Present : Jayewardene A.J. 1923.

INSPECTOR OF POLICE, KALUTARA, *v.* ARASECULARATNE *et al.*

407—P. C. Kalutara, 3,213.

Unlawful gaming—Prosecuting inspector refusing to disclose name of informant—Adverse inference drawn by Magistrate.

The information on which the search warrant under section 6 of the Gaming Ordinance, 1889, is issued forms part of the record of the case, and ought to be available to the defence, for, it is open to the accused persons to refer to the information on which the search warrant was issued, and contend that the information did not justify the issue of a warrant, and that the case against them should be treated as if the presumptions created by the entry under the warrant were non-existent.

The prosecuting inspector in his evidence in cross-examination refused to disclose the name of the informant ; and the Magistrate drew an adverse inference against the prosecution from the refusal.

Held, " If the informant to the police had not given any information to the Magistrate, or if counsel for the accused was referring to some other informant, then the witness would have been justified in refusing to give his name, and his refusal cannot be made the subject of adverse comment—legitimately—by counsel for the defence or of adverse inferences by the Judge."

" Though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is the duty of the Judge apart from objection taken to exclude the evidence. *A fortiori* if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness."

Weston v. Peary Mohun Das [1] followed.

THE facts are set out in the judgment.

Akbar, Acting S.-G. (with him *Dias, C.C.*), for the complainant appellant.

Hayley, for accused, respondents.

August 28, 1923. JAYEWARDENE A.J.—

This is an appeal by the Solicitor-General against the acquittal of the seven respondents who, with two others, were charged with unlawful gaming under section 4 of the Gaming Ordinance of 1889.

The house of the first accused was entered under a search warrant duly issued under section 6 of the Ordinance, and on the occasion of the entry the respondents were found in a room playing a game

[1] *(1912) 40 Cal. 898, at p. 920.*

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of cards called " bebi " for stakes. The first six respondents were arrested, but the seventh and two others succeeded in running away. The strong presumption created by section 10 of the Ordinance that the accused were engaged in unlawful gaming applies to the accused, but the Magistrate has found that in spite of the presumption arising under section 7 of the Ordinance he would not be justified in holding that the public had access to the house on the occasion of the gambling in question. It is not the policy of this Court to interfere lightly, with acquittals when they are based on questions of fact, but, after carefully considering all the evidence, I feel constrained to set aside the acquittals in this case, as it strikes me that the judgment of the Court has been affected by the wrong conclusions and inferences it has drawn from various irrelevant matters. In the course of his judgment the learned Magistrate says that the prosecution refused, and rightly refused (see Evidence Ordinance, section 125), to give the name of the informant, and that the defence rightly commented upon the refusal. The informant whose name was withheld was one of the persons on whose sworn statement the search warrant under section 6 was issued. The information on which the warrant was issued forms part of the record of the case, and is, or ought to be, available to the defence, for it is open to the accused persons to refer to the information on which the search warrant was issued and contend that the information did not justify the issue of a warrant, and that the case against them should be treated as if the presumptions created by the entry under the warrant were non-existent.

The prosecuting Police Inspector in his evidence stated that the evidence on which the search warrant was issued was filed of record, but in cross-examination he added that he was not prepared to disclose the name of the informant. No application was made to the Court for access to the information on which the warrant was issued, and counsel for the defence was satisfied with the refusal of the witness. If the informant whose name the inspector refused to disclose was the person upon whose information the warrant was issued, the defence would have become aware of it on reference to the warrant proceedings. But I do not think the accused knew that the informant had given information to the Police Magistrate for the issue of the search warrant. In this case the information in question was sworn to not only by this informant, but also by a police sergeant who had been watching the premises for several days. But, if the informant to the police had not given any information to the Magistrate, or if the counsel for the accused was referring to some other informant, then the witness would have been justified in refusing to give his name and his refusal cannot be made the subject of adverse comment—legitimately—by counsel for the defence or of adverse inferences by the Judge. This question was considered by Woodroffe J. in *Weston v. Peary Mohun Das* (*supra*), where referring

to section 125 of the Indian Evidence Act which is identical with section 125 of our Evidence Ordinance, he said :—

> "The learned Judge further allowed the claim of privilege for which the Evidence Act, section 125, provides, but has yet in several instances drawn inferences adverse to the police defendants by reason of the non-disclosure by them of the source of their information, the subject of the privilege. The learned Judge's comments were, in my opinion, not open to him. It must be, of course, first determined whether there is a privilege or not. But it is obvious that after the Court has once held that a document or subject-matter of inquiry is privileged, with the result that the other party cannot compel production or answer, the comment is not then open to the Court that the party to whom privilege has been allowed has not done or said that which the law and the Court have said he cannot be compelled to do or to say. I will only add as regards section 125 of the Evidence Act that though the section does not in express terms prohibit the witness, if he be willing, from saying whence he got his information, both the English authorities from which the rule is taken and a consideration of the foundation of the rule show that the protection should not be made to depend upon a claim of privilege being put forward, but that it is the duty of the Judge apart from objection taken to exclude the evidence. *A fortiori* if objection is taken, it cannot, since the law allows it, be made the ground of adverse inferences against the witness."

