PAUL LALA *ats.* POLICE.

[Appellate Jurisdiction (Corrie C.J.) October 13, 1943.]

Licence Ordinance, 1924—s. 15 (2)[1]*—Convictions for selling unbroken packages or quantities equal to or exceeding one unbroken package—whether void for duplicity—witnesses treated as hostile—matter for discretion of Magistrate.*

Appellant, a retail storekeeper, was charged with selling goods in unbroken bags while not being a wholesaler. The charge was proved by evidence of the sale of eight bags of sharps but the conviction was formally recorded "for that he on the 12th day of July at Mua did sell unbroken packages or quantities equal to or exceeding one unbroken package to wit: eight bags of sharps to one Muneer storekeeper of Burotu". At the hearing before the District Commissioner three witnesses for the prosecution were allowed to be treated as hostile.

HELD.—(1) The conviction is void for duplicity.

(2) The Appellant was found guilty of an offence for which he was not charged.

(3) The question of allowing witnesses to be treated as hostile is one for the Judge or Magistrate who hears the witness and is not a good ground of appeal.

Cases referred to :—

Price v. Manning (1889) 42 Ch.D. 372 ; 61 L.T. 537 ; 58 L.J. Ch. D. 649.

APPEAL AGAINST CONVICTION. The facts are fully set out in the judgment.

R. A. Crompton, for the appellant.

A. G. Forbes, for the respondent.

CORRIE, C.J.—The appellant, Paul Lala, was charged on an information alleging that he, on the 12th July, at Mua, sold eight unbroken bags of sharp flour to one Muneer, storekeeper, of Burotu, contrary to s. 15 (2) of the Licence Ordinance No. 31 of 1924.[1] The Licence Ordinance 1924 is in fact No. 3 of that year, but it is clear that no confusion arose as to the charge against the appellant.

After hearing the evidence for the prosecution and the appellant in his own defence, the District Commissioner, whose note was correctly headed " Selling goods in unbroken bags while not being a wholesaler. S. 15 (2) 3/1924 ", entered upon his note the finding " guilty " and imposed a sentence of £5 or one month I.H.L.

The formal conviction, drawn up in Form 14 in the Schedule to the Summary Jurisdiction Procedure Ordinance, in accordance with s. 34 of that Ordinance, recorded that the appellant was convicted " for that he on the 12th day of July at Mua did sell unbroken packages or quantities equal to or exceeding one unbroken package, to wit : eight bags of sharps to one Muneer storekeeper of Burotu."

[1] *Cap.* 154. Revised Edition Vol. III page 1688.

The material part of s. 15 (2) of the Licence Ordinance 1924 is as follows :—

> " A retail store licence shall enable the licensee to sell on premises " specified in the licence the same goods or articles as a wholesale " and retail store licence but not in unbroken packages nor at any " one time in quantities equal to or exceeding an unbroken " package."

It is clear that under this sub-s. two separate and distinct offences are created—the sale of an unbroken package and the sale at any one time of quantities equal to or exceeding an unbroken package.

By his grounds of appeal the appellant seeks to have the conviction set aside upon four separate grounds. In the first place, he maintains that he was found guilty of an offence with which he was not charged. While the District Commissioner's note merely records the finding of guilty, the formal conviction is, in the alternative, for the offence of selling quantities equal to or exceeding one unbroken package, an offence with which the appellant was not charged.

Again the appellant maintains that the conviction is void for duplicity. This also is a good ground of appeal, as although the District Commissioner merely entered a finding of guilty, the formal judgment is for two alternative offences, and therefore is void upon the face of it.

By his third ground, the appellant alleges that there was no evidence to support the conviction. This, too, is a good ground of appeal as there was no evidence whatever of the sale of an unbroken bag.

By his fourth ground of appeal, the appellant alleges irregularity at the trial, in that three winesses for the prosecution, Alexander Duncan Hedstrom, Hanif and Gangaram, were allowed by the District Commissioner to be treated as hostile witnesses and were cross-examined by the Prosecuting Police Officer. The appellant alleges that this course was taken by the District Commissioner without any application by the prosecution, but it is not clear from the record whether such was the fact or not.

The question of allowing a witness to be treated as hostile is one for the Judge or Magistrate who hears the witness. In the ruling case of *Price v. Manning*, 58 L.J. Ch. D., page 649, at page 650, Cotton L.J. said " but in my opinion that is a matter for the discretion of the Judge ; he sees the witness, and can determine from his manner whether he is so hostile that the plaintiff should be allowed to cross-examine him." Fry L.J. and Lopes L.J. gave judgment to the same effect.

In the circumstances, therefore, I hold that upon this last ground the appeal falls. It must succeed, however, upon each of the first three grounds, and the conviction and sentence are therefore quashed and the appellant acquitted.