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PARKINSON v. R.

Citation # JM 1960 CA 9

Country Jamaica

Court Court of Appeal

Judge Cools-Lartigue, J.A.; Duffus, J.A.; Waddington, J.A.

Subject Criminal law

Date December 2, 1960

Subsubject Unlawful possession of goods – Search warrant – Evidence – Reasonable suspicion – The Unlawful Possession of Property Law, Cap. 401.

Full Text Appearances:

J. R. Cools-Lartigue for the appellant.

V. C. Melville for the Crown.

DUFFUS, J.:

The appellant was convicted by one of the resident magistrates, Kingston, of the unlawful possession of 212 brassieres and 1 roll of lace, contrary to s. 8 of the Unlawful Possession of Property Law, Cap. 401 [J.], and it is against this conviction that he appeals.

The facts as given in evidence by Detective Corporal Winston Dyer are that on June 9th, 1960, as the result of information received, he obtained a search warrant under the Unlawful Possession of Property Law to search the appellant's premises at 64 Luke Lane, Kingston. Dyer attended at the premises where he saw the appellant and told him that he had information that he had purchased certain articles of hardware, namely, files, saw blades and hose fittings, which had been reported missing from hardware stores in St. Andrew. The appellant denied purchasing any of these articles, whereupon the officer informed him that he had a search warrant, and proceeded to search the premises. The building was of two storeys; on the lower floor the appellant operated a dry goods store and his living quarters were on the upper floor.

Forty-two new brassieres were found in a wardrobe in the bedroom, which the appellant said he had bought from men working at the wharf from time to time.

The detective asked the appellant if he had anything else which he had purchased from "men working at the wharf", whereupon the appellant showed (end of page 1) the detective 170 other similar brassieres in a room to the rear of the store. There the detective also saw a roll of blue lace which the appellant said he had bought from "one of the men at the wharf".

The detective was not satisfied with the account given by the appellant and arrested him for the unlawful possession of the brassieres and lace together with some other goods which latter are not material to this appeal as no conviction was recorded in respect thereof. At no stage of the trial was the search warrant tendered in evidence nor was its absence accounted for.

The first ground of appeal argued before us was that the failure to produce the search warrant at the trial was fatal to the Crown's case, the charge having been laid under s. 8 of the Law and not under s. 5.

Section 5 (1) empowers any constable or authorised person to arrest a suspected person without a warrant. By s. 2:

" 'Suspected person' means any person who -

has had in his possession or under his control in any place anything being an article of agricultural produce; or

has in his possession or under his control in any place anything including an article of agricultural produce,

under such circumstances as shall reasonably cause any constable or authorised person to suspect that that thing has been stolen or unlawfully obtained."

Section 8 provides:

If information is given on oath to any resident magistrate or justice that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any house, store, yard or other place ... the resident magistrate or justice may, by warrant under his hand directed to any constable, cause the house, store, yard, place ... to be entered and searched at any time of the day or, if the warrant so authorises, by night.

...

If upon search made in accordance with the provisions of subsections (1) and (2) of this section, anything which the constable has reasonable cause to suspect to have been stolen or unlawfully obtained is found, the constable shall arrest and bring before a resident magistrate -

the person in whose house, store, ... such thing is found; and

...

if the constable has reasonable cause to suspect that such person placed or was privy to the placing of the thing in such house, store ... knowing or having

reasonable cause to suspect the same to have been stolen or unlawfully obtained."

It is to be noted that the procedure to be followed after arrest is not the same in cases of arrest under s. 5, where there is no warrant, as in cases under s. 8, where there is a warrant.

Section 5 (2) provides:

"As soon as possible after the arrest of a suspected person, the constable or authorised person making the arrest, shall bring the suspected person, together with anything found in his possession or under his control which is reasonably suspected to have been stolen or unlawfully obtained, before a resident magistrate sitting in Court."

Section 8 has no provisions similar to s. 5 (2). There is no mandatory provision to take the prisoner before the resident magistrate as soon as possible after arrest nor is there provision to take the thing found before the resident magistrate, although in practice it will always be more satisfactory to do both.

The procedure before the resident magistrate in cases of arrest under s. 5 is set out in the various subsections of that section whereas the procedure in cases (end of page 2) of arrest pursuant to a warrant under a. 8 is to be found in s. 10, which reads in part:

"A resident magistrate may call upon any person brought or appearing before him under the provisions of sections 8 or 9 of this Law to give an account to the satisfaction of the resident magistrate. ..."

