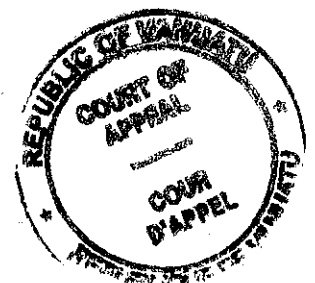


4. We heard both the application for leave to appeal against the strike out and the merits of the appeal against the strike out. We accept that this appeal raises an important question as to appeal rights from Island Court decisions. We therefore give leave to appeal against the Supreme Court's decision to strike out Chief Dan Bob's appeal to that Court.
5. The appellant's case is that Section 30 of the Courts and Judicial Services Act [CAP. 270] empowers the Supreme Court to hear appeals on any question of law, fact or mixed law and fact.
6. Here the question before the Magistrates Court was a question of custom relating to chiefly title. The appellant says in this case its appeal to the Supreme Court was both an appeal on a question of law and a question of fact and so within the bounds of section 30.
7. The question of law arose, the appellant submits because of errors made by the Magistrates Court in hearing the appeal. The question of fact arose because in deciding a question of chiefly title, as a question of custom, evidence establishing the relevant facts were required.
8. The judge in the Supreme Court adopted the reasoning of Spear J. in *Poilapa v. Masai* [2011] VUSC 69 when he struck out the appeal. In that case there was also a chiefly title dispute. Spear J. concluded that the appeal structure identified in the Island Courts Act and the Courts and Judicial Services Act did not contemplate an appeal from the Magistrates Court to the Supreme Court on a question of custom. He considered that a question of custom was neither a question of law or fact and so section 30 of the Courts and Judicial Services Act did not authorise an appeal to the Supreme Court on a question of custom.
9. The judge in the Supreme Court did not specifically deal with the appellant's claim that the Magistrate had made errors of law in the conduct of the hearing of the appeal from the Island Court.
10. And so the applicant's case is based on the proposition that he can bring his proposed appeal to the Supreme Court within s. 30 of the Courts and Judicial Services Act. He submits his appeal does raise a question of fact and law, thus s.30 gives appeal rights to the Supreme Court from a case begun in the Island Court.
11. During the course of argument before us an issue arose as to whether s. 30 authorised any appeal from a Magistrates Court judgment where the proceedings had begun in the Island Court. The issue can be expressed by this question:



Does s. 22 of the Island Court Act, which provides for an appeal right from the Island Court to the Magistrate's Court, prevent appeals beyond the Magistrates Court by limiting the effect s.30 of the Courts and Judicial Services Act?

12. We consider this latter issue first. If we are satisfied s. 30 does provide appeal rights from decisions of the Island Court through to the Supreme Court then we consider whether in this case there is a question of law and/or fact giving jurisdiction to appeal.

Discussion

13. Section 30 of the Courts and Judicial Services Act provides:

"30. Appeals from Magistrates' Court

- (1) *Subject to the provisions of any other Act, the Supreme Court has jurisdiction to hear and determine appeals from judgements of the Magistrates' Court on all or any of the following:*

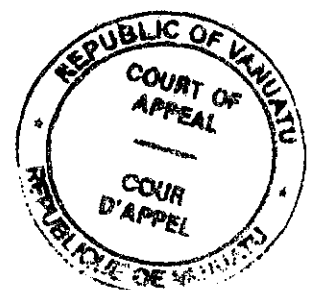
- (a) *a question of law;*
- (b) *a question of fact;*
- (c) *a question of mixed law and fact.*

- (2) *The Supreme Court in hearing an appeal:*

- (a) *is to proceed on the face of the record of the Magistrates' Court; and*
- (b) *may exercise such powers as may be prescribed by or under this Act or any other law; and*
- (c) *has the powers and jurisdiction of the Magistrates' Court; and*
- (d) *may review the procedures and the findings (whether of fact or law) of the Magistrates' Court; and*
- (e) *may substitute its own judgement for the judgement of the Magistrates' Court; and*
- (f) *may receive evidence.*

- (3) *(Repealed)*

- (4) *The Supreme Court is the final court of appeal for the determination of questions of fact. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave."*



14. This section on its face provides wide appeal rights from "*judgments of the Magistrates Court*" to the Supreme Court. However these appeal rights are "*Subject to the provisions of any other Act*".
15. The question is therefore whether there is any provision in the Island Courts Act (which gives jurisdiction to that court and provides for appeals) which limits s. 30 and the apparent wide appeal rights.
16. The current s.22 of the Island Courts Act provides for appeals. It states:

