

1941

Present : Howard C.J.

## SITHAMPARAMPILLAI v. MURUGESU

824—M. C. Point Pedro, 20,480.

*Warrant—No endorsement regarding security bond—Warrant defective—Escape from custody of Fiscal's process server no offence—Penal Code, s. 219.*

Where a warrant issued, under section 62 (1) (a) of the Criminal Procedure Code against an accused who was evading service of summons, did not contain an endorsement with regard to the execution of a bond as required by section 51 of the Criminal Procedure Code,—

*Held*, that the warrant was defective and that a public servant executing it could not be said to have acted in discharge of his public functions, nor was the person arrested in lawful custody.

A Fiscal's Process Server is a public servant within the meaning of section 19 of the Penal Code.

**A** PPEAL from a conviction by the Magistrate of Point Pedro.

*E. D. Cosmé* (with him *K. C. Nadarajah*), for the accused, appellant.

*H. W. Thambiah* for the complainant, respondent.

*Cur. adv. vult.*

January 28, 1941. HOWARD C.J.—

This is an appeal against the decision of the Magistrate of Point Pedro convicting the accused of charges under sections 219 and 367 of the Ceylon Penal Code and sentencing him to six months' rigorous imprisonment on each charge, the sentences to run concurrently. Proceedings were instituted against the appellant under section 148 (b) of the Criminal Procedure Code. A written report was made to the Magistrate by one Kandappu Sithamparappillai, a Fiscal's Process Server as a public servant. Counsel for the appellant contends that the proceedings are vitiated *ab initio* inasmuch as a Fiscal's Process Server is not a "public servant" within the meaning of this term in section 19 of the Penal Code. In my opinion there is no substance in this contention. A Fiscal's Process Server is clearly within the ambit of the fifth category of descriptions specified in section 19 of the Penal Code and was moreover treated as such in the case of *Wijetunge v. Podi Sinno*<sup>1</sup> and *Goonetilleke v. Atapattu*<sup>2</sup>.

It is also argued that the conviction of the appellant on the charge of resisting his lawful apprehension under section 219 of the Penal Code cannot be sustained because the warrant on which his apprehension was sought is defective. It is alleged that it is defective for the following reasons :—

(a) because it was not in the prescribed form and hence contravened section 50 of the Criminal Code ;

(b) because it did not contain the endorsement specified in section 51 (1) of the Criminal Procedure Code.

With regard to (a) Counsel for the appellant argued that the warrant was issued under section 62 (1) (b) of the Criminal Procedure Code and

<sup>1</sup> 3 *Brown's Reps.* 57.

<sup>2</sup> 6 *C. L. R.* 63.



should have, therefore, been in Form No. 3 in the Second Schedule. The warrant issued in this case does not contain the words "although it has now been proved to me upon oath (or affirmation) that the said summons has been duly served upon him". Instead of these words it contains the words "and it has been proved to me that he is evading service of the summons". I am of opinion that the warrant was issued under paragraph (a) and not paragraph (b) of section 62 (1). No special form has been prescribed for a warrant issued under this paragraph. The words in the warrant were applicable to the special circumstances in which it was issued and in employing the language he did the Magistrate was exercising the powers vested in him by section 442 of the Code. There is, therefore, no substance in the argument that for this reason the warrant was defective.

(b) now requires consideration. The warrant did not contain the endorsement with regard to the execution of a bond. It has been argued by Counsel for the respondent that section 51 does not apply to a warrant issued under section 62 (1) (a). I do not consider that any such limitation can be placed on the operation of section 51. Does, however, the absence of the endorsement so vitiate the validity of the warrant so as to make an arrest effected thereby unlawful? Counsel for the appellant on the authority of *Wills v. Sholay Kangany*<sup>1</sup> and *Deputy Fiscal, Kegalla v. Tikiri Banda*<sup>2</sup> contends that it does. In *Wills v. Sholay Kangany (supra)* it appeared that the Magistrate in directing the issue of a warrant of arrest acted on a printed form on the back of the complaint containing some stereotyped statements usually required to be sworn to for the purpose of obtaining a warrant. In condemning this procedure de Sampayo J. stated that the issue of a warrant is a serious matter and the Magistrate should exercise his own independent judgment on the facts before he does this judicial act. In every case it is the duty of the Magistrate to see that the complainant or other person when giving what purports to be oral evidence, gives it consciously and with a due sense of his own responsibility and that he not merely adopts general statements already printed and furnished to him by the proctor. In *Deputy Fiscal, Kegalla v. Tikiri Banda (supra)* it was held that a warrant, which is issued for the arrest of a judgment-debtor in terms of section 219 (2) of the Civil Procedure Code and which is not signed by the Judge, is void. A person who escapes from the custody of an officer purporting to execute such a warrant is not guilty of an offence under section 220A of the Penal Code. In the course of his judgment, Jayewardene A.J. stated as follows:—

"The judge must see that the warrant as issued contains on the face of it all the essential particulars. The persons against whom the warrant is sought to be executed is entitled to see the warrant for the purpose of satisfying himself as to these particulars, for example, as to the amount, or that the person executing the warrant against him was legally authorised so to do . . . . Under the Criminal Procedure Code, the person executed a warrant of arrest must notify the substance of the warrant to the person arrested, and if so required,

<sup>1</sup> 18 N. L. R. 443.

<sup>2</sup> 29 N. L. R. 443.



show him the warrant or a copy thereof signed by the person issuing the same . . . . When a warrant is *ex facie* defective, the public servant executing it cannot be said to be acting in the discharge of his public function, nor is the person arrested in lawful custody.”

It will be observed that the direction in section 51 with regard to the endorsement on the warrant is mandatory so far as bailable offences are concerned whereas in the corresponding section of the Indian Criminal Procedure Code it is merely permissive. The provision was no doubt inserted in the Ceylon Code so that the warrant should bring to the notice of the person arrested his right to release from custody on furnishing bail. The endorsement was, in these circumstances, an essential particular. As it was missing, the warrant was *ex facie* defective and in executing it the Fiscal's Process Server cannot be said to be acting in the discharge of his public function. Nor was the appellant in lawful custody. The conviction and sentence of the appellant under section 219 are therefore quashed. The conviction and sentence under section 367 are affirmed.

*Varied.*

