1938 *Present :* **de Kretser J.**

THURAIRATNAM *v.* MOHIDEEN PICHAI.

144—P. C. Kalmunai, 22,360.

Search warrant—Affidavit by Excise Inspector—Credible information—Magistrate's authority to issue search warrant—Ordinance No. 17 of 1929. s. 73 (1)—Excise Ordinance, No. 8 of 1912, s. 35.

Where an Excise Inspector swore an affidavit that he had received credible information that a person was in unlawful possession of ganja and that he had verified the information and found it to be true,—

Held, that the affidavit contained sufficient material for the issue of a search warrant under section 73 (1) of Ordinance No. 17 of 1929.

Under section 73 (1) of Ordinance No. 17 of 1929 the Magistrate must be satisfied by information on oath that there is reason to suspect ; under section 35 of the Excise Ordinance he must have reason to believe after inquiry.

In both cases the information should furnish facts which should lead the Magistrate to find that a *prima facie* case exists for the issue of a search warrant.

[1] *18 N. L. R. 289.* [2] *1 Broome 75.*

APPEAL from an acquittal by the Police Magistrate of Kalmunai.

E. H. T. Gunasekera, C. C., for complainant, appellant.

C. T. Olagasegram, for accused, respondent.

May 26, 1938. DE KRETSER J.—

An Excise Inspector swore an affidavit that he had received credible information that the man who is now the first accused was in possession of Ceylon-grown ganja in his house, and that he had verified the information and found it to be true.

He moved for and obtained a search warrant, which was made returnable on October 18, 1937.

The warrant was on a printed form and stated as follows :—

"Whereas information has been laid before me, and on due inquiry thereon I have been led to believe, &c."

Armed with this warrant the Inspector went to the house of the person named in the warrant on October 11, 1937, and found him at home. He demanded if the Inspector had a search warrant and the Inspector showed him the warrant and explained its purport. The accused told him he could search but if he failed to find ganja he would not let the Inspector get out.

Accordingly the Inspector's party began to search, the accused himself opening a box. Whilst a headman was searching this box the accused struck the headman's hand and asked the party to "clear out", and when the Inspector did not go the accused struck at him and later at an Excise guard who came up. The Excise party then attempted to search the accused's son's house and were resisted.

The Inspector then charged four persons with obstructing him, a public servant, in the discharge of his duties, and with assault and criminal force, the charges being laid under sections 183, 186, and 344 of the Penal Code.

The learned Magistrate acquitted the accused at the conclusion of the Excise Inspector's evidence-in-chief on the ground that the search warrant had been irregularly issued, that the entry of the son's boutique was illegal, and there was a misjoinder of charges.

The Attorney-General appeals from the acquittal of the first accused, *i.e.*, the person against whom the search warrant had been issued.

The question of misjoinder need not be considered seriously and was hardly referred to during the argument. The Magistrate seems to have forgotten that he was responsible for the framing of the charges, and if he found that he had made a mistake the remedy was quite simple.

The illegality of the entry into the son's boutique is not questioned. There remains only the case of the first accused.

The Magistrate thought that before the search warrant was issued the Magistrate who did issue it should have examined the person who gave information to the Inspector. The Inspector says he had the informant ready but the Magistrate did not call for him. The Magistrate says that the Inspector grossly failed in his duty because he did not request the Magistrate to record that evidence. I see no justification for this

stricture. A prosecuting officer may suggest to a Magistrate that certain evidence is desirable but he is under no obligation to instruct the Magistrate as to his duty and it is scarcely fair to visit the omission of the Magistrate on the Inspector.

Crown Counsel argues that the authorities relied on by the Magistrate do not apply as the Excise Inspector was acting under Ordinance No. 17 of 1929, which does not require a Magistrate to believe that an offence has been committed before he issues a search warrant but allows him to do so on receiving information which raises a suspicion in his mind that an offence has been committed, whereas in the case of *Dewasundera v. Sinnathane* [1], on which the Magistrate relies, the search warrant was issued under section 35 of the Excise Ordinance, No. 8 of 1912, which requires that the Magistrate should have reason to believe that an offence has been committed before he issues a search warrant. Counsel for the accused admits the distinction but contends that in both cases the Magistrate should first have information before him in a form required by law and sufficient to justify his suspicion or belief.

