Saparamadu V. Joseph

200/1965

Present:T. S. Fernando, J

P. D. M. SAPARAMADU, Petitioner, and T. C. JOSEPH (Inspector of Police), Respondent

S. C. 39 of 1965—Application for Revision in terms of section 356 of the Criminal Procedure Code in M. C. Kandy, 37414

Unlawful gaming—Trial before same Magistrate who issued the search warrant—Legality—Bias—Gaming Ordinance (Cap. 46), ss. 2, 5(1), 7, 8.

In a prosecution for unlawful gaming (section 2 of Gaming Ordinance), a Magistrate is not disqualified, on the ground of bias, from hearing the case merely because he has earlier issued a search warrant in terms of section 5(1) of the Gaming Ordinance. Accordingly, the accused is not entitled to succeed in an objection based on that ground of bias to a case being tried by the Magistrate who has issued the search warrant.

APPLICATION to revise an order of the Magistrate's Court, Kandy.

H. V. Perera, Q.C., with A. C. M. Uvais and Nimal Senanayake, for the accused-petitioner.

V. A. S. Pullenayegum, Crown Counsel, with R. Abeysuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 9, 1965. T. S. FERNANDO, J.—

This is an application invoking the power of this Court under section 356 of the Criminal Procedure Code to reverse an order made in a criminal case awaiting trial by the Magistrate of Kandy.

On the 18th April 1964 the Magistrate, acting in terms of section 5 (1) of the Gaming Ordinance of 1889 (Cap. 46), issued a warrant authorizing entry into premises No. 34, Sangaraja Mawata, Kandy, the search thereof and the exercise by the warrant-holder of all the powers conferred on the latter by the said section of the Ordinance. An entry into the afore-mentioned premises was accordingly made by a party of police officers led by an Inspector of Police, and it would appear that the accused-petitioner and several others were detained and taken before the Magistrate to be dealt with according to law. Case No. 37414 of the Kandy Magistrate's Court was thereafter instituted charging the accused-petitioner with committing the offence of unlawful gaming punishable under section 2 of the Ordinance.

Before the case could be tried, counsel for the accused took the preliminary objection that it should not be tried before the Magistrate for the reasons stated hereunder:—

(1) The Magistrate had issued the search warrant in question, and that it would be necessary for the defence to challenge the validity of that warrant. The issuing of the warrant was an executive act and was done by the Magistrate in an executive capacity, and therefore the same Magistrate should not judicially consider its validity or propriety.

(2) It may be necessary for the defence to call this Magistrate as a witness to show the circumstances in which the warrant came to be issued.

On behalf of the accused, it was expressly stated in the Magistrate's Court that no suggestion was being made that the Magistrate entertains any personal bias in the case.

These two objections appear to be an anticipatory echo of the reasons stated by Chagla J. in the Indian case of *Emperor v. Valli Mohammad Sheikh Mohammad* where the Bombay High Court considered a similar question arising in respect of a search warrant issued in terms of the Bombay Prevention of Gambling Act (4 (iv) of 1887), sections 5 and 6. Said Chagla J.:—"It seems to us wrong in

principle that the Magistrate who issues the warrant under section 6 should be the same judicial authority who should try the accused who has the right to challenge the propriety of that very warrant .... We agree that section 556 (of the Criminal Procedure Code of India) which disqualifies a Magistrate who is personally interested trying a case has no application, because the fact of issuing the warrant does not give any personal interest to the Magistrate in the case which he is trying. But a more important and a more fundamental legal principle is involved. It is always open to the accused to challenge the validity or the propriety of the warrant issued by the Magistrate in a case tried under the Bombay Prevention of Gambling Act, and it is entirely wrong that the same person who in his executive capacity issues the warrant should judicially consider its validity or propriety. It has also got to be remembered that the accused has the right to call the Magistrate who issues the warrant as a witness on his behalf, and therefore it is not right that the accused should be put to the difficulty of applying for a transfer of the case to some other Court in the event of his deciding to call the Magistrate as a witness."

