1932 *Present : Akbar J.*

N. R. M. CHETTIAR *v.* DARLEY, BUTLER & CO.

In revision, P. C. Colombo, 39,029 and 39,030.

Search warrant—Powers of Police Magistrate to issue for investigation of offence—Primâ facie proof of offence—Criminal Procedure Code, s. 68.

The powers of a Police Magistrate to issue a search warrant for the investigation of an offence can be exercised only when the offence has been disclosed *primâ facie* by legal evidence on record.

APPLICATION to revise an order made by the Police Magistrate of Colombo.

The petitioner indented for 2,800 bags of rice of the value of Rs. 22,450 from respondents, Darley, Butler & Co., "on a promissory note of 12th April, 1932, on the usual 45 days' credit," and "bills of lading were handed to petitioner to enable him to take possession". Meanwhile respondent learned that petitioner had decamped and that his firm was in a bad way financially. Respondent sought to obtain recovery of the rice by a search warrant, duly issued by the Police Magistrate.

In P. C. 39,030 respondent deposed to criminal breach of trust by petitioner in that latter had been given a number of bags of rice for storage as respondent's agent. Part of the contract was that petitioner was to pay Customs and other landing dues, which the petitioner was at liberty to recover from respondent subsequently.

H. V. Perera (with him *Canakeratne* and *Nadarajah*), for petitioner.—

There is insufficient material to authorize a search warrant in any circumstances; search-warrant mode of process is incidental to a criminal trial; a search warrant cannot be given to enable persons to recover movables in possession of another.

The form of warrant is questionable, see Criminal Procedure Code, section 413. The law does not authorize a person to go into a Police Court and get a search warrant on an *ex parte* application. Complainant swears to certain facts in Police Court, a good deal of which is hearsay. After conviction, Police Magistrate has right to deal with productions as he thinks fit. Custody is always temporary, pending investigation of some matter as to whom property is to go (*Silva v. Hamid*[1]). Police Magistrate cannot take ownership from one man and give it to another. His jurisdiction is normally criminal; any other jurisdiction is under section 413, of Criminal Procedure Code. Only other jurisdiction, not coming under section 413, is to restore the *status quo*. The evidence led also shows a civil liability on a promissory note. It is for Police Magistrate to judge whether there has been cheating prior to transaction *re* movables; in such case there must be the elements of cheating. A Court has no right to act on hearsay evidence even in an *ex parte* application (*Police Sergeant, Tangalla v. Porthenis*[2]).

The law applicable is same as in 39,029. There is hearsay evidence here also. Customs dues and landing charges were paid by petitioner. The guarantee broker was in fact agent between respondent and petitioner. Petitioner submits there was a *bona fide* sale of rice bags.

[1] *20 N. L. R. 414.*

[2] *22 N. L. R. 163.*

The matter reached finality in the Police Court when Police Magistrate made order and proctor made his statement. No complaint under section 148 at all. Complaint must be on oath and signed: section 149. Section 150 requires writing. If section 68 applies it does so only with regard to something required for investigation; here the rice has no bearing on the case. The section applies where thing itself is evidence. The function of Police Magistrate is to find if an offence has been committed. This follows logically from section 66, as it deals primarily with documents. Section 70 applies to a place used for keeping stolen property. No order under section 70 can be made unless Police Magistrate has certain evidence before him.

A search warrant is permissable only when a thing cannot and will not be produced otherwise. Indian Criminal Procedure Code, section 96, is similar on this point.[1] The issue of a search warrant is a judicial act after a judicial inquiry. However large Police Magistrate's discretion may be, it can apply only within limits laid down by law. It is not a general search, because thing to be searched for has been specified. Police Magistrate must have minimum *prima facie* case prior to issue of warrant. Broker's acceptance of cheque is sufficient to constitute sale.

Keuneman (with him *N. E. Weerasooria*), for respondent.—Petitioner cheated respondent by not disclosing the fact that he was insolvent at time of making note. Hearsay evidence deals mainly with fact of petitioner's absence. Property in rice had passed to petitioner. Rice being perishable, respondent wants order for sale and to bring money into Court.

