1922.

Present : Bertram C.J.

ANUKULASURIYA *v.* MERASHA *et al.*

1,142—P. C. Gampola, 4,038

Unlawful gaming—Police should lead direct evidence before obtaining search warrant—Hearsay—Must informant be called at the trial—Description of premises in the warrant—Habituality—Publicity.

To obtain a search warrant under the Gaming Ordinance the police should satisfy the Magistrate by direct evidence of the unlawful gaming. It will not do for them merely to tender hearsay evidence. They must either produce their informant, or they must accompany the informant to the spot which he had disclosed, and then observe what goes on, and give direct evidence themselves.

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. Though the informant may have been called as a witness in connection with the issue of the search warrant, the police are not bound to call him at the trial any more than they are bound to call any other witness. Their failure to do so may be a point for comment, but it cannot affect the validity of the warrant.

It is enough if the description in the warrant of the premises to be searched sufficiently identifies the premises. It is not necessary (where a number exists) that the number of the premises must be referred to in the warrant.

The question as to what is *habituality* and *publicity* with reference to gambling discussed.

THE facts are fully set out in the judgment.

Jansz, C.C., for the Crown, appellant.

January 31, 1922. BERTRAM C.J.—

This is an appeal against an acquittal. The charge was laid under the Gaming Ordinance, 1889, an Ordinance which has led to a certain amount of discussion on a great number of legal points. It is important, however, that this Ordinance should not be allowed to become encrusted with technicalities. It is a strict Ordinance, and must be strictly and jealously construed. But that does not mean that it must be construed in a meticulous or technical spirit.

It seems to me that the learned Magistrate, who has written a very careful and painstaking judgment, had been led into certain misconceptions which vitiate his conclusions. In all cases under this Ordinance the first step to ascertain is, whether the search warrant which initiates the proceedings has been validly issued. If it has

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been validly issued, then section 9 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.

Now it seems to me that the learned Magistrate has been led into erroneous conclusions, both as regards the validity of the issue of the search warrant and as regards the facts. With regard to the search warrant, he takes two exceptions to it. First of all he says that the defence had no opportunity of cross-examining the original informant ; secondly, he thinks that the premises were not identified with sufficient particularity. The first point seems to me clearly erroneous. What happened was this. The prosecuting police officer at the trial informed the Court that he did not propose to call the informant ; at a later stage of the proceedings he declined to give the informant's name. Now this may have been right or wrong on the part of the police officer ; but it was not a circumstance which could affect the validity of the search warrant. The question of the validity of the search warrant must be tested by what happened at the time when it was issued, not by anything that may have been done at the subsequent trial. But, in my opinion, subject to one small point, there is nothing to criticise in the proceedings at the subsequent trial. The position as regards the informant was this. Our decisions have required that the police in such cases should satisfy the Magistrate under section 7 by direct evidence. It will not do for them merely to tender hearsay evidence. They must either, therefore, produce their informant, or they must accompany the informant to the spot which he had disclosed, and then observe what goes on, and give direct evidence themselves. In this case they called the informant before the Magistrate. Now when that has been done in the proceedings for the issue of the warrant, I do not think it is competent for the police to decline to disclose the name of the informant. 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. It ought not to be only on the appeal that the validity of the warrant can be challenged. Therefore, if the name of the informant appears on the record in connection with the issue of the warrant, it is futile to speak of refusing to disclose his name. His name is disclosed already. But though this is so, the police are not bound to call the informant any more than they are bound to call any other witness. Their failure to do so may be a point for comment. It certainly cannot affect the validity of the warrant, nor would it necessarily affect the case itself. The question with which at this stage the Court has now to concern itself is the question of the presumption. With that the informant has not necessarily anything to do. The presumption arises on what is found upon the raid, and at this raid the informant is not necessarily present. Though the defence cannot

insist on the informant being called, it is, of course, always open to the Court to examine the informant for its own satisfaction, and if anything is disclosed on the evidence which causes the Court to doubt the truth of the informant's story, such a course would not unreasonably be taken. This question of the calling of the informant, therefore, in the present circumstances, can be left out of account.

With regard to the second point taken to the validity of the warrant, the learned Magistrate seems to hold that if the house where the gambling is going on has in fact got a number fixed to it, that number must be referred to in the warrant. I confess that I am at a loss to understand the reasoning upon which the learned Magistrate has arrived at this conclusion. All that is necessary is that the description of the premises in the warrant should sufficiently identify those premises, and there can be no doubt that in this case the identification was sufficient. The warrant, therefore, being good, the next question that arises is: Was what was found at the raid sufficient to set up the presumption? Of that there cannot be the least doubt.

Then comes the question: Has the defence removed that presumption? Again, there can be no doubt, because the defence called no witnesses. The Magistrate, however, preferred to deal with the case on the facts. I will, therefore, consider it from that point of view. He appears to have had no doubt that on a long succession of evenings gambling was carried on. But he asks himself, was such gambling carried on with "habituality" and with "publicity" following a previous decision of this Court. Here the test which the Magistrate propounded to himself was certainly sound. He thinks, however, that "habituality" is not shown, because there is a gap in the series of evenings on which gaming went on. The house was repeatedly watched by the police. Gambling was seen to be going on on August 21, 23, 26, 28, and on September 2, and after that point there is no evidence of any further gambling until the 16th. The learned Magistrate thinks that this hiatus destroys the necessary continuity.

I cannot myself take this view. It does not follow that because no evidence was given of gambling during this interval that it did not take place. But even though there was a gap, that would not destroy the habituality. In the next place: Is there proof of publicity? Mr. Jansz has pointed out one circumstance, and that is that time after time, when gambling was being watched, the ninth accused, the occupier of the premises, was observed taking a commission from the gamblers. The commission was described by a well-recognized word, the word "*thon*." This was obviously part of the system under which the gambling was carried on. Of course, one can conceive of a private gambling club being carried on in which "*thon*" is taken by the proprietor or manager. But such a

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hypothesis is negatived in this case by two circumstances: One is that the gamblers were of a miscellaneous description, including both Sinhalese and Moors; and secondly, there is the evidence, which I see no reason to disbelieve, that those who watched the premises saw persons freely coming and going. Sometimes a woman was at the door, sometimes a child, and sometimes nobody at all. All those circumstances taken together seems to me amply to prove publicity.

There is one circumstance which affected the mind of the Magistrate, and that is that whereas the informant asserted that the gambling took place in the front room, the police witnesses said that it took place in the back room, which was a kitchen. That certainly is a circumstance. I do not know how it is to be explained. If it suggested a suspicion that there was no gambling at all, and that the whole thing was a concocted conspiracy on the part of the police, it might be sufficient to turn the scale. But the circumstances disclosed by the raid leave no doubt upon my mind that there was continuous gambling going on, whether with or without intervals. I do not think, therefore, that this circumstance, though certainly deserving of notice, is in any way decisive. In my view of the facts, I think the right course for me is to convict the accused persons now, and to sentence them all to fines of Rs. 20, or, in default of payment, to a fortnight's rigorous imprisonment. I make order accordingly.

Set aside.