The learned Magistrate did not consider that this decision of the Bombay High Court was applicable here, and I think that he was right in that view. I cannot see what reason there is for an accused person to call as a witness at the trial the Magistrate who issued the search warrant. As Bertram C. J. observed in *Manukulasuriya v. Merasha* [(1922) 24 N. L. R. at p. 34.], the proceedings for the issue of the warrant ought to be before the defence at the trial so that they may be able to raise any necessary points against its validity. The record of the proceedings speaks for itself; there is nothing that the Magistrate can say to supplement it or interpret anything stated therein. If at any stage that record requires to be produced at the trial such production does not necessitate the calling of the Magistrate himself as a witness. Mr. Perera himself could not advance any reason or indicate any circumstance in which it would become imperative for the Magistrate who issued the search warrant being called as a witness at the trial.

In regard to the other reason indicated in the judgment of the Bombay case, whatever might be the position under the Bombay Prevention of Gambling Act where even a Superintendent of Police has been empowered to issue a search warrant under the Act, on a correct interpretation of the power of a Magistrate under section 5 of the Gaming Ordinance, I am satisfied that our Magistrates act not in any executive capacity but in their judicial capacity. Mr. Perera did not appear to me to press seriously the contention that a Magistrate in issuing a search warrant under our Ordinance acts in an executive capacity. Therefore, it seems to me, with due respect to the judges who decided the Bombay case upon which the accused relied, that the reasons given therein for the order eventually made are untenable.

Mr. Perera, however, in the course of his argument before me in supporting the objection to the case being tried by the very Magistrate who has issued the search warrant, formulated a ground of objection on the following lines: While conceding that the concluding words of section 5 (1) of the Gaming Ordinance made it plain that a trial before the Magistrate who had himself issued the search warrant in a particular case is not illegal, he contended that, where it is competent to invite a person to draw inferences from certain facts, it was contrary to principle that the person who can be so invited is the very person who has already reached an inference from those same facts. It is undoubtedly correct to say that, notwithstanding that a search warrant under section 5 has issued after a Magistrate has had good reason to believe that a specified place is kept or used as a common gaming place, it is open to that same Magistrate at the trial which follows action taken on the search warrant to go back upon the belief he had reached at the stage of the issue of the warrant. The question is one of drawing inferences from facts and therefore inferences could be drawn not only by a Magistrate at a trial but also, as our law reports show, even by this Court on appeal. Bertram C. J. did state in the case of *Manukulasuriya v. Merasha* (supra), that in all cases under the Gaming Ordinance, the first step to ascertain is, whether the search warrant which initiated the proceedings has been validly issued. If it has been validly issued, then section 7 creates a very strong

presumption, and it is for the defence, if it can, to rebut that presumption. If it transpires that the warrant was not validly issued, then the case must be examined on the facts apart from the presumption. I agree, however, with the argument of learned Crown Counsel that section 7 of the Ordinance which creates the presumption does not alter the burden of proving the charge which still remains on the prosecution, but that in discharging that burden the prosecution is entitled to invoke the statutory presumption. I find difficulty in agreeing with the observations of Gratiaen J. in *William v. Weerakoon* [(1951) 53 N. L. R. 141] that before a Court can decide that the presumption created by section 7 applied the preliminary proceedings leading up to the issue of the warrant should also have been produced and scrutinised or that there was any obligation on the prosecution to lead such evidence as was sufficient to bring the presumption, if relied on, into operation. I am inclined to adopt the reasoning on this point of Beaumont C. J. in the Indian case of *Vallibhai v. Emperor* [(1933) A. T. R. (Bom.) 79.] who stated that "there is a presumption under section 114, Illustration (e) of the Evidence Act which enables us to presume that the officer issuing the warrant has performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence on the matter." Again, with much respect, I experience no little difficulty in following Gratiaen J. when he observed in the case already referred to above that he did not regard it as legitimate for a Court to assume that the search warrant has been regularly issued upon proper material, and to proceed from a presumption of regularity to apply the further statutory presumptions which the Ordinance creates under sections 7 and 8.

The point pursued by Mr. Perera was that, where the Magistrate who issued the warrant and the Magistrate who hears the trial are one and the same person, the effect is to invite the person who has made inferences from certain facts to review his own inferences with the object of making contrary inferences. We are all far from intending to say that any judge or magistrate is not capable of reaching a decision different to that reached by him earlier after he has had an opportunity of re-considering his inferences and upon a

review of the relevant facts. I do not therefore agree with the observation of learned Crown Counsel at the argument that to say that the Magistrate who hears the trial should not be the same Magistrate who has issued the search warrant amounts almost to slander of the Magistrate. As Mr. Perera observed, such a Magistrate is legally competent and in certain cases an accused person may well say that he has no objection to a trial before the very Magistrate who issued the warrant. Where, however, an accused person has objected to such a trial, is there any principle of justice that requires the Magistrate to permit the trial to take place before another Magistrate?

