1944 *Present:* **de Kretser J.**

SCHOKMAN, Appellant, *and* SIRISENA *et al.* Respondents.

639—M. C. Anuradhapura, 10,520.

Search warrant—Written information upon which the warrant issued—Deposition of witnesses—Evidence read over and explained—Gaming Ordinance, s. 5.

Where the written information upon which a search warrant was issued under section 5 of the Gaming Ordinance consisted of the depositions of witnesses which were signed by them and were read over and explained to them by the Magistrate.

Held, there was a sufficient compliance with the requirements of the section in order to raise a presumption of guilt.

APPEAL from an acquittal by the Magistrate of Anuradhapura.

J. Mervyn Fonseka, K.C., Solicitor-General, with *E. H. T. Guneseker*a, Crown Counsel, for the appellant.

L. A. Rajapakse, K.C. (with *P. Navaratnarajah*), for respondents.

Cur. adv. vult.

December 1, 1944. DE KRETSER J.—

Fourteen persons were charged with unlawful gaming. They had been arrested when a place was searched under a search warrant. The Magistrate held that the search warrant had not been issued in the conditions mentioned in section 5 (formerly section 7) of the Gaming Ordinance. He found two of these persons guilty and acquitted the others. The appeals of the persons found guilty have been dismissed. The complainant appeals from the acquittal with the sanction of the Attorney-General. The learned Solicitor-General contended on his behalf that the cases relied on by the Magistrate do not apply in the circumstances of the case. He rather hinted that those decisions might well be reviewed. I was inclined to send this appeal before a fuller Bench but Mr. Rajapakse for the respondents strongly urged that I should not follow that course unless it were really needed.

Section 7 of the Gaming Ordinance raises a presumption of guilt and, as remarked by Bertram C.J. in *Police Sergeant, Tangalla v. Porthenis*[1] " the result of the issue of a search warrant is so drastic, that this Court

[1] *22 N. L. R. 163.*

has come to the conclusion that special care should be taken to see that all the conditions attaching to the issue of a warrant are fully complied with ".

In a long series of cases, of which the one just referred to is only one, " the Courts have declared that the Magistrate must be satisfied upon sufficient prima facie evidence. It is not enough that general evidence should be given him that the informant has reason to believe that gaming is going on upon the premises ". The evidence must satisfy the Magistrate that there is good reason to believe that the place is kept or used as a common gaming place.

Up to the date of that case the written information referred to in section 5 had been in the form of an affidavit. The question considered always was the sufficiency of the evidence before the Magistrate.

A new matter, however, came up for consideration before Lyall Grant J. in *Parson v. Kandiah* [1]. There a witness was taken before a Magistrate, who recorded his evidence on oath. The witness did not sign the deposition nor was there anything to show that his deposition had been read and explained to him. Lyall Grant J. said " No doubt it would have been sufficient if the information, which was given on affirmation, had been read over and explained to the informant and signed by him ". As there was no evidence this had been done he refused to draw the presumption created by section 7.

This case lays emphasis not on the information being insufficient but on the fact that the information was not " written information ".

The same question came up before Drieberg J. in *Sub-Inspector of Police v. Jacolis Peiris*[2]. There the supporting witness put his mark to his deposition and his mark had been attested by the Magistrate. The written information had come in the form of an affidavit by a Police Sergeant. Drieberg J. considered the material in the affidavit insufficient and said " it is not necessary to consider the sufficiency of the material because the information by the witness was not properly before the Court ". He purported to follow *Parson v. Kandiah*, and agreed that until the statement is read and explained to the deponent it was not written information. With all due respect I would say that the witness did not purport to be the informer in writing. The written information came from the Sergeant and the form had been complied with. The witness apparently had been examined by the Magistrate in the course of making the inquiry referred to in section 5. Section 5 does not specify any particular form of inquiry nor is there any requirement that the deposition should be read over and explained to a witness and signed. Nor is there any provision of the law requiring a Magistrate to read over and explain evidence to a witness and get his signature, except in certain cases specified in the Criminal Procedure Code regarding proceedings under it, and even then there is provision for the defect being supplied by evidence aliunde. The fact remains that Drieberg J. thought that the recorded evidence was not written information unless it was read and explained to the witness and signed by him.

[1] (*29 N. L. R. 94*). [2] (*30 N. L. R. 509*).

