

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 24/70

BEFORE: The Hon. Mr. Justice Shelly (Presiding)  
The Hon. Mr. Justice Fox  
The Hon. Mr. Justice Edun

R E G I N A v. BERNICE SPENCE and  
STANFORD TOMLINSON

Mr. Horace Edwards, Q.C., for appellants  
Mr. Paul Harrison for Crown

FRIDAY, 30th October, 1970

FOX, J.A.:

The informations before the Court on 10th February, 1970, charged unlawful possession of ganja. The evidence which was led by the prosecution established extremely strong cases against both appellants which were unshaken by cross-examination of the solicitor who appeared for the defence at the trial, and unaffected by the denial of possession which they made upon oath. They were convicted by the learned resident magistrate for Westmoreland, and in accordance with the mandatory provisions of the Dangerous Drugs Law, Cap. 90, were sentenced to imprisonment with hard labour, Tomlinson for three years and Spence for eighteen months. Verbal notice of appeal was given on behalf of each appellant. In due course, grounds of appeal were filed in the resident magistrate's court, in person, by Spence on 18th February, 1970, and by Tomlinson on 10th March, 1970. Tomlinson's address for service was stated as c/o Queen's Counsel in Kingston. These grounds filed by both appellants questioned the reasonableness of the verdict on the evidence. They are plainly without merit and were not pressed. What has been argued before us with the leave of the court, is a further ground of appeal which was filed out of time in this

court on behalf of both appellants on 3rd April, 1970, by Mr. Horace Edwards, Q.C. who, it should be stated, is not the Queen's Counsel named in the document which contained the original grounds of appeal filed by Tomlinson. The further ground filed by Mr. Edwards complained that the informations on which the appellants were convicted were bad in law as:

- (a) the section of the law stated did not ground the offence charged; and
- (b) the appellants were convicted of offences for which they were not charged.

By virtue of the provisions of section 2 (A) of the Dangerous Drugs Law, as amended by section 3 of the Dangerous Drugs (Amendment) Act, 1964, Act 10 of 1964, a person is liable to be dealt with for the offence of being in possession of ganja "on summary conviction before a resident magistrate." Every information laid in connection with proceedings before a court of summary jurisdiction is "sufficient" if it contains the matters set out in section 64 of the Justice of the Peace Jurisdiction Law, Cap. 188. These include a statement in "ordinary language" of the specific offence for which the accused person is charged, such particulars as may be necessary for giving reasonable information as to the nature of the charge, and if the offence charged is one created by statute, "a reference to the section of the statute creating the offence" (section 64(2)).

The informations in these cases did not comply with this last requirement. There should have been a reference to section 7(c) of the law. Instead, there was a reference to section 9(c). The law contains section 9(1)(c) but not section (9(c). The informations were clearly not "sufficient". If the error had been noticed when the matter came on for hearing before the resident magistrate, it could have been avoided by laying a fresh information, or corrected by way of exercise of the magistrate's power to "amend all defects and errors in ..... any proceeding, civil or criminal, in his

court.... as may be necessary for the purpose of determining the real question in controversy" (section 190, The Judicature (Resident Magistrates) Law, Cap. 179). The error was not noticed. The trial proceeded. The point was at no time raised. No one was misled. Not the clerk of the courts who led evidence to support a case of unlawful possession of ganja; not the solicitor for the appellants who conducted a defence in answer to a charge of unlawful possession of ganja; not the appellants themselves who gave evidence upon oath to substantiate the defence that they were never in possession of ganja; not the learned resident magistrate who on the evidence adduced before him recorded a verdict of guilty against both appellants for unlawful possession of ganja; and, finally, at a later stage, still not the appellants themselves or those who may have advised them when the first grounds of appeal were filed based upon the insufficiency of evidence to bring about a conviction for unlawful possession of ganja. In the circumstances, it is beyond question that the error of a reference to section 9(c) in the information instead of section 7(c),, did not, and will not cause any injustice to the appellants. The point was not raised at the trial and, consequently, in accordance with the provisions of section 303 of the Judicature (Resident Magistrates) Law, the existence of the error is not a sufficient ground for allowing the appeal and quashing the conviction.

A number of cases were cited to us by counsel in support of his submissions. They are all distinguishable from the instant case. R. v. George McFarlane, 3 J.L.R. 154; point taken at the trial that the wrong section was mentioned in the information but no amendment was made and the defendant was convicted on the information as laid. R. v. Gray (1965), 8 W.I.R. 272; the information disclosed no offence known to the law. The judgment does not state whether the point was taken at the trial, and although there was a reference to the provisions of section 302 of the Judicature (Resident Magistrates) Law which empowers the Court of appeal to amend all defects and errors

in criminal cases tried by a magistrate, there is no reference to section 303, or any discussion as to the implications of its provisions. R. v. Chung Quee (1934-35) J.L.R. 139; information bad for duplicity with the possibility of the accused being misled, and the consequence of evidence which might have been inadmissible being received at the trial. R. v. Mabel Green Resident Magistrate's Court Criminal Appeal 235/66 of 3rd October, 1966, (unreported); accused charged on the information with an offence under the Road Traffic Law and convicted of that offence on evidence which was relevant to another offence under that Law. The case was concerned with misunderstandings in the resident magistrate's court of the nature of the charge on the information; of the relevant evidence; and of the particular offence for which the accused was being convicted. R. v. Charley Fung, et al, Resident Magistrate's Criminal Appeal 155 (a) (b) (c) of 5th November, 1965 (unreported); point raised at the trial, information not amended.

Section 303 of the Judicature (Resident Magistrate's) Law is directory. Once the court is satisfied that the error or defect has not caused and will not cause injustice to the person convicted, and that the point was not raised at the trial, this court is afforded no alternative. The appeal shall not be allowed "for any error or defect in form or substance appearing in any .... information.... on which there has been a conviction." The court will therefore exercise its power to amend the information by inserting the correct section, 7(c), in place of 9(c). This amendment to both informations is accordingly ordered. The appeal is dismissed.