I was referred by Crown Counsel to the fairly recent case of *Regina v. Camborne Justices* [(1955) 1 Q. B. 41.], where a Divisional Court of the Queen's Bench in England reviewed the authorities on the question of judicial bias. Answering the question what interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias, Slade J. stated that "in the judgment of this Court the right test is that prescribed by Blackburn J. in *Regina v. Rand* [(1866) L. E. 1 Q. B. at 233.]—namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown." I do not think that the principle which was examined in the *Camborne Justices* case (supra) is that invoked by the petitioner on the present application. Indeed, he expressly stated to the learned Magistrate that no question of any personal interest is suggested. Mr. Perera emphasized that a fair and impartial trial carries with it the implication that the person accused should not be made to labour under the belief that he has to carry here an additional burden, the burden of convincing a person who has already reached a certain belief that he was wrong in entertaining that belief.

Very great reliance was placed by Crown Counsel on the recent decision of the Queen's Bench Division of England in *Morgan v. Bowker* [(1963) 2 W. L. B. 860.], where Lord Parker C. J., in a case

arising under the Obscene Publications Act, 1959 (7 and 8 Eliz. 2, Ch. 66), dealing with the procedural point that it was wrong and vitiates proceedings for justices who have issued a summons to determine the summons when it comes on for hearing, stated: —"Justices must come to a prima facie view when articles are brought before them, as these justices did. They are not determining the matter; they are merely deciding whether a summons should issue. It seems to me quite wrong to suggest that because they have taken a prima facie view, they are in some way biased or incapable of approaching with an open mind the hearing of the summons. I feel that there is nothing whatsoever in that objection."

Before attempting to apply that decision to the present question arising upon our Gaming Ordinance, it is necessary to see whether there are one or more important differences between the two statutes. Under section 3 (1) of the Obscene Publications Act, a warrant to enter and search premises is issued by a justice of the peace when he is satisfied that there is reasonable ground for suspecting that .... obscene articles are kept for publication for gain in the premises concerned. Under the Gaming Ordinance (section 5) a search warrant is issued when the Magistrate is satisfied that there is good reason to believe that any place is kept or used as a Common Gaming place. Moreover, there is no place in the English Act in question for a statutory presumption such as that contained in section 7 of our Gaming Ordinance. A justice of the peace under the English Act is merely deciding whether a summons should issue. When he has decided that, he is in respect of that matter, so to say, *functus officio*. The matters to be proved on a charge under the English Act remain unaffected by the earlier proceeding in respect of the issue of the summons. Under our Ordinance, the presumptive proof of unlawful gaming arising upon the issue of a search warrant operates on the incidence of the burden of proof. The English authority cited is therefore distinguishable, and, in my opinion, is not applicable to the case before me.

The position, therefore, that we have here is that the Magistrate who issued the search warrant is legally competent to hear the trial.

That such is the position is conceded even by Mr. Perera. The accused himself has expressly stated that no suggestion is being made that the Magistrate entertains any personal bias in the case. We are therefore confronted here at this stage with the simple point that the Magistrate, having a discretion as to whether the case should be heard by him or by another Magistrate, has decided that there is no good reason why it should not be heard by him. The principles upon which a court will act in reviewing a discretion exercised by a lower court were recently referred to by Their Lordships of the Privy Council in the case of *Ratnam v. Cumarasamy* [(1965) 1 W. L. R. at p. 11.] as being well settled. Said Lord Guest, "there is a presumption that the judge has rightly exercised his discretion. The Court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice." I have not been satisfied that the order complained of has been reached on any wrong principle. Indeed, to grant the accused's prayer in this case would be tantamount to concluding that where an accused person objects to his trial taking place before the Magistrate who has issued a warrant in terms of section 5 of the Gaming Ordinance the Magistrate has no alternative to the upholding of the objection.

The application for an order from this Court that the trial do take place before another Magistrate is refused.

Application refused.