

Present: Jayewardene A.J.

1928.

DEPUTY FISCAL, KEGALLA v. TIKIRI BANDA.

316—P. C. Kegalla, 8,930.

*Warrant—Arrest of judgment-debtor—Not signed by Judge—Validity—
Escape from legal custody—Penal Code, s. 220.*

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.

A PPEAL from a conviction by the Police Magistrate of Kegalla.

Navaratnam (with *de Zylva*), for accused, appellant.

Ferdinands, for complainant, respondent.

Schokman, C.C., for Attorney-General, as *amicus curiae*.

July 11, 1928. JAYEWARDENE A.J.—

This case was first argued before me on June 15, when there was no appearance for the respondent, and I desired that notice be issued to the Attorney-General. Counsel appeared for the respondent at the second hearing, and I heard Crown Counsel on behalf of the Attorney-General as *amicus curiae*.

The accused was charged with escaping from the custody of a Fiscal's poen in which he was lawfully detained, having been arrested under a warrant in civil case No. 6,856 of the District Court of Kegalla, an offence under section 220A of the Penal Code. The accused was convicted and sentenced to pay a fine of Rs. 100.

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The facts of the arrest and escape were not seriously disputed. The only question for decision is whether the warrant on which he was arrested was good in law. The warrant was issued in a civil case—D. C. Kegalla, 6,856, under section 219 (2) of the Civil Procedure Code, which empowers a Court to issue a warrant for the arrest of a judgment-debtor who fails to comply with an order made under that section for his attendance. The warrant was issued in accordance with an order of the Court. It did not bear the signature of the District Judge, but at the foot were the words "By order of Court, (signature) Secretary."

It is contended that the warrant was invalid inasmuch as it was not signed by the Judge, and that there was no legal arrest.

Chapter XVII of the Civil Procedure Code contains provisions in regard to witnesses and their attendance. The Court, in the first instance, would issue a summons under section 121. The summons may be signed by the Secretary, according to form No. 32 in schedule II. If the witness fails to comply with the summons, the Court may order him to be arrested and brought before the Court, under section 137. A form of warrant of arrest against a witness for disobedience to summons is given in schedule II. It is form No. 39. The warrant must, according to that form, be signed by the Judge.

So, again, the warrant for the arrest of a judgment-debtor under section 305 has to be signed by the Judge, as shown in form No. 60.

The summons to a person accused of contempt of Court under section 793 must be signed by the Judge, and so must the warrant under section 794 (forms 132 and 133).

It would thus appear that a warrant must, under the Civil Procedure Code, be signed in every case by the Judge himself. An enactment giving a power of committal for non-payment of a debt is a highly penal one, and must be strictly construed. (*Costa v. Perera*.¹) Lord Esher remarked in *Scott v. Morley*²: "If you treat the Debtors Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly. It is a highly penal Act, affecting the liberty of the subject."

In *Wills v. Sholay Kangany*,³ de Sampayo J. commented on the impropriety of issuing warrants on insufficient material. He observed: "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." His observations apply equally to the issue of warrants in civil cases. The Judge must see that the warrant as issued contains on the face of it all the essential particulars. The person against whom the warrant is sought to be executed is entitled to see the warrant for the purpose of satisfying

¹ (1913) 17 N. L. R. 319.² (1887) 20 Q. B. D. 120, 126.³ (1915) 18 N. L. R. 443.

himself as to these particulars, for example, as to the amount, or that the person executing the warrant against him was legally authorized so to do. The Court should not delegate this function to the Secretary or to any other person.

In *Sheik Nasur v. Emperor*,¹ where the returnable date on the warrant was July 26, but it had been extended to August 8, and that date did not appear on the warrant, it was held that the warrant was bad on the face of it and failed to show that it could be executed at the time when the resistance was offered.

In the present case it is to be noted that the warrant was returnable on July 14. It bears an endorsement: "11th August, 1927—extended and reissued for 8 Sept. 1927". This endorsement is merely signed by the Secretary, and does not even contain the words: "By order of Court". The accused was arrested on August 17. This endorsement was, I am of opinion, both informal and irregular.

In *Hendrick v. Fonseka*,² the accused escaped, when he was arrested on a civil warrant endorsed by the Deputy Fiscal of Colombo, to the Deputy Fiscal of Kalutara, by means of a rubber stamp, and it was held that the mere use of a rubber stamp in a proceeding which affected the liberty of the subject did not constitute an endorsement and the accused was acquitted. A provision requiring a Judge's signature must be strictly complied with, and even a Judge's initials cannot be regarded as his signature. Where in foreclosure proceedings a notice had to bear the seal and official signature of the Judge, under the Indian Regulation 17 of 1806, section 8, in order to render the conditional sale absolute, but the notice only bore the initials of the Judge, the Privy Council held that it was not a compliance with the Regulation (*Madho Persad v. Gajudhar*,³ followed in *Kubra Bibi v. Wajid Khan*⁴).

The rule as to the proper observance of formalities applies whether the warrant of arrest is issued in a civil or a criminal case.

Under the Criminal Procedure Code, the person executing a warrant of arrest must notify the substance of the warrant to the person arrested, and, if so required, show him the warrant or a copy thereof signed by the person issuing the same. In *Empress v. Amar Nath*,⁵ it was observed that, this being the law in respect of a supposed criminal, it followed, *a fortiori*, that an arrest under civil process must be governed by a similar restrictive provision.

The interpretation of all statutes must be favourable to personal liberty. (*Hull Dock Co. v. Brown*.⁶) A warrant issued on an order which is unlawful (*Telesinghe v. Anthony*⁷) or issued *ultra vires* (*Sapapathipillai v. Alagaratnam*⁸) cannot form the basis of a criminal

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Tikiri Banda¹ (1909) 37 Cal. 122.² (1917) 4 C. W. R. 122.³ (1884) 11 Cal. 111.⁴ (1893) 16 All. 59.⁵ (1883) 5 All. 318.⁶ (1831) 2 B. & Ad. 59.⁷ (1893) 2 S. C. R. 129.⁸ (1922) 24 N.-L. R. 56.

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prosecution. When a warrant is *ex facie* defective, the public servant executing it cannot be said to be acting in the discharge of a public function, nor is the person arrested in lawful custody (*Menikrala v. Kiribanda* ¹ and *Silva v. Pedrishamy* ²).

Where a warrant of arrest is not signed as required by law, a public servant is not acting under lawful orders, in the manner authorized by law, and the person arrested is not being lawfully detained. (*Abdul Gafur v. Empress* ³ and *Mahajan Sheik v. Emperor*.⁴)

To sustain a conviction, the officer executing the warrant must be clothed with all the authority necessary to entitle him to make a lawful arrest. (*Rex v. Levesque*.⁵)

In my opinion the absence of the District Judge's signature made the warrant void, and there was consequently no legal arrest or detention and no offence has been committed.

I set aside the conviction, and acquit the accused.

Set aside.
