J A M A I C A

IN THE COURT OF APPEAL

R.M. COURT CRIMINAL APPEAL NO. 100/76

BEFORE: THE HON. PRESIDENT

THE HON. MR. JUSTICE HENRY

THE HON. MR. JUSTICE ROBOTHAM (ag.)

REGINA

v

NANCY SANCHEZ-BURKE

Mr. Frank Phipps Q.C., Mr. Huntley Munroe Q.C. and Mr. D. Harrison for the Appellant

Mr. Henderson Downer for the Crown

July 11, 12, 13, 22, 1977

HENRY J.A.

On July 13, 1977 having allowed this appeal, set aside the conviction and sentence and entered a verdict of acquittal we indicated that we would put in writing our reasons for so doing and our views in relation to certain questions raised at the hearing of the appeal. We now do so.

The appellant was convicted in the Resident Magistrate's Court for St. Andrew on an indictment containing two counts each of which charged her with doing an act preparatory to the making of a payment outside the Island in contravention of section 8 (1) of the Exchange Control Act. That section provides as follows:-

> "Except with the permission of the Minister no person resident in the scheduled territories shall, subject to the provisions of this section, in the Island do any act which involves, is in association with, or is preparatory to, the making of any payment outside the Island to or for the credit of a person resident outside the schedule territories."

As originally drawn, the particulars of offence in each

count of the indictment alleged that:-

> "Except with the permission of the Minister, Nancy Margarite Sanchez-Burke, a person resident in Jamaica in the Island on the 24th day of August 1975, had in her possession (foreign currency) for the purpose of making a payment outside the Island".

At the close of the Crown's case counsel for the appellant moved for acquittal on the ground inter alia that there was no proof before the court that the appellant was resident in Jamaica - a necessary ingredient to the charge. The learned resident magistrate found that there was "no sufficient proof before the court that defendant was resident in Jamaica" but having concluded that there was sufficient evidence to satisfy her "that defendant was in the Island", she proceeded to amend the indictment by striking out the word "resident" in each count of the indictment. This action was apparently prompted by the submission of counsel for the Crown to the effect that for the purpose of the offences charged it was open to the Crown to prove that the person charged either was in the Island or was resident in the Island. For this submission he relied on the provisions of paragraph 1 (1) of Part II of the Fifth Schedule to the Act, which are as follows:-

> "1 (1) Any person in or resident in the Island who contravenes any restriction or requirement imposed by or under this Act..... shall be guilty of an offence punishable under this Part."

Different sections of the Act impose different restrictions and requirements, some of which relate to persons in the Island and others (like section 8 (1) to persons resident in the Island. It seems clear that paragraph 1 (1) while intended to apply alike to all these different sections is not intended to create offences in relation to persons upon whom no restriction or requirement is imposed by or under the Act. Where a section imposes a restriction on a person resident in the Island it does not impose that restriction on a person who is merely in the Island and a person in the Island who disregards that restriction is not, by virtue of paragraph 1 (1), guilty of an offence. It follows that the indictment as amended disclosed no offence. At the hearing of the appeal counsel for the

Crown very properly conceded that the conviction on that indictment could not be upheld. He, however, submitted that a new trial ought to be ordered of the indictment in its original valid form. We did not consider this to be a proper course to adopt. At the end of the Crown's case the learned resident magistrate found that there was no sufficient proof that the appellant was resident in Jamaica. On this finding she would have been obliged to acquit the appellant on the indictment as it stood. A new trial therefore could only be a means of enabling the Crown to fill the gaps in their evidence. The only evidence adduced as to residence was the passport of the appellant. A passport while it is an official document is not a public document which is proof of the truth of its contents. Thus in R v Rice 1963 1 Q.B. 857, Winn J. had this to say at p. 872.

> "It is, however, essential, whether for the purposes of logical reasoning or for a consideration of the evidentiary effect in law of any such document, to distinguish clearly between its relevance and its probative significance: the document must not be treated as speaking its contents for what it might say could only be hearsay. Thus a passport cannot say "my bearer is X" nor the air ticket "I was issued to Y."

