headnote of which reads as follows:

> "Section 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 (Guyana), empowers a magistrate with the consent of the accused to deal summarily with an indictable offence which is specified in the First Schedule to the Ordinance if certain conditions are fulfilled. The offence of accessory after the fact to an offence is not one of the offences specified in the Schedule. The appellant H. and one C. were charged indictably on one information, H. with the offence of embezzlement by public officer, contrary to s. 191 of the Criminal Law (Offences) Ordinance, which is one of the offences specified in the Schedule to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 and C with the offence of accessory after the fact to the offence with which H was charged. On the application of the prosecutor under the provisions of section 60 of the Summary Jurisdiction (Procedure) Ordinance Cap. 15, that both charges be dealt with by the magistrate summarily, both the appellant and C agreeing thereto after having been informed of their right to trial by jury, the magistrate proceeded to hear and determine the charges together summarily. C was found not guilty on the charges laid against him and was discharged while the appellant H was found guilty of the charge laid against him. The appellant appealed against his conviction and it was held: (1) it was not competent for the prosecutor to apply for the offence of accessory after the fact to be dealt with summarily and not competent for C to elect to be tried summarily nor for the magistrate to deal summarily with the offence charged against C; (2) although the charge against C was dismissed the joint trial of the appellant was a nullity."

In allowing the appeal, Luckhoo J. stated:

> "The procedure adopted by the magistrate in dealing with the offence charged against C was wholly irregular. In

"our opinion the joint trial of both offences was a nullity for the reason that it was not competent for the offence charged against C to be tried summarily. It is also in our opinion immaterial that the charge laid against C was dismissed."

The learned Chief Justice had allowed the appeal by the first appellant in respect of the charges of conspiracy to import, conspiracy to export and offering to sell - all category B offences - on the ground that the magistrate had no jurisdiction to try these charges without the necessary consents. I have earlier referred to the judgment of the learned Chief Justice in which he relied on Emmanuel v. Cox and held that in the instant case so much of the trial as was within the jurisdiction of the magistrate was valid, and so much as was outside is jurisdiction was rejected as null and void; following on this, he severed the trial of the charge on which the magistrate had jurisdiction - possession of cocaine hydrochloride - from the purported trial of the charges of conspiracy and offering to sell, on which the magistrate had no jurisdiction.

It will be noted that apart from Emmanuel v. Cox the other cases cited do not support the severance of the charges. Can they be distinguished? In Brangwynne v. Evans the magistrate heard all three informations against the appellant together and found the appellant guilty on all three informations; the convictions were quashed because the consent of the appellant was not sought as required by law. Here the magistrate had jurisdiction to try each information separately, but the Court held that the only course to be adopted was to quash the convictions on all three informations because the procedure adopted was contrary to law.

In R. v. Olivo the appellant had been tried simultaneously on two indictments and as two indictments cannot be tried together, the conviction was quashed because the trial at which such a procedure is adopted is a complete nullity.

In Francis Bain v. Commissioner of Police, contrary to the provisions of the Criminal Procedure Code, two informations against the appellant were heard together without his consent and the convictions were quashed, again because of the irregularity in the procedure.

The case of Harding v Ramjattan was distinguished by Mr. Kendall who pointed out that there the two defendants were charged on one information and the charges could not therefore be severed; but Luckhoo J. in his judgment made it abundantly clear that the procedure adopted by the magistrate was wholly irregular in that a summary matter had been tried with a matter which could not be dealt with summarily - even with the consent of the defendants.

In the instant case the trial was commenced by the learned magistrate on two charges without the necessary jurisdiction to try either. Subsequently the appellants were pleaded on three charges of which the magistrate had jurisdiction to try the two charges relating to possession but no jurisdiction to try the third charge relating to offering to sell cocaine hydrochloride. Of the two charges of possession the learned Chief Justice allowed the appeal on one as there was no sufficient evidence to support the charge; the appeal against conviction on the other charge of possession was dismissed by the learned Chief Justice who relied on Emmanuel v Cox and held that the trial on this charge could properly be severed from the trial of the other charges.

With respect to the decision of the learned Chief Justice. it seems to me that Emmanuel v Cox was decided on the special provisions of the Criminal Procedure Code of St. Lucia and in relying on it for the purposes of this case the learned Chief Justice fell into error. The other cases to which reference has been made above appear to lay down that where the procedure is irregular or there has been a trial by a magistrate without the necessary jurisdiction so to do, then such an act constitutes an irregularity which has the effect of rendering null and void the trial which has taken place; in any review of such a trial the appellate tribunal will quash the conviction and set aside the sentences as the whole proceeding has been a nullity. It is not open to the court to sever a part of the proceeding in respect of a particular charge as the entire proceedings have been tainted by the irregularity which has taken place.

The appeal therefore succeeds on grounds 2 and 3.

Mr. Chin See followed Mr. Muirhead and made further submissions on the other grounds of appeal with which I need not deal having held that the appeal succeeds on grounds 2 and 3. He then went on to submit that if the Court allowed the appeal it ought not to order a re-trial or a venire de novo as the trial had not validly commenced and was no trial at all. He agreed that the Court had power to order a new trial but argued that the Court ought not to exercise its power and order a new trial taking into account all the circumstances of this case. He referred to cases in support of his submissions.