This view is supported by the *dictum* of the House of Lords in *Wentworth v. Lloyd*[1] where Lord Chelmsford dealing with the privilege attaching to professional confidence laid down a principle applicable to similar privileges of every kind. He said :—

> "As Lord Brougham says, when speaking, in *Bolton v. The Corporation of Liverpool*[2] of the supposed right to compel the disclosure of such communications, it is plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his right. The exclusion of such evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice."

[1] *(1864) 10 H. L. C., p. 589.* [2] *(1833) 1 Myl. and K. 88, 94.*

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The learned Magistrate then proceeds to remark that " the defence alleges that two men—Kaithan and Andrew—who are enemies of Arasekularatne (the first accused) gave false information to the police. It is not possible in this case to investigate the allegation, as the informants on whose evidence a search warrant issued under section 7 of the Ordinance are shielded from cross-examination." It is, however, only one of these men—Andrew—who gave information to the police and to the Magistrate. It cannot be fairly said that these men were shielded from cross-examination, for it was open to the Magistrate, if he thought that the interests of justice required it, to have submitted Andrew, his informant, for cross-examination. There is no evidence that Kaithan gave any information to the police, and this seems to be only a conjecture on the part of the first accused. Courts are not unfamiliar with suggestions of this nature by accused persons, and too much importance should not be attached to them. The learned Magistrate then says that " the defence points out that the whole matter could have been thoroughly investigated if the connected case in which the first accused is charged with keeping a common gaming place had been first inquired into." He thinks that the police were, as usual, trying to obtain a conviction in this case first, and then to use it as evidence in the connected case " as it has been held that a place is a common gaming place if it is proved that unlawful gaming was conducted there even on one occasion only." He also thinks that in the case against the first accused the defence would have an opportunity of cross-examining the informant. Continuing, he adds :—" This method of prosecution therefore can hardly be regarded as fair from the point of view of the accused, who have no opportunity of cross-examining the informants, and yet are faced with the difficulty of rebutting a presumption of guilt arising out of the evidence given by the informants."

I am not sure that these suggestions and comments of the Magistrate are justified. What is there to show that these " informants " will be called as witnesses in the connected cases ? Here again the remedy was in the Magistrate's hands. He could either have heard the two cases together, or could have insisted on the connected case being heard first, if he thought the police were not acting properly and that the accused would be prejudiced by the procedure adopted. He concludes this part of his judgment by saying : " In the circumstances, the only line of defence open to them is to examine the evidence for the prosecution to see whether there is sufficient evidence, apart from the presumption which arises under section 7 of the Ordinance, that the place was kept on the occasion when it was raided as a common gaming place." Does he allow the defence to disregard the presumption created by the Ordinance, and to treat the case as an ordinary one of unlawful gaming ? I do not think it is possible to do so as the search warrant has been issued quite

regularly. The Magistrate then proceeds to discuss the evidence, and holds that in spite of the presumption which arises under the Ordinance he could not be justified in holding that the house of the first accused was used as a common gaming place on the occasion in question.

It is clear from the above that the learned Magistrate's judgment has been greatly influenced by the many irrelevant considerations contained in it. It is also impossible to say whether he himself treated the case as one in which the presumptions arose. The very errors into which the Magistrate has fallen in this case appear to have been committed by the Magistrate who heard P. C. Gampola, No. 1,142, and they were pointed out and corrected by Bertram C.J. (see *Manukulasuriya v. Merasha* [1]). I invite the Magistrate's attention to this case.

I refrain from referring to the evidence in view of the order I propose to make, but I may mention that the Magistrate in accepting the evidence of the first accused regarding the seventh accused, who he said had gone for a bath leaving his coat, with a note book, watch chain, and silver buttons in it, has overlooked the fact that the seventh accused himself stated to the Magistrate, when charged, that he was away at the Kalutara Police Court at the time, and gave the names of witnesses to prove an *alibi*. There are several other features in the case which make it undesirable that the acquittals should be allowed to stand. The case requires a fuller and fairer investigation in justice to all concerned

I therefore set aside the acquittals and send the case back for a trial *de novo* before another Magistrate, as the Magistrate who heard the case has expressed his views on the evidence strongly.

Sent back

[1] (1922 27) *N. L. R.* 33.