In *Bartholomeusz v. Mendis*[1] an Inspector of Police presented what purported to be an affidavit by him but it had not been signed by him. Akbar J. held this was not written information on oath. A witness too had been examined but there was nothing to show that the deposition had been read and explained to him. Nor was Akbar J. sure he had even signed it. Akbar J. followed the view of Drieberg J.

These are the three cases followed by the Magistrate. The Solicitor-General referred me also to *Edwards v. Perera*[2] where it was conceded that the issue of the search warrant had been irregular inasmuch as the information had not been read over and explained though it was signed. Poyser J., however, convicted on the evidence. Mr. Rajapakse referred me to *Beddevela v. Abraham et al.*[3] where Poyser J. followed Drieberg J.

The present case is distinguishable from the above cases inasmuch as the depositions were not only signed by the witness but there is evidence that they were read over and explained to the witnesses, who at the trial had no complaint to make regarding the accuracy of the record made. The case seems to have been tried in the absence of the permanent Magistrate, who probably would have been able to supply the assurance that the depositions had been read over and explained, if he had been trying the case.

The defect, if any, is one of form only and I would not be disposed to favour technicality to such an extreme point as the respondents' Counsel contends I should.

With all due respect, I should like to express my dissent from the judgments relied upon by the Magistrate.

It is true that it is a serious thing to invade a person's house and it is a serious matter to raise a presumption of guilt, but the Ordinance places the public interests as being of paramount importance and it would be unfortunate to raise technicality to such a height that the most important principle is frustrated. I cannot see how if once information is recorded it is converted into written information, it becomes something less if it is not explained to, and then signed by the witness. The Magistrate is a responsible judicial officer and one cannot assume he would make an incorrect record or would not realise the gravity of the step he was about to take. Such assumptions are not made when persons are tried on other matters affecting their liberty, and if the judgments referred to were given their full significance it would not be enough to record and explain the deposition and get the witness to sign but there should also be a certificate by him that he acknowledges it to be correct. Otherwise we would again be acting on a presumption, viz., that his signature signifies that he acknowledges it to be correct. We might then even ask to be satisfied that the deposition was properly explained and that the witness understood what was being said, because he was in strange surroundings and in the august presence of a Magistrate. When a Magistrate records evidence he hears the question, he hears the answer, he sees how the answer fits the question, the record is being made question by question and there is scarcely any occasion for misunderstanding.

[1] *32 N. L. R. 333.* [2] *4 C. L. W. 66.*

[3] *11 Times of Ceylon L. R. 57.*

especially when the witness is speaking in English or when he is speaking in the vernacular and the Magistrate understands him and can dispense with an interpreter. Suppose the witness brought an affidavit, written by some one purporting to record his oral information, and he swore to it before the Magistrate and immediately handed it to the Magistrate that would be sufficient. If under section 6 a witness made an oral statement and the Magistrate got him to swear it was true that would be enough. If he produced a written statement and swore to it that would be written information, but if the Magistrate were himself the scribe it would not do, until it was explained to the witness and signed. This seems to be rather a quibble than sound reasoning. The Magistrate would record the information in a manner much more likely to create a better impression on the witness and on the Magistrate.

Under section 6 (*a*) a house is liable to be searched by the Magistrate merely because it has been branded within six months as a common gaming place by the conviction of some person. There the Magistrate has a record before him, but the conviction spreads such a miasma of suspicion that it lingers on long enough to raise a presumption that the place is still a gaming place and may lawfully be raided. It is a case of the public welfare coming first. It is also a case where the Magistrate has information within his knowledge and control and could be trusted to use his discretion.

By section 6 (*b*) a Magistrate is empowered to act in an emergency on unsworn and unrecorded oral information. Presumably as a responsible officer he satisfies himself before acting but he is acting in such a hurry that he has no time to record the information. He may act regarding a place hitherto unbranded as a common gaming place. Again a case of the public welfare coming first. It is also a case where he has no time for issuing a search warrant and getting a suitable person to execute it. If he receives written information on oath from some person he has not seen or may not see before he acts (for the information need not be handed in personally, who may be an ignorant catspaw of some person, he may issue a search warrant.

It seems to me that the provision as to written information may be only a provision as to the means of communication, providing both a convenient and secret method for the informant. Evidence by affidavit is something less than evidence taken by the Magistrate and I cannot believe that the Legislature had a rooted preference for the former. It is a Magistrate who must be informed and it is he who must be satisfied that the place is a common gaming place. He is given a discretion as to how he may act. He should not act till he is satisfied and this Court cannot, beyond a limited degree, be the guide of the Magistrate's conscience.