In R. v. Rose et al (1982) 2 A.E.R. 731 the headnote reads:

> "The respondents were variously charged with murder and attempting to pervert the course of public justice. At the end of the trial and after the jury had retired the judge privately sent messages to the jury through the clerk of the court imposing a time limit within which he required them to reach a majority verdict failing which he threatened to discharge them. The jury convicted the respondents by a majority of ten to two. The respondents appealed against their convictions, contending that the judge had applied improper pressure on the jury to reach a verdict by the imposition of a time limit. The Court of Appeal allowed their appeals on the ground that there had been a material irregularity in the proceedings which required that the verdict be quashed but it refused to order a vehire de novo for which the prosecution applied."

The Crown appealed, contending that a new trial ought to have been ordered and in dismissing the appeal it was held that:

> "where in the course of a trial that had been validly commenced there was a material irregularity between the time the trial commenced and its conclusion with a judgment of conviction following an unequivocal verdict of guilty by the jury, the Court of appeal had no jurisdiction to order a new trial by the issue of a writ of venire de novo but was required to quash the conviction."

This case may be distinguished from the instant case as it had been validly and properly commenced and the irregularity took place at the end of the trial whereas in the instant case the learned magistrate had no jurisdiction to try the charges against the appellants and the irregularity existed from the commencement of the trial.

In Reid v. R. (1978) 27 W.I.R. 254 the Privy Council set out the principles to be applied in deciding whether to order a new trial; the headnote reads:

> "The appellant was convicted of murder, the case against him having turned upon his identification by a single eye witness. That witness admitted that she had heard a description of him at a date which she had identified as being between the murder and that of the identification parade. She was asked no questions to throw light upon what characteristics had featured in the description of the appellant that she had heard and what part if any the description had played in enabling her to identify the appellant. The Court of Appeal allowed the appellant's appeal but, by a majority, ordered a new trial."

On appeal to the Privy Council against the order for a new trial, the appeal was allowed. It is unnecessary to refer to the reasons given in the judgment as this case is one in which there was a valid trial - as in R. v. Rose et al referred to above - whereas the instant case was one in which the learned magistrate had no jurisdiction.

In neither of the above cases had the trial been a nullity and so they do not offer much assistance in the instant case.

In R. v. Donald White (1976) 24 W.I.R. 454 the applicant was convicted by a jury on two counts of an indictment charging him with shooting with intent and illegal possession of a firearm. Several grounds of appeal were filed but only one was argued, viz., that the verdict of the jury was an imperfect one and therefore the trial was a nullity. The Crown did not seek to support the conviction. The appeal was allowed and the convictions and sentences set aside. At the hearing of the appeal Counsel for the appellant argued that the court did not have the power to order a new trial where the trial had been declared a nullity. The court did not therefore order a new trial nor did the court order a verdict of acquittal to be entered.

In the course of his judgment Zacca J.A. (as he then was) dealt with the question whether the Court of Appeal in Jamaica has the power to order a new trial where a trial has been declared a nullity and considered the following authorities, inter alia:

In R. v. Winston McDonald and Clover Haye (1969) 14 W.I.R. 11, the court of Appeal of Jamaica declared the trial to be a nullity and ordered a new trial; Henriques P. there stated:

> "The trial having been declared by this Court to be a nullity, there has in fact been no trial. The court therefore, in the interest of justice, orders a new trial."

In R. v. Monica Stewart (1971) 17 W.I.R. 381, the Court of Appeal of Jamaica declared the trial a nullity but did not order a new trial. The order of the Court was to the effect that the appeal was allowed, the conviction quashed and the sentence set aside.

In Roberts v. R. the Court of Appeal of the West Indies Associated States declared the trial to be a nullity and ordered a new trial.

In Deokinan v. R. (1965) 8 W.I.R. 209, the British Caribbean Court of Appeal held that the trial was a nullity and therefore there could neither be judgment and verdict of acquittal, nor an order for a new trial. Archer P. there stated:

> "In this case the trial has been a nullity, that is to say, there has not been a trial at all. There can, therefore be neither a judgment and verdict of acquittal nor an order for a new trial. The conviction is quashed and the sentence set aside."

Having considered the various authorities Zacca J.A. went on to say:

> "In the present case under review, the trial being a nullity, there has not been a trial.... By section 14 (2) of the Judicature (Appellate Jurisdiction) Act, the court in quashing a conviction must either enter a verdict of acquittal or, where the interests of justice so require, order a new trial. Although there is a conviction recorded against the applicant, the trial being a nullity, this court in quashing the conviction could not enter a verdict of acquittal. There having been no trial we are of the view that the court cannot order a new trial. We are therefore of the opinion that the order made at the conclusion of the hearing of the appeal was the correct order to be made. The effect of that order is that the applicant has not been effectively tried on the indictment."

It seems to me that in the instant case, as the proceedings before the learned magistrate were a nullity, the appellants have not been effectively tried on the informations laid against them and there should be a new trial before a different magistrate.

I would therefore order accordingly.