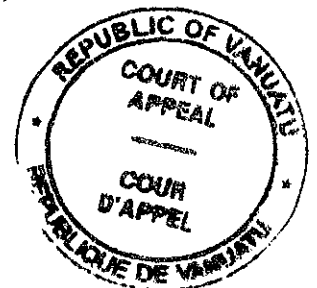
"22. Appeals

- (1) *Any person aggrieved by an order or decision of an Island court may within 30 days from the date of such order or decision appeal from it to the Magistrates' Court.*
- (2) *The court hearing an appeal against a decision of an Island court shall appoint two or more assessors knowledgeable in custom to sit with the court.*
- (3) *The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.*
- (4) *An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal.*
- (5) *Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the Magistrates' Court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against."*

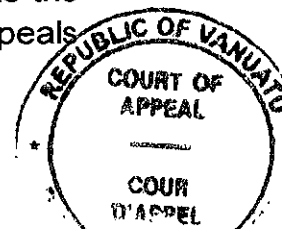
17. The section has changed somewhat since its introduction in 1983. Originally subsection (1) provided.

"APPEALS

22. (1) *Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal therefrom to-*
 - (a) *the Supreme Court, in all matters concerning disputes as to ownership of land;*
 - (b) *the competent magistrates' court in all other matters."*

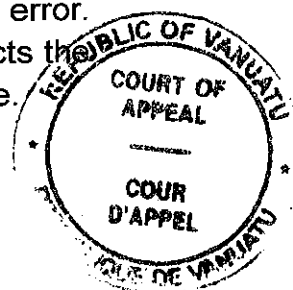


18. However in 2001 the original subsection (1) was repealed and the current subsection substituted. (We note a consequential amendment, repealing s.22(4), and removing the reference to the Supreme Court in ss.5, was not undertaken presumably by error although clearly required given the change to subsection (1)).
19. The removal of appeals direct from the Island Court to the Supreme Court in 2001 appears to have occurred to reflect the changes to the way in which customary land disputes were to be dealt with by the introduction of the Customary Land Tribunals Act [CAP. 271] (commencement date 10 December 2001).
20. The current Section 22 provides only for appeals from the Island Court to the Magistrate's Court. No mention is made of any appeal rights beyond the Magistrates Court in s.22.
21. The question for this Court is therefore, given s. 22's silence on appeal rights from the Magistrates Court to the Supreme Court, whether that silence means no such appeal rights exist. Is this absence of an express appeal right from the Magistrates Court in s.22 to be taken as a provision of "*any other Act*" (in the language of s.30(1)) preventing such appeals?
22. If s.22 does restrict appeals in this way then all decisions of the Island Court, criminal, civil and custom would have one right of appeal only, to the Magistrate's Court. No further right of appeal to the Supreme Court would exist.
23. We accept that there are cogent arguments both for and against limiting appeal rights from the Island Court ultimately to the Supreme Court in the relevant legislation. We accept therefore that our decision as to whether or not such an appeal right exists is properly based both on an interpretation of the relevant legislation together with an assessment of the competing policy questions raised in this appeal.
24. First we consider the interpretation question; does s. 22 limit the effect of s. 30 so that there is only one appeal from decisions of the Island Court, to the Magistrate's Court?
25. Favouring an interpretation that s.22 does not limit second appeal rights to the Supreme Court is the proposition that the Island Courts Act and s.22 are concerned with the Island Court's jurisdiction and not the Magistrates Court's appeal jurisdiction. Sections 22 and 23 of the Island Courts Act provide for the right and process of appeals from the Island Court to the Magistrate's Court. And so it could be concluded that the absence of any direct provision in the Island Courts Act relating to appeals from the Magistrates Court to the Supreme Court is unsurprising. The Island Courts Act provides for appeals

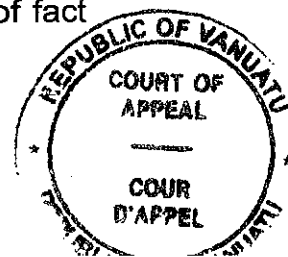


from that Court to the Magistrate's Court, and the Courts and Judicial Services Act, which provides for Magistrates Court jurisdiction (and that of other courts) deals with appeals from Magistrates Court decisions.