Petitioner was respondent's agent and criminally misappropriated goods given, viz., bags of rice. No formal denial that the place in Chalmers Granaries closed for two days. Alleged sale is on the 9th, hence document must necessarily be drawn up on the 9th. Correspondence conclusively shows respondent was still negotiating with M. S. W. Abdul Ally. If cheque was presented for payment at any time, sale would have been completed. Search warrant was asked for and given as step in prosecution as a whole. Rice is now being kept as security, until civil action is instituted and decided (*Sub-Inspector of Police v. Ram Menika*[2]). Magistrate's power of receiving sufficient evidence is discretionary. The orders were correctly made at stages when they were made. Where Police Magistrate has made no order subsequent to refusal, petitioner cannot come to Supreme Court. No question of revision arises.[3] *In re Application of Abdul Latiff* under section 148, certain evidence has been called and then respondent can fall back on section 68 or 70 (*a*) or (*c*).[4] Search warrant may be granted if Police Magistrate suspects somebody has done away with something (*Queen Empress v. Tirupati*[5]). Followed by Privy Council in *Clarke v. Chowdhury*[6].

June 21, 1932. AKBAR J.—

These two cases were argued together. In P. C. 39,029 the respondent who said he was a director of the firm of Messrs. Darley, Butler & Co., Ltd., stated on oath on April 22, 1932, that his firm imported rice on

[1] *15 Cal. 109.*
[2] *8 C. L. R. 98.*
[3] *19 N. L. R. 346.*
[4] *15 Calcutta 109.*
[5] *3 Madras 18 at p. 20.*
[6] *39 Calcutta 953.*

indent for other firms in Ceylon and that the petitioner indented 2,800 bags, value Rs. 22,540, which arrived on April 12, 1932. The petitioner handed the respondent "a promissory note on the 12th of April, 1932, on the usual 45 days' credit" and "bills of lading were handed to the accused to enable him to take possession". The respondent went on to say that he had learnt on April 21 that the petitioner had closed his business; that he had failed in his business and that he had disappeared. Further, his broker had searched for the petitioner and his whereabouts were not known. The respondent further gave it as his opinion that the petitioner "must have known on 12th April, 1932, that he was in this bad financial position and he had no business to take our rice or give this promissory note".

If the respondent's firm had known his position the respondent would not have delivered the rice. He claimed he had the right to stop delivery. He could not say where the bags were—they were all marked D. B. & Co., Ltd., N.R.M.N., Colombo. He moved for a search warrant on Nos. 115-118, Chalmers Granaries. His firm would guarantee any cost in connection with the removal of the rice on a search warrant. This was all the evidence led.

According to the evidence, it was quite clear that the transaction was one of sale and that the property in the rice had passed to the petitioner immediately the bills of lading were given over to the petitioner and the promissory note accepted by the respondent. The respondent claimed the right to stop delivery of the goods after the possession had passed to the buyer on a completed transaction of sale. The respondent claimed this right because he had learnt certain things on hearsay and his broker (who was not called) had failed to find the accused. On the date on which the respondent moved the Police Court for a search warrant the promissory note was not due for another 35 days. Because the respondent had learnt certain things from certain persons not called, he was of the opinion that the petitioner should have known on April 12 of his bad financial condition and the petitioner had no business to take the rice and give the promissory note. Upon this evidence the Police Magistrate immediately issued a search warrant to seize the bags of the rice with the marks D. B. & Co., Ltd., N.R.M.N. on the named premises and to remove them to the respondent's store, returnable on April 25, 1932. The search warrant was executed and 1,111 bags were found. On the returnable date the proctor for the petitioner moved that petitioner's property be returned to him as the warrant was issued illegally. The learned Police Magistrate refused this application, when the proctor for the respondent stated that he was satisfied with the return of the bags and did not want to prosecute the case. The petitioner then stated that he was applying to this Court for revision of the proceedings. I may add that the learned Police Magistrate did not state in his order the section under which he purported to act nor the offence for an investigation of which he thought the production of the bags of rice was necessary, but the clerk who drew up the search warrant has stated in the warrant that the offence disclosed was that of cheating and the warrant has been signed by the Police Magistrate on this footing.

