1930

Present : **Akbar J.**

BARTHOLOMEUSZ *v.* MENDIS.

751—*M. C. Kandy*, 4,370.

Search warrant—Unlawful gaming—Information upon which the warrant is issued—Affidavit unsigned—Statement of witness not read over—Irregularity—Gaming Ordinance, No. 17 *of* 1889, *s.* 7.

Where a search warrant was issued under section 7 of the Gaming Ordinance upon the affidavit of a prosecuting Inspector, which was not signed by him, and the evidence of a witness, whose statement was not signed or read over and explained to him,—

Held, that the search warrant was irregular.

APPEAL from a conviction by the Municipal Magistrate of Kandy. *Gratiaen*, for accused, appellant.

November 28, 1930. AKBAR J.—

This case was first argued on September 28, but during the course of the argument it became apparent to me that I should send for the connected case, viz., M. C. Kandy, No. 4,308. Even then the case had to be postponed because certain other papers had to be called for.

In the case now in appeal, the accused was charged with permitting premises known as the New Central Hotel to be used as a common gaming place in breach of section 5 (*b*) of Ordinance No. 17 of 1889. As Mr. Gratiaen points out, this charge is defective, because under that

sub-section the charge must state that the accused permitted the place to be used by a definite person as a common gambling place. The charge does not mention who this other person is who was keeping or using the premises as a common gaming place. But this is not the only objection that has been pointed out in this case. These premises were searched on a search warrant issued under section 7 of the Gaming Ordinance, No. 17 of 1889. The case had to be postponed on the second occasion for the papers which led to the issue of a search warrant. The proceedings were as follows :—

Mr. Bartholomeusz, Inspector of Police, Kandy, purported to swear an affidavit, stating on oath that gaming was carried on in these premises. But there is a serious defect in the so-called affidavit, because, although it bears the signature of the Magistrate, Mr. Bartholomeusz has forgotten to sign it. Therefore, the information conveyed by Mr. Bartholomeusz was not written information on oath as required by section 7—see in particular the remarks of Mr. Justice Lyall Grant in the case of *Parsons v. Kandiah* [1] and which were approved by my brother Drieberg J. in the case of *Sub-Inspector of Police v. Jacolis Perics* [2]. Apparently a witness was produced before the Magistrate at the same time by the Inspector ; his name appears to be, so far as I can read the record. Don Pedrick Wickremesinghe Wadumestri ; the statement purports to be evidence because I see the witness was affirmed, but although there is the signature of the Magistrate at the bottom of the statement there is another signature which does not seem to be the signature of this witness. Even, suppose it is signed by the witness, as recorded, the statement does not fulfil the requirements pointed out by Mr. Justice Drieberg in the case last quoted. In that case too a man called Charlie was examined on affirmation and his statement was recorded by the Magistrate ; Charlie, put his mark to the record and that was attested by the Magistrate, but Mr. Justice Drieberg, following the 29 N. L. R. case, came to the conclusion that inasmuch as this information given by the informant was not read over to him and signed by him, and as there was no record that this was done, the so-called statement must be ruled out and that it could not be regarded as written information. So that there was no material before the Magistrate to enable him to issue a warrant. As Bertram C.J. said in the case of *Police Sergeant, Tangalla v. Porthenis*[1], the result of issuing a search warrant is so drastic under the Ordinance that the Supreme Court came to the conclusion that special care should be taken to see that all conditions attaching to the issue of a warrant were fully complied with. Any slackness displayed by a Magistrate in the procedure preceding the issue of a search warrant must therefore be given full effect to in considering whether the warrant was rightly issued.

It is quite clear to my mind that in this case the conviction can only be justified on the presumptions created by section 10 of the Ordinance when the premises are entered into upon a search warrant properly issued. As I hold that the search warrant was wrongly issued, these presumptions cannot be drawn. It is true that in the connected case 11 persons were charged for gmbling on the occasion in question and that they all pleaded "guilty", but that does not affect the right of the accused in this case to question the validity of the search warrant on which these drastic presumptions are allowed to be drawn by section 10 of the Gaming Ordinance. The conclusion I have come to therefore is that this conviction is wrong and must be set aside. I cannot understand how the Magistrate came to ignore the simple provisions required by the law as regards the information which he must have, before a

[1] 29 *N. L. R.* 94. [2] 30 *N. L. R.* 509. [1] 22 *N. L. R.* 163.

warrant is issued authorizing Police Officers to enter a private house and search the premises.

The conviction is set aside and the accused is acquitted.

Set aside.