I am not convinced that there is much substance in the argument based on the difference in phraseology and find it difficult to believe that the Legislature intended to authorize the issue of a search warrant more easily in the one case than in the other. In both cases the information should furnish facts which lead the Magistrate to find that a *prima facie* case exists for the issue of a warrant. Under section 73 (1) of the Ordinance No. 17 of 1929 he must be satisfied by information on *oath* that there is *reason* to suspect. Under section 35 of the Excise Ordinance he must have *reason* to believe after such inquiry as he thinks necessary. In the former Ordinance he acts upon information on oath : in the latter upon information which need not be on oath and after such inquiry as he thinks necessary. The former Ordinance having prescribed that the information should be on oath does not insist on further inquiry for the simple reason that at an inquiry the information will be given on oath. Any evidence on oath must comply with the rules of evidence. The important point to remember is that in both cases it is the Magistrate who has to be satisfied, and while one may condemn a Magistrate who is too easily satisfied I fail to see how it can be said that he was not satisfied and that the issue of the search warrant was illegal, so illegal as to make it of no effect. In the case of *Dewasundera v. Sinnathane* (*supra*) Akbar J. emphasized what the Magistrate ought to have done but he did not proceed to acquit the accused purely on the ground of the search warrant being illegal. He went on to consider other matters and ended by acquitting the accused "in the circumstances". The case is reported only as indicating what a Magistrate should do and not as an authority for the proposition that the obstruction was justified because the warrant was illegally issued.

The case of *Goonesekera v. Appuhamy* [2], relied upon by the Magistrate does not deal with the case of a search warrant and the facts of that case are quite different.

All the Inspector had to prove was that he was acting in the lawful discharge of his duty and he did that when he proved that a Magistrate,

[1] *31 N. L. R. 493.* [2] *37 N. L. R. 11.*

the authority constituted by the Ordinance, issued a search warrant under which he was justified in acting as he did. It would be an extraordinary situation if an Excise Inspector had to instruct a Magistrate as to what he should do or if he were to refuse to execute a search warrant because he believed it ought not to have been issued. It would also be strange if an accused person who knew nothing of the alleged defects could obstruct a public officer with criminal intent and then justify what he did by claiming to be acting in the exercise of lawful rights.

Undoubtedly the subject must be protected against invasion of his house unlawfully, and clearly Inspectors and Magistrates must not be encouraged to act carelessly or arbitrarily but, equally, high-handed opposition to pubic officers must not be condoned and technicality so stretched as to enable offenders to escape punishment.

Now, in the case before us the Magistrate did have information upon oath and that information might raise a suspicion in his mind sufficient to justify him in issuing a search warrant. If the Excise Inspector only conveyed what another had told him the Magistrate would properly satisty himself about that information but here the Inspector went on to state that he had verified the information and found it to be true. That is the same as the Inspector speaking to facts within his own knowledge. He swore to these facts. Why should the Magistrate not be satisfied ? This bit of evidence has been overlooked by the Magistrate. It was overlooked by Counsel in this case, possibly because the Magistrate did not send up the proceedings on which the search warrant had been issued. They had to be called for.

The very foundation of the acquittal therefore fails. But there is more. If the search warrant had been illegally issued and if resistance to it would be justified on that ground then perhaps the acquittal might stand, but the evidence is that the accused did not resist search but invited it coupling it with a threat. Having then accepted the legality of the search he should at least explain what made him change his mind and why without any intimation of a change of mind he should assault the searching party.

The trial was abruptly stopped and it is undesirable to say more as the case must go back for the trial to proceed.

The acquittal of the first acused is set aside and the Magistrate directed to proceed with the trial.

Sent back.