Petitioner naturally complains that the warrant was illegally issued because the property had passed to him, he having cleared the rice after paying Customs charges and because there was no evidence to prove a charge of cheating, the statement recorded on this point being all hearsay and inadmissible. Further, the complainant had to lead evidence that the petitioner had the intention to cheat on April 12, and the respondent's opinion, however eminent the position of the respondent may be in commercial circles, was not worth the paper it was written on, in criminal proceedings. He had to place facts to satisfy the Court. I do not wish to say anything further on this aspect of the case, because there will no doubt be other developments arising from this motion for restoration of property the title to which had passed from the respondent except to mention two other matters. Counter-affidavits were put in by the respondent and his broker at the hearing of this application, which I have read as they were not objected to, but I still think no further facts have been disclosed to show that the charge of cheating has been made out. I may be wrong ; and I do not wish to prejudice the respondent further by giving my views on the further contention of the petitioner's counsel that the object of the respondent was not to charge the petitioner with any offence, but merely to exercise his right to stop delivery of goods which had already been delivered to the purchaser and the purchase price of which was not yet due according to the terms of the contract of sale and that the respondent had abused the process of a criminal Court instead of filing papers for a mandate of sequestration before judgment in a District Court and giving proper security to meet a possible claim of damages. I do not wish to prejudice the respondent as I have said because Mr. Keuneman's argument was that his client's intention was to prosecute the petitioner on a charge of cheating and not to recover property. If that was his client's intention he may still carry it out, for a charge of cheating in respect of goods of the value disclosed in this case is non-summary and non-compoundable. But the issue of the search warrant was clearly illegal at this stage of the case, if it was a case, for the reasons given by me. How a production of the bags in this case was going to help the complainant to prove his charge of cheating I cannot see at present. My order is that the issue of the search warrant on April 22, 1932, was illegal and the bags of rice will be restored to the petitioner on receipt of this order by the Police Magistrate with liberty to the respondent to proceed on with his charge of cheating if so advised before another Police Magistrate in spite of the admission of the proctor for the respondent on April 25, 1932, that he was satisfied with the return of the bags and that he did not want to prosecute the case.

P. C. 39,030. In this case the facts are slightly different. On April 22, 1932, the respondent deposed to the offence of criminal breach of trust by his agent, the petitioner. He definitely stated that the bags of rice were entrusted to the petitioner for storage until sale by the respondent. If this is true the title was in the respondent. The respondent then, it is true, went on to give hearsay evidence that the petitioner " had gone

broke and had decamped"—that is what he heard. He again relied on the allegation that his guarantee broker could not find the petitioner but the broker was not called to give evidence. In the affidavit of the petitioner before me he contended that there was a sale and he referred to a cheque given by him to the broker to which no reference was made by the respondent in his evidence, but which he now admits was received by his broker in his counter-affidavit. The respondent however stated in this affidavit that the broker had no authority to receive the cheque and that it was not accepted by him. It is also true that the petitioner referred to the fact now admitted that the petitioner had paid over Rs. 2,000 as the Customs duties, but according to the respondent this payment was part of the contract of storage and the petitioner had the right to recover this sum from the respondent. Whatever the truth may be, I think justice requires that the respondent should be given a chance of substantiating his charge of criminal breach of trust and that he should not be prejudiced in the meantime, because his counter-affidavit has disclosed certain further facts which are disputed by the petitioner. Even in this case the Police Magistrate issued the search warrant on hearsay evidence and the search warrant mentions the offence of cheating as the offence disclosed, whereas the offence if it is one is criminal breach of trust by an agent, which is a non-summary and non-compoundable offence.

When the search warrant was executed 1,282 bags were found instead of 1,400 bags cleared; so that if the charge can be made out 118 bags have been misappropriated. The issue of the search warrant, if the charge can be made out, has disclosed the extent of the misappropriation, if it is a misappropriation.

According to the local case of *In re Adbul Latif*[1] a Police Magistrate has wide powers under section 68 of the Criminal Procedure Code to issue a search warrant for the purpose of the investigation of an offence which has been disclosed *primâ facie* by legal evidence on record. The only difficulty I had was that the greater part of the evidence on record was inadmissible but the counter-affidavits which were not objected to fill the gaps to some extent if they are believed and I think that this case should be further investigated.

The Indian cases too on a similar section of the Criminal Procedure Code indicate that a Magistrate has large powers to issue search warrants in certain circumstances during the investigation of offences (see *Queen Empress v. Mahant*,[2] *In re Ahamed Mohamed*,[3] and the Privy Council case, *Clarke v. Chowdhury*[4]).

My order will be that this case will go back for inquiry before another Police Magistrate, provided that the respondent will take steps to proceed on with this case within 7 days of the receipt of the record in the Police Court. If he does so the rice will remain with the respondent with liberty to him to apply for a sale of the rice on the ground of deterioration of quality by public auction, the nett proceeds to be deposited in Court

[1] *19 N. L. R. 546.*
[2] *I. L. R., 13 Madras, p. 18.*
[3] *I. L. R., 15 Calcutta, p. 109.*
[4] *I. L. R., 39 Calcutta, p. 953.*

to the credit of the case and to abide the further orders of the Court. If the respondent does not take the necessary steps to continue this case within the time named by me the rice will be restored to the petitioner.

Sent back.