Present: Ennis J.

1924.

GUNASEKERA *v.* ARSECULARATNE *et al.*

65—P.C. Kalutara, 3,213.

Criminal Procedure Code, ss. 187 and 425—Charge not framed till close of case for prosecution—Search warrant directing search forthwith—Search not effected for some weeks but within returnable date—Is search good?—Forthwith—Gaming Ordinance, s. 7.

The fact that the evidence for the prosecution was closed before a charge was framed was held not to have vitiated the proceedings, as the accused was not prejudiced thereby.

A search warrant was issued under section 7 of the Gaming Ordinance, 1889, on March 26, and was returnable on April 20. The warrant directed to enter "*forthwith*" and search the house specified. The search was not effected till April 19.

Held, that the warrant was valid and that the search was not effected "forthwith."

"The Magistrate by specifying the time within which the warrant should be returned had considered what the warrant meant in directing an act to be carried out forthwith."

THE facts are set out in the judgment.

H. J. C. Pereira, K.C. (with him *D. F. Fernando*), for the appellants.

Illangakoon, C.C., for the Crown.

February 22, 1924. ENNIS J.—

This is an appeal from convictions for gaming. It appears that each of the accused was sentenced to a fine of Rs. 100, and, in addition, the second, fourth, and seventh accused were given one month's rigorous imprisonment, because they had been previously convicted of the same offence. It was urged on appeal that the provisions of section 187 of the Criminal Procedure Code had not been complied with, and that the accused were not charged before the case for the prosecution was closed. It this connection too cases were cited—*Denois v. Charles* [1] and *Rex v. Silva*.[2] In both these cases attention was drawn to the fact that a failure to frame a charge would vitiate the proceedings. This case is not on all fours with either of those cases; for in this case a charge was framed. Moreover, the accused cross-examined all the witnesses,

[1] *4 Bal. Notes of Cases 53.*

[2] *5 Bal. Notes of Cases 53.*

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and himself led evidence after having pleaded to the charge. The fact that the evidence for the prosecution was closed before the charge was framed was no doubt an irregularity, but it does not vitiate the proceedings, as the accused was in no way prejudiced. The next point raised on appeal was that the search warrant, which was issued under section 7 of the Ordinance, had no force or effect at the time the search was carried out. There appeared at first considerable force in this suggestion. The warrant is in the form A found in the Code. But it bears no date, which is quite consistent with the fact that no provision for a date is made in the form. At the foot of the warrant there appear the words " returnable on April 20, 1923." It appears from the evidence that the warrant was applied for and issued on March 26, 1923, and it was urged that, inasmuch as the warrant directs the officer to whom it is addressed to " forthwith " enter and search the house specified, to wait until April 19 before carrying out the search was not a compliance with the warrant, and that the warrant must be held at that time to have been time-expired. The case of *Lewis Pillai v. Chelliah* [1] was cited to show that the Ordinance is a strict Ordinance, and that there must be a strict compliance with the provision in connection with the issue of warrants. Then, again, *Soysa v. Anglo-Ceylon and General Estates Company* [2] was cited to show that the words " forthwith " should be construed as meaning " without any delay that can possibly be avoided," and it was urged that in this case that there was a delay which could not be said to be unavoidable. It is much to be regretted that the warrant bore no date other than the returnable date, and it is also to be regretted that so long a time was allowed within which this warrant could be carried into execution. But I have considered this question closely, and I have come to the conclusion that the warrant was still valid, and that the Magistrate by specifying the time within which the warrant should be returned had considered what the warrant meant in directing an act to be carried out forthwith. On the merits of the case I see no reason to interfere. There is a very strong judgment on the facts. The defence practically was that this was a private new year's party, and that the people gathered there were friends. The presumption created by the Ordinance must be rebutted, and in this case the presumption has not been rebutted, because the only evidence called for the defence, namely, the first accused, has been emphatically disbelieved. In the circumstances I see no reason to interfere with the convictions or sentences, and dismiss the appeals.

Appeal dismissed.

[1] *3 Bal. Notes of Cases 54.*

[2] *(1916) 19 N. L. R. 374.*