Present: Wood Renton J.

1911.

GUNEWARDENE *v.* PAKEER LEBBE.

743—P. C. Kandy, 27,173.

Charge—No formal charge—Search warrant not "warrant" within the meaning of s. 187 of the Criminal Procedure Code—Irregularity not cured by s. 425.

A formal charge is necessary in all cases in which the Criminal Procedure Code requires it, and section 425 does not cure any irregularity in that respect.

A search warrant is not a warrant within the meaning of section 187 (2) of the Criminal Procedure Code.

THE facts are set out in the judgment.

Gladwin Koch, for appellant.—There is no legal proof of possession by the accused of the cacao so as to throw on him the burden of explaining its presence. The house in which the cacao was found belongs to his mother, and is occupied by her jointly with the accused and others. (*3 N. L. R. 170, Koch's Reports 12, 2 Leader 107.*)

The cacao found in the house in question cannot reasonably be said to be stolen. Proof is not forthcoming that any cacao was stolen from complainant's estate, and general statements that thefts were of frequent occurrence on the estate is scarcely sufficient to sustain a charge like the present.

No charge has been framed against the accused. The entry "charge explained" has been held not to satisfy the requirements of section 187 of the Criminal Procedure Code. The accused was not brought before the Court on summons or warrant. (*4 N. L. R. 104, 4 A. C. R. 141, 1 S. C. D. 84, 2 S. C. D. 53, 2 Leader 119.*)

Bawa, for respondent.—[Wood Renton J.—I only desire to hear you on the objection that no charge has been framed.] There is proof here that a search warrant was issued, and as section 17 (2) of the Cacao Ordinance empowers a peace officer to arrest any person in possession of wet cacao suspected to be stolen, it is urged that a special quality is given to search warrants by this Ordinance, and the accused can be said to have been brought before Court on a warrant as contemplated by section 187 (2).

G. Koch, in reply.—A search warrant does not contain a statement of the particulars of the offence, and would not sufficiently apprise the accused of the precise accusation against him.

Cur. adv. vult.

1911

November 14, 1911. WOOD RENTON J.—

Gunewardene v. Pakeer Lebbe

The accused-appellant was charged in the Police Court of Kandy with having been in possession or charge of wet cacao suspected to have been stolen, in contravention of the provisions of section 17 (1) of " The Cacao Thefts Prevention Ordinance, 1904. " The learned Police Magistrate convicted him, and sentenced him to one month's rigorous imprisonment. Two main points were pressed upon me by Mr. Koch in support of the appeal: in the first place, that no charge had been framed against the appellant; and in the next place, that the cacao in question had not been found in his exclusive possession. The latter point is, in my opinion, clearly bad on the evidence. But I think that the appellant must succeed on the former. With the assistance of counsel on both sides I have carefully examined the record, and I cannot find that the accused-appellant was brought before the Court either by summons or by warrant. Unless, therefore, there is some provision in " The Cacao Thefts Prevention Ordinance, 1904, " which dispenses with the necessity for a charge, or which otherwise meets the point that I am dealing with, the provisions of section 187 (1) of the Criminal Procedure Code apply. A formal charge is necessary, and its absence, in accordance with well-known and recognized decisions, will be fatal to the proceedings. As I have already said, the proceedings commenced without summons or warrant. The conductor of the estate from which the cacao is suspected to have been stolen appeared before the Court and gave information against the accused-appellant and two others, with whose cases we are not now concerned. The learned Police Magistrate thereupon issued a search warrant, and the peace officer who executed that warrant produced the accused-appellant before the Court. The search warrant is clearly not in itself a warrant within the meaning of section 187 (2) of the Criminal Procedure Code. But it was argued by Mr. Bawa, the respondent's counsel, that inasmuch as under section 17 (2) of the Ordinance of 1904 a police officer or a peace officer who finds any person in possession or charge of wet cacao which he suspects to have been stolen may bring such person before a Police Magistrate, the effect of this enactment is to add a special statutory quality to any search warrant which has formed the foundation of the police officer's or the peace officer's inquiries There would, I think, have been considerable force in this argument if section 17 (2) of the Ordinance of 1904 had said anything about search warrants. It does not, however, do so. It authorizes any police officer or peace officer who finds any persons in possession or charge of wet cacao to bring him before a Police Magistrate forthwith. The power which it creates in no way depends upon the issue or the existence of a search warrant at all. It would, therefore, I think, not be right to hold that by virtue of the provisions of the sub-section just mentioned a search warrant becomes a warrant within the meaning of section 187 (2) of the Criminal Procedure Code.

1911.

WOOD RENTON J.

Gunewardene v. Pakeer Lebbe

It appears from the record that the Police Magistrate told the accused-appellant what he was charged with. In the journal entries for October 9, 1911, I find an entry in these terms: "Charge under section 17 (1) of Ordinance No. 8 of 1904 explained." That, however, is insufficient. A formal charge must be framed in cases where the Criminal Procedure Code requires this to be done, and section 425 of that Code will not, in my opinion, cure any irregularity in this respect. The conviction and the sentence on the accused-appellant must be set aside. I have seriously considered the question whether the case ought not to be sent back for a new trial, since I am not favourably impressed with the conduct of the accused-appellant on the merits. But after having carefully thought the matter over, I agree with the point put by Mr. Koch at the close of his argument for the appellant. This is a statutory offence. The statute extends the old law by making the mere possession of wet cacao, which is reasonably suspected to have been stolen, *primâ facie* evidence of the guilt of the accused. In such cases I think the prosecution may fairly be called upon to prove its charge strictly in the first instance, and as this has not been done in the present case I direct the acquittal of the accused-appellant.

Set aside.