There is a distinction between written and oral information, but there is also the distinction between little time being available and more leisurely action. Is then the real distinction between a case for quick action and a different case or is the emphasis on form ? Is the Magistrate empowered in section 6 to act only because he has no time for issuing a search warrant after selecting a suitable person to execute it or does his presence account for the difference ? It seems to me that the vital

matters to be considered are the public welfare and the Magistrate's responsibility and the form in which the information comes is an incidental matter.

Section 12 (3) of the Oaths Ordinance does not require a Commissioner of Oaths to explain an affidavit but only to state in his jurat the place and date when the oath was administered and to initial all alterations erasures or interlinerations which had been made (not necessarily by himself) before the oath was administered. Section 4 does not require explanation of the deposition to witnesses nor that their signature should be obtained. Section 6 provides for existing forms and formalities to be continued until fresh rules are made. I inquired but was not referred to any rules governing this matter nor have I been able to find any.

Section 84 of the Courts Ordinance empowers Justices of the Peace to administer oaths. Section 82 relates to judicial officers. Neither section requires explanation of an affidavit. Under the English rule No. 53 where an affidavit is made by a person who appears to the officer taking the affidavit to be illiterate or blind then the jurat should state not merely that it was read over to the deponent but that he seemed perfectly to understand it. If there is no such certificate there must be other evidence that the affidavit was read over and apparently understood by the deponent. A Magistrate may well make such inquiry under section 5 if the deponent were before him, but if he was not, why should he assume that the man was either blind or illiterate? The term "written information" may have been borrowed from the English Law, where an information marks the beginning or institution of proceedings before a Court of summary jurisdiction and it lies when an offence is alleged to have been committed. I am not aware that in Ceylon proceedings are instituted in any way not provided for in the Criminal Procedure Code. The term "information" was used in earlier enactments.

It seems to me that when a person gives oral information a Magistrate may decline jurisdiction if he does not desire to institute the search himself or sees no emergency such as section 6 contemplates.

If a person gives written information it must not only be on oath but should be full enough to justify a Magistrate acting on it without further inquiry.

If the information is not full enough, or for any other reason the Magistrate desire it he may make inquiry and that would include the recording of evidence.

There is nothing to prevent a Magistrate being the scribe and preparing the written information, administering the oath either at the start or after reading over and explaining what he has prepared. He might then present such written information to himself. But this is only saying that he might not only receive evidence but take evidence.

The question seems to be not whether the witness signed or whether the deposition was read over and explained but whether the case is one provided for in the Ordinance: is the search warrant one issued under the Ordinance? The answer would depend on whether the terms of the Ordinance can be satisfied in substance and the form is immaterial.

Whether the Magistrate has assumed a jurisdiction the Ordinance did not give him, or whether he always had jurisdiction to issue a search warrant and the Ordinance only provides the method of approach to him.

In my opinion the form of approach is not an imperative provition and informality or irregularity should not matter as long as the Magistrate is properly satisfied. But I need not do more than decide that the evidence in this case has supplied the material which was wanting in the cases referred to and, therefore, the presumption arises. The accused did not choose to give evidence or to call witnesses, though given an opportunity of doing so. The Magistrate has accepted the evidence of the prosecution and the only question is whether that evidence discloses facts rebutting the presumption of guilt, which cannot be a strong presumption. I find no such evidence. The Magistrate fined the first accused Rs. 20 and the 13th accused, who took a prominent part in running the gaming, only Rs. 30. I find the respondents guilty and sentence each of them to pay a fine of Rs. 20. The Magistrate will give them such time as he thinks proper in which to pay the fine. In default, in each case of default the sentence will be two weeks' rigorous imprisonment.

I would add that I can see no reason why the Police should not adopt a wiser and easier procedure. I was informed that Assistant Superintendents of Police are Justices of the Peace. They could easily record the information, explain it to the deponents and get them to swear to their depositions and sign them. They could then produce the witnesses and the Magistrate would act wisely in explaining the depositions to the witnesses and seeing that they stand by them and he could make a record of what he has done. On being satisfied he has sufficient material before him he could then issue the search warrant. This would obviate any occasion for the validity of the search warrant being later questioned.

Appeal allowed.