806

JAMAICA

IN THE COURT OF APPEAL

R.M. COURTS CRIMINAL APPEAL NOS. 185/65, 185A/65

BEFORE: The Hon. The President

The Hon. Mr. Justice Waddington

The Hon. Mr. Justice Shelley

R. vs DAVID SPAULDING

and

CARLTON WALLACE

Mr. C. Raymond for the Crown

Mr. E.C.L. Parkinson, Q.C. for the appellant

10th February, 1966.

WADDINGTON, J.A.,

The appellants were convicted of the offence of unlawful possession of goods in the Resident Magistrate's Court for the parish of Kingston, and were each fined £7 or two months imprisonment at hard labour on the 19th of August, 1965.

It has been brought to the attention of the Court by Crown Counsel that there appeared to have been certain irregularities in the procedure in this matter. The information on which the appellants were charged was to the effect that they were found in possession of a motor car tyre in respect of which there was reasonable cause to suspect that it had been stolen or unlawfully obtained, contrary to Section 8 of the Unlawful Possession of Goods Law, Chapter 401, and on the backing of the Information there is this endorsement - "on the 4th of August, 1965, both accused and tyre brought before the Court, and both accused ordered to account on 18th of August, 1965, by what lawful means they came in possession thereof, and not having accounted to my satisfaction is adjudged guilty - sentenced on 19th of August, 1965, each fined £7 or two months hard labour."

/It will thus.....

It will thus be seen that the Information charges a breach of the offence set out in Section 8 of the Unlawful Possession of Goods Law. The proceedings started by the issue of a search warrant under section 8 of the Law, and when the appellants were brought before the Court on the 4th of August, the search having taken place on the 3rd of August, evidence was led by the Detective Corporal Pusey, who had obtained the warrant and who had searched the premises of the appellant, Spaulding, and after that evidence was led, the cross-examination appeared to have been deferred until the 18th of August.

On that date the witness Pusey was cross-examined at length by Counsel for the defence, and also other evidence was given by other witnesses who were also cross-examined. It does not appear from the record exactly when the order to account was made, and indeed, looking at the record, if it is assumed that the order to account was made on the 4th of August, then clearly that order to account was made before the cross-examination of the witnesses for the prosecution, and, as was pointed out by learned Counsel for the Crown, on the authority of the case R. v. Williams, (1964) 6 W.I.R.,320, that would have been irregular, as it is necessary that an opportunity for cross-examination should be given to the suspected person before any order to account is made.

Counsel for the Crown after pointing out these irregularities and having pointed out that, as the procedure appears to have been under Section 8, and therefore the learned Resident Magistrate should have made an order under Section 10 of the law, that is to say, an order for the appellants to account by what lawful means the goods found on their premises came into the house, or that they were not privy to the placing of the things in the house, and having pointed out that that order was not made, but that it appeared that an order was made instead under Section 5 of the Law,

/submitted that...

submitted that this Court could do one of two things; that it could either declare the proceedings a nullity by virtue of these irregularities and send the case back for a new trial, or alternatively, that the Court could accede to an application by Counsel to grant an amendment to the Information by substituting Section 5 instead of Section 8.

Crown Counsel, however, has quite frankly said that he would hesitate to press that second submission, having regard to the peculiar nature of this statute, and in view of the fact that it has always been held that the procedure laid down by this statute should be strictly observed. We agree entirely with that comment by the learned Crown Counsel.

Mr. Parkinson has informed us that as far as he was concerned, the procedure adopted by the Court was the procedure under Section 5, and that on the 4th of August, the learned Resident Magistrate did make an order for the appellants to account under Section 5. The case, however, he submitted, had been conducted on the basis that it was an Information under Section 8 of the Law, and he said that the learned Resident Magistrate had made an order to account before he had had an opportunity of cross-examining the witnesses, and that he did not waive his cross-examination, this being a criminal case in which he could not in any event have done so.

He also brought to the attention of the Court a further apparent irregularity which appeared when he was cross-examining the witness, Pusey, in that it appeared from what the witness said that he had obtained the warrant on which he searched the appellants' premises some time in the morning of the 3rd of August, whereas, the Information on which that warrant was based, was sworn in the evening of that day, and he pointed out this irregularity, that the warrant appeared to have been issued before the Information was sworn.

/We have.....

We have given the matter very careful consideration, and if the facts of the case, that is to say, the merits of the case warranted it, this Court would certainly regard all these irregularities as amounting to a nullity and would send the case back for a new trial. However, having regard to the merits of the case, it is quite clear to us that this appeal would have succeeded on the merits, and for these reasons we do not think that we should adopt the procedure first suggested by the learned Crown Counsel.

In the circumstances, we will allow this appeal by quashing the convictions and setting aside the sentences.