It seems to us that by the use of the words "under the provisions of sections 8 or 9 of this Law" there is a burden cast on the prosecution, where the machinery of this law has been set in motion by a warrant, to prove that the provisions of s. 8 (and s. 9 where applicable) have been complied with before any person can be called upon to give an account, and how better can this proof be given than by production of the warrant which initiated the proceedings?

Attention must also be drawn to the words used in s. 8:

"(3) If upon search made in accordance with the provisions of subsections (1) and (2) of this section...."

It is our view that where the charge is laid under s. 8 evidence should be given that the search was made pursuant to the subsections thereof, which set out in detail the circumstances under which the warrant may be issued and the directions to the constable as to what things he is to search for and the place, time and manner of the search.

This proof should be given by production of the warrant itself.

Learned counsel for the Crown submitted that production of the search warrant was procedural and a mere formality and should not be regarded as a matter of substance. He referred us to *Price v. Humphries* (1) ([1958 2 All E.R. 725 at p. 728] where Lord Goddard, C.J., says:

"There is a distinction between an objection which goes to the merits and one which goes only to procedure. If it goes to the merits and the prosecution have

failed to prove something on which the guilt or innocence of the defendant depends, then justices must be very careful about allowing cases to be re-opened. ... If it is only a matter which goes to procedure ... then I do not think that they ought to allow an objection which has been, so to speak, kept up the sleeve till the last minute. ... If the difference between an objection which goes to the merits and one which goes only to procedure is borne in mind, many of the difficulties will be cleared up."

Counsel for the Crown referred also to the judgment of this Court in *R. v. Walters (2)* as authority for the proposition that production of the warrant was not necessary, but we do not agree that this case decides any such thing. In that case the arresting constable obtained a search warrant under s. 3 (1) of Cap. 415 [J.] (1938 Edn. of the Laws of Jamaica), the provisions of which are somewhat similar to those in s. 8 (1) of Cap. 401 [J.] (1953 Edn.), but the charge was laid under s. 2 of Cap. 514, the wording of which is somewhat similar to s. 5 of Cap. 401 (1953 Edn.), giving power to the constable to arrest without a warrant. The charge having been laid under s. 2 there was no necessity to tender the search warrant in evidence, but in any event the report of the case does not indicate whether the warrant was or was not in fact produced at the hearing before the resident magistrate.

It is our considered opinion that where the charge is laid under s. 8, production of the search warrant is not merely procedural and a formality, but is something of substance going to the foundation of the charge, therefore failure to produce the warrant or to account for its absence, in which case secondary evidence of its contents could have been properly admitted, is fatal.

We are at a loss to know why in the circumstances of this particular case the charge was not laid under s. 5, which the decision in *R. v. Walters (2)* recognises as being procedurally correct. Detective Corporal Dyer was not looking for brassieres or haberdashery but for articles of hardware, which presumably (end of page 3) were so specified in the warrant. Had he found the articles stated in the warrant, then the charge would have been correctly laid under s. 8. The ant undoubtedly gave legality to the entry of the appellant's premises but what excited the constable's suspicion regarding the haberdashery was the his statement that he had obtained them from men working at the wharf. Surely therefore the appellant was arrested as a "suspected person" as defined by s. 2 under the powers of arrest given by s. 5.

Another ground of appeal argued before us was whether on the evidence there was reasonable cause on which to found the constable's suspicion that the brassieres and lace had been stolen or unlawfully obtained. In examination-in-chief he says, "I was not satisfied with how he came in possession of these goods so I arrested him," and in cross-examination he says, "To some extent I would agree there would have been no suspicion about brassieres if he had not said he bought them from men at the wharf. I got the impression he was getting the goods from the wharf." Nowhere does it appear that the constable had any information that similar goods had been stolen from anyone or that there was the loss of any such goods from any wharf or, for that matter, from any place or person whatever. What then made the constable suspect that the goods had been stolen or unlawfully obtained?

In charges laid under the Unlawful Possession of Property Law [J.] evidence must be given either specifically or inferentially to show that the constable, prior to arrest, had reasonable cause to suspect that the goods were either stolen or unlawfully obtained (*R. v. Walters (2)*); and if such evidence is not given the

resident magistrate should not call on the person charged, to account.

There was nothing, in our view, which could have given rise to a reasonable suspicion in this case. The appellant kept a dry goods store and the goods were of the kind that one would expect to find in such a store. He lived on the premises and therefore we see nothing wrong in the appellant keeping some of the goods in his bedroom. If, in fact, he had said that he bought the articles from men at the wharf, then evidence should have been given as to the reason this statement aroused the constable's suspicion. This statement by itself does not appear to us to be a sufficiently compelling reason on which to found suspicion.

For these reasons this appeal must be allowed. The conviction is quashed and the sentence set aside. (end of page 4)

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