We have been referred to three cases which, it is argued, contain dicta to the contrary. The first, R v Brailsford 1905 - 2 K.B. 730 in fact refers to a passport as an official document. The second, Campbell v Wallsend Slipway and Engineering Co. Ltd. reported in the Times on March 17, 1977 we do not consider to be of assistance. The third, R v Governor of Risley Remand Centre, Exparte Hassan (1976) 1 W.L.R. 971 (1976) 2 A.E.R. 123 is an application for habeas corpus on behalf of a Pakistani who, having entered the United Kingdom was subsequently arrested for deportation on the allegation that his entry was unlawful. His allegation was that his entry was lawful but his passport which would have contained the entry by the immigration officer confirming that allegation had been lost. The judgment of Lord Widgery undoubtedly contains several passages which suggest that the vali-

dity and accuracy of the relevant entry in the passport would be recognised upon its production. These passages, however, should in our view be considered in the light of the particular circumstances of the case. The executive who were alleging that the applicant had entered the country illegally operated through the immigration department a system whereby stamped entries were made in the passports of persons who entered the country legally. Such a stamped entry in the passport of the applicant would clearly have been, as against the executive, evidence in support of his claim that he had entered legally. This is, however, far different from the proposition that in a criminal case where the Crown had to rely on the accuracy of such an entry in proof of one of the ingredients of the offence charged, the mere production of the passport with such an entry would suffice. For these reasons we conclude that the finding of the learned resident magistrate on the issue of residence was correct and that the applicant was entitled to an acquittal at the close of the Crown's case. A new trial would not therefore be justified even if defence counsel had not, as he did, rested on his submissions.

We turn to the ground of appeal our decision on which may, we are told, affect a number of pending appeals although in the event it has not been necessary to the outcome of this appeal. This relates to the fiat of the Director of Public Prosecutions which is required by paragraph 2 (1) of Part II of the Fifth Schedule to the Exchange Control Act. That paragraph is as follows:-

> "No proceedings for an offence punishable under this Part shall be instituted, except by or with the consent of the Director of Public Prosecutions: Provided that this subparagraph shall not prevent the issue or execution of a warrant for the arrest of any person in respect of such an offence, or the remanding in custody or on bail of any person charged with such an offence."

Without the proviso, that paragraph clearly provides that the fiat of the Director of Public Prosecutions is to precede the institution of all criminal proceedings for offences against the

Act. Such proceedings may be instituted either by information and summons, by information and warrant or by arrest without warrant. Where proceedings are instituted by information and summons the restrictions imposed by the paragraph are not affected by the proviso. Where, however, the proceedings are instituted by way of arrest, either with or without a warrant the proviso appears to modify the restrictions by permitting such arrest as well as the subsequent remand in custody or on bail of the person arrested. The proviso therefore clearly envisages that the fiat will not be obtained prior to the institution of criminal proceedings by way of arrest. Counsel for the applicant has submitted that in these cases the fiat must be obtained before the next step in the proceedings is taken so that where, as in this case, the proceedings are instituted by arrest without warrant, the fiat must be obtained before the information is laid. Counsel for the Crown on the other hand submitted that the fiat may be obtained at any time before the commencement of the trial. In our view the paragraph is primarily concerned with preventing oppressive indiscriminate prosecutions and to this end it contemplates that the advice and consent of the Director of Public Prosecutions ought to be obtained at the earliest possible opportunity. The proviso should therefore be read with this primary objective in mind. In our view in those cases where the proviso applies the fiat of the Director of Public Prosecutions must be obtained within a reasonable time after the taking of such actions as the proviso exempts. What is a reasonable time is a matter to be determined on the facts of each particular case.

For the purpose of ascertaining whether the fiat has been obtained at the proper time it is desirable that it should be produced to the court before the commencement of the trial. Where this is not done consideration will have to be given to whether any objection may properly be taken after the close of the

Crown's case, in the light of the decision in Price v Humphreys (1958) 2 A.E.R. 725. This, however, is a matter which has not been argued before us.