26. Section 22(1) originally provided for appeals on land matters direct from the Island Court to the Supreme Court (see at 17). It expressly prohibited a further appeal to the Court of Appeal (at subsection (4)). If Parliament had intended to prohibit appeals beyond the Magistrates Court by s.22 it would have been a simple matter to have expressly done so, to match s. 22(4).
27. Nor is s.30 limited, on its face, only to appeals from first instance decisions of the Magistrate's Court. If s.22 and s.30 are to be limited in the way proposed then for clarity the words in s.30 identifying what can be appealed namely; "... *judgments of the Magistrates Court*" should exclude appeal judgments of the Magistrates Court.
28. On the other hand s.22 does not specifically provide for a second appeal to the Supreme Court. If a second appeal from the Island Court is to be provided then the typical limits on second appeals might be expected; appeals only on questions of law and only if leave was granted.
29. There is already an extensive system of review of decisions of the Island Courts provided for in the Act (see for example s.14, s.21 Island Courts Act). This review system may be seen as providing an informal appeal process to the Magistrate's Court and therefore effectively providing two reviews of Island Court decisions (although both to the Magistrates Court).
30. We turn now to the relevant policy questions. The Island Courts and the Magistrates Court hear the vast majority of cases in Vanuatu. Their decisions affect the everyday lives of many citizens. The Island Court can imprison citizens. It can rule on civil claims for modest sums but which can have a profound effect on the economic life of individuals. The Courts land (before the recent legislative changes) and chiefly custom jurisdiction has an important effect on the cultural life of Vanuatu.
31. These issues themselves raise competing policy questions. There is significant interest in early finality of disputes. This in the interests of individuals and society. Even if a litigant is disappointed with a court decision if the decision and any appeal is delivered speedily then the litigants can get on with their lives knowing where they stand. Delay and therefore uncertainty of outcome in litigant can cause both individual and community loss of confidence in the Courts.
32. However appeal rights protect individual litigants from primary Court error. And so where the Courts have gone wrong correction on appeal protects the integrity of the judicial system and litigant's confidence in a fair outcome.



33. Fundamental legal questions of vital importance to the Vanuatu community can arise from litigation which begins in the Island Court. Such important cases need the expertise of the Supreme Court.
34. Generally we consider the Courts should favour protection of appeal rights (including second appeals) especially where the appeals, as here, are from substantive decisions (for example imprisonment, determination of chiefly title).
35. s.22 and s.30 do not expressly remove appeal rights. To read the sections as providing for removal requires an acceptance that s.22 implies such limitation by silence and that s.30 is read down to exclude appeals for cases begun in the Island Courts. This contradicts the proposition that appeal rights from substantive decisions should only be removed by clear unambiguous direction by Parliament.
36. We are satisfied that on balance both the interpretation question and the relevant policy issues favour a right of second appeal from decisions of the Island Court.
37. We consider the balance is tipped in favour of a second appeal. Parliament has not explicitly limited such appeals given the wide range of appeals permitted by s.30 from judgments of the Magistrates Court.
38. While we accept such a conclusion could add to the delay in the resolution of such cases we do not anticipate many such appeals. We think it likely that only the most significant cases in the Island Court will find their way to the Supreme Court. Given the likely importance of such cases a second appeal to a court of the prestige of the Supreme Court is reasonably justified.
39. We are therefore satisfied that s.22 of the Island Courts Act does not limit s.30 of the Courts and Judicial Services Act and that there is an appeal right from Island Court decisions to the Magistrates Court and from that court to the Supreme Court.
40. We invite Parliament to consider an amendment to s.30 which specifically provides that where the appeal from the Magistrates Court to the Supreme Court is from an original Island Court decision then the appeal must raise an important question of law and leave to appeal is required. This would ensure only those cases that truly require consideration by the Supreme Court are dealt with by that Court.
41. We now turn to whether appeals from the Magistrates Court to the Supreme Court on questions of custom (here chiefly title issues) are questions of fact and or law within s.30.



42. As we have noted the judge in the Supreme Court concluded that questions of custom are neither questions of fact or law. This conclusion was based on Spear J's assessment of this question in *Poilapa v. Masaii* (see previous reference).

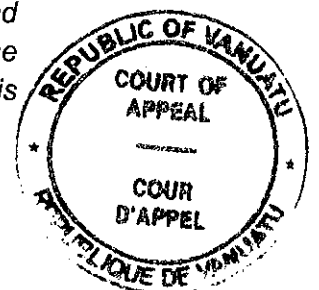
43. Spear J. said:

19. *The issue is then whether custom can be considered: (1) a question of law; (2) a question fact; or (3) a question of mixed law and fact – such that it comes within the enabling confines of s. 30 (1). I do not consider that custom, in this context, fits into any of those categories and, furthermore, this was the deliberate intention of the legislature. Nor do I consider that the carefully defined appellate structure set up s.22 of the Island Courts' Act, as extended by the Judicial Services and Court's Act, ever contemplated that custom would be subject to two levels of appeal. The principle reason for that conclusion lies in the plain wording and the intent of the legislation.*

20. *While Magistrates and Judges are of course to be considered learned in the law and to have expertise in assessing factual issues, custom is something quite different and it is treated quite differently. That is recognised by Island Courts being constituted by three justices knowledgeable in custom and the first appeal court being required to include at least two assessors knowledgeable in custom- s. 22 (2) Island Court's Act [Cap. 167]. That recognises that matters of custom are outside the expected and required expertise and the knowledge of a Magistrate sitting alone or a Judge of this Court.*

