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Collister, J.

to have been cited before the Court and paragraph 371 of the Police Regulations was obviously not considered. The decision of the point was not essential in that case as there was abundant evidence *aliunde* to support the conviction. Upon a reconsideration of the whole matter and upon a review of the authorities which have been referred to in the judgments of the learned CHIEF JUSTICE and my learned brother NIAMAT-ULLAH, J., I am of opinion that the case of *Ghunnai* v. *Emperor* (1) does not express a correct view of law as regards section 25 of the Evidence Act.

In my judgment a confession made to the chaukidar of a village is barred by the provisions of section 25 of the Evidence Act.

BY THE COURT:—The answer to the question referred to us is in the affirmative.

APPELLATE CRIMINAL

Before Mr. Justice Allsop and Mr. Justice Ganga Nath

EMPEROR *v.* BADALWA AND OTHERS*

1936
May, 25

Opium Smoking Act (Local Act II of 1925), section 9—Search warrant issued by Magistrate—Trial by same Magistrate—Jurisdiction.

A Magistrate who had issued a search warrant under section 9 of the U. P. Opium Smoking Act can legally try the case of the persons arrested in consequence of the search, for offences under the Act.

Under the Gambling Act the issue of a search warrant gives rise to certain presumptions against the accused, and as the Magistrate who issued the warrant is a possible witness on the important question whether it was properly issued, it may not be advisable for him to try the case himself; but there is no such consideration under the Opium Smoking Act, as the presumption under section 5 of the Act arises quite irrespective of the issue of a search warrant under section 9, and the question whether it was properly issued is not relevant at the trial.

*Criminal Appeal No. 75 of 1936, by the Local Government, from an order of Fariduddin Ahmad Khan, Sessions Judge of Fatehpur, dated the 14th of October, 1935.

(1) [1934] A.L.J., 143.

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EMPEROR v. BADALWA

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Messrs. *A. P. Dube* and *J. K. Srivastava*, for the respondents.

ALLSOP and GANGA NATH, JJ.:—This is a Government appeal against the acquittal of five men who were charged with offences under sections 6 and 7 of the Opium Smoking Act. They were convicted by the Magistrate and sentenced to various fines; Badalwa and Chandrika Prasad were also sentenced to simple imprisonment for a period of one month. There was a previous conviction against Chandrika Prasad. They appealed to the Sessions Judge, who held that the facts were as found by the Magistrate but allowed the appeal and acquitted the appellants because he was of the opinion that the trial was illegal. His reason for so thinking was that the Magistrate who tried these men and convicted them had previously issued a warrant of search under section 9 of the Opium Smoking Act, and it was in consequence of that search that these men had been found in the house of one of them together with apparatus for the smoking of opium. The learned Judge has relied upon the case of *Syam Behari* v. *Emperor* (1). That was a case under the Gambling Act in which a learned Judge of this Court expressed the opinion that a Magistrate who had issued a warrant of search under the Act should not subsequently try the men who were arrested in consequence of that search. The facts of the case are not fully given in the judgment and it is possible that the learned Judge was expressing himself more widely than he intended; but if he meant to hold that it was always illegal for a Magistrate to try a case after he had issued a search warrant, we are respectfully unable to agree. *Syam Behari's* case purported to follow an earlier case of the Lahore High Court, namely *Raja Ram* v. *Emperor* (2). In that case

(1) A.I.R., 1934 All., 987. (2) A.I.R., 1924 Lah., 247.

no such general proposition was laid down. It was a case where a question arose whether a warrant issued under the Gambling Act was properly issued or not, and the learned Judge who decided the case came to the conclusion that the Magistrate who had issued the warrant should not have tried the accused because he was a possible witness owing to the fact that the question had arisen whether the warrant had been properly issued. We can understand that there may be cases of that kind where it is not advisable for a Magistrate to try a case, but it is quite a different thing to say that a Magistrate who issues a search warrant can in no case legally try people who are charged with offences as a result of the search made. In another case of this Court, namely the case of *Muhammad Ali Khan* v. *Emperor* (1), a learned Judge of this Court held that the mere fact that a Magistrate had issued a search warrant under section 5 of the Gambling Act did not disqualify him from trying the case. One of us in a recent case, Criminal Reference No. 177 of 1936, took the same view.

It has been suggested to us that the learned Magistrate should not have tried this case under the Opium Smoking Act because he had taken cognizance of it under the provisions of section 190(1)(*c*) of the Code of Criminal Procedure. We find that there is no force in this suggestion. The Excise Inspector had made a complaint in writing and it was on that complaint that the Magistrate took cognizance of the case, and he obviously did so under the provisions of section 190(1)(*a*) of the Code of Criminal Procedure.

We may remark that there may be cases under the Gambling Act where it is an important question whether the search warrant was properly issued, because the issue of a search warrant under that Act gives rise to a presumption against the accused. There is nothing of this kind under the Opium Smoking Act. A presumption

(1) (1926) 24 A.L.J., 568.

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arises under section 5 of the Act quite irrespective of the issue of a warrant of search under section 9 of the Act; so that when a man is being tried for an offence under the Act the question whether a warrant of search was properly issued can never be relevant and it follows that there is no reason why the Magistrate should ever be required to give evidence for the defence or for the prosecution. We are satisfied that the trial was quite legal and the learned Sessions Judge was wrong in acquitting the appellants on the technical ground which he raised.

We have already remarked that the Magistrate and the Sessions Judge were both of opinion on the facts that the appellants were guilty. However, as the Sessions Judge did not act in accordance with that view, we have allowed counsel to put the facts before us. [The evidence was then considered.] In our opinion all the appellants are guilty. We are inclined to set aside the order of the learned Sessions Judge and restore that of the Magistrate, but we think that it was unnecessary for the Magistrate to send Chandrika Prasad to prison. He was previously convicted as long ago as 1926 and we do not think that it is necessary that there should be any punishment other than fine. We therefore allow this Government Appeal, set aside the order of the Sessions Judge and restore the order of the Magistrate, with this modification that Chandrika Prasad is sentenced to a fine of Rs.30 only instead of to a fine together with simple imprisonment for a period of one month.