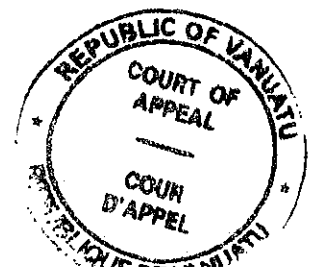
21. *This is not to say, however, that a decision of the Magistrates' Court sitting on appeal from a decision of the Island Court cannot be appealed to the Supreme Court. Indeed, s. 30 of the Judicial Services and Courts Act specifically provides for such a right of appeal but only on questions of law or a mixture of both. An obvious example that identifies the difference is, as in this case, the issue of who is eligible to assume a particular chiefly title. A finding that a particular chiefly title is to be passed on to the eldest son of the chief is a question of custom. Who that eldest son might be is a question of fact.*

30. *In this case, the Appellants have sought to maintain their challenge to the custom aspects of the judgment of the Efate Island Court notwithstanding that the judgment in that respect has been upheld on appeal by the Magistrate's Court correctly constituted by a Magistrate and two assessors knowledgeable in custom. The custom issues have now been ruled on by five people knowledgeable in custom (the three Island Court Justices and the two assessors in the Magistrate's Court) which clearly represents a wealth of knowledge and experience. There are no further rights of appeal from the Magistrates' Court on the custom issues. It is right that this matter is*



understood to have been concluded as to the custom issues by the Magistrate's Court decision."

44. We are satisfied that the question of custom in this case was a question of fact and that generally questions of custom are questions of fact. Thus given our conclusion with respect to the interpretation of s.30 we are satisfied a decision of the Island Court relating to custom appealed to the Magistrates Court may be further appealed to the Supreme Court.
45. The establishment of custom in the Courts requires evidence to prove what the custom is. As is illustrated by the Magistrates Court decision in this case the questions posed and answered by that Court in its judgment were based on the evidence called to establish for example, the relevant chiefly title for the area in issue and any biological link between the chiefly title and the Claimant.
46. Although the Island Court Justices and the Magistrates Court Assessors have expertise in custom issues they are not appointed because they necessarily have in-depth knowledge of the facts of the particular disputed custom before the Court. The disputed custom must be established by evidence called and subject to challenge in Court.
47. For these reasons we are satisfied a question of custom is a question of fact within the terms of s.30.
48. The next question for this Court is whether a question of law can arise in a hearing which is concerned with a question of custom. The Supreme Court relying upon the decision of Spear J, concluded that a question of law would not arise in litigation involving a question of custom.
49. Spear J's decision on this issue is somewhat unclear. At [19] the judge said that he did not consider on a question of custom could fit into the category of a question of law. However at [21] the Judge appears to accept questions of law can arise in custom cases.
50. We are satisfied a question of law could arise when a question of custom is before the Court. We see no reason why simply because a court is considering a question of custom a question of law cannot arise. There is nothing inherent in the enquiry as to custom which means a question of law cannot arise.
51. The appellant's proposed appeal grounds from the Magistrates Court in this case illustrate in a somewhat different way how questions of law may arise in custom cases.



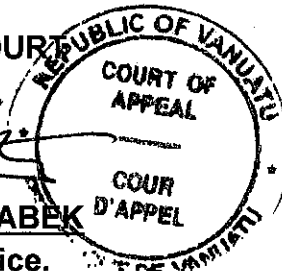

52. The grounds of appeal filed by Chief Dan Bob from the Magistrates Court to the Supreme Court included claims that:-
- (a) The appeal hearing in the Magistrates Court was not a “proper” hearing because of a failure to appoint assessors under s.22(2) of the Island Court;
 - (b) The Magistrates Court wrongly ruled evidence inadmissible;
 - (c) The Magistrates Court failed to consider relevant evidence.
53. These grounds of appeal are questions of law. They illustrate that questions of law may arise in litigation which involves a question of custom.
54. We are satisfied that there is jurisdiction for the Supreme Court to hear appeals from the Magistrates Court in cases which have begun in the Island Court. We are satisfied that questions of custom can and typically will involve questions of fact and may involve questions of law. We are satisfied in this case questions of fact and law arise in the appeal to the Supreme Court.
55. We therefore quash the order striking out Chief Dan Bob’s appeal to the Supreme Court. The Supreme Court will now need to hear Chief Dan Bob’s appeal.

Costs

56. The appellant is entitled to costs on a standard basis for an appeal.

DATED at Port-Vila this 8th day of May, 2015

BY THE COURT



Hon. V. LUNABEK
Chief Justice.