APPELLATE CRIMINAL.

Before Henderson and R. C. Mitter JJ.

1936

Sep. 16, 17, 23, 28.

RANGA LAL SEN

v.

EMPEROR.*

Gambling—Common gaming house, What is—Presumption under s. 47 of the Calcutta Police Act (Ben. IV of 1866), Nature of—Indian Evidence Act (I of 1892), s. 114, Ill. (e).

Per HENDERSON J. Under s. 3 of the Calcutta Police Act, in order to constitute a common gaming house, apart from money which may be made or lost at the actual gaming, some sort of profit must be made by the person owning, occupying or using the room. This may be by way of admission fee or payment of a sum for permission to use the room as a common gaming house.

If a Deputy Commissioner, on receipt of information on oath and after making an enquiry which he thinks necessary, has reason to believe that a place is used as a common gaming house and issues a search warrant, the search warrant is legal and s. 47 automatically comes into play. Upon proof of such facts, the legality of the warrant cannot be called in question. When the warrant is in proper form, the Magistrate may also, under s. 114 of the Indian Evidence Act, draw a presumption that the necessary formalities have been complied with.

Section 47 does not create a presumption in the sense in which that term is used in the Indian Evidence Act. It provides that something which would not otherwise be evidence is made evidence and it is for the Magistrate to take it into consideration.

Per MITTER J. The chance of or actual profit made by the successful gambler is not the gain referred to in s. 3 of the Calcutta Police Act. It means the profits accruing to the owner or occupier of the room or establishment which is not the direct result of the betting in which he himself may have taken part. These may for instance be entrance fee or commission charged on gamblers.

Section 47 raises a rebuttable presumption of fact which may be nullified by other evidence on the record. For taking the benefit of s. 47, the Crown has only to show that the warrant, pursuant to which the place was searched, was a legal warrant, that is, one which was issued in terms of s. 46. The Crown has to show, if at all, by evidence, that the warrant issued by

*Criminal Appeals, Nos. 582 and 664 of 1936, against the order of H. K. De, Fourth Presidency Magistrate of Calcutta, dated July 21, 1936.

the authority mentioned in that section was issued after that authority had received information on oath and after such enquiry which it deemed necessary.

Slips of paper containing records of bets are instruments of gaming.

Walvekar v. *Emperor* (1) distinguished.

Adams v. *Emperor* (2) relied on.

CRIMINAL APPEAL.

The material facts of the case and the arguments in the appeal appear in the judgment.

Maneendra Nath Mukherji for the appellant.

The Offg. Deputy Legal Remembrancer, Debendra Narayan Bhattacharjya, for the Crown.

Cur. adv. vult.

HENDERSON J. These two appeals have been heard together. They originally came on for hearing before myself sitting alone. But, in view of the importance of some of the points raised, I thought it desirable that they should be heard by a Division Bench. The appellant in Appeal No. 582 is one Dr. Ranga Lal Sen. He has been convicted of offences punishable under ss. 44 and 45 of the Calcutta Police Act. The other appellant is one Mr. Jacob who was convicted of an offence punishable under s. 45 of that Act.

The facts are extremely simple. The alleged common gaming house is situated in a consulting room at the Eastern Drug Stores, 17, Park Street. The appellant Sen is one of the doctors who may be consulted by patients at that place. The prosecution witness No. 1, Sergeant Clarke, came with a search warrant from the Deputy Commissioner of Police, Mr. Duckfield, and searched the place on June 29, 1936. His evidence is that he found both the appellants sitting at a table. Sen was filling in a betting slip and a sum of Rs. 11-8 was found on the table. Other betting slips were also found in a drawer.

(1) (1926) I. L. R. 53 Cal. 718. (2) (1935) I.L.R. 62 Cal. 1093.

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Now we have no doubt at all from this evidence that, at the time of the search, Jacob was making a bet with Sen. He never even suggested that he had gone there for the purpose of a professional consultation. Sen alleged that the money found on the table had been sent to him on account of his fees for professional attendance by a man named Herbert, and he called the defence witness Banerji, who is one of the partners of the Eastern Drug Stores, to prove it. Banerji says that the money was sent in a letter from Herbert about ten minutes before the search. There is no reason why Banerji should know what the contents of the letter were and no reason why the money should be found on the table. Herbert has not been examined. We have no doubt that this explanation is false and that the money had been put on the table by Jacob in connection with his betting.

Now it is quite clear that this evidence in itself would be quite insufficient to show that this consulting room was a common gaming house. The prosecution in fact relied on the provisions of s. 47 of the Calcutta Police Act and contend that the finding of the betting slips is evidence that the consulting room is used as a common gaming house and that Sen and Jacob were there for the purposes of gaming.

Mr. Bhattacharjya contended on behalf of the Crown that, altogether apart from this section, if Jacob was betting with Sen, Sen was presumably hoping to make a profit and this is sufficient to establish that the room in question is a common gaming house. We are certainly not prepared to assent to that proposition; on such a construction the elaborate definition contained in s. 3 of the Act would be wholly unnecessary.

The question has been considered in two cases to which our attention has been drawn. In the case of *Walvekar* v. *Emperor* (1), s. 47 did not apply. It

(1) (1926) I. L. R. 53 Cal. 718.

was, however, found that the evidence itself afforded sufficient proof on the point. In that case betting was carried on in the premises and fees were realised by the persons who were in charge of the place. The question was also elaborately considered by Costello J. in the case of *Adams* v. *Emperor* (1). We respectfully agree with what is stated there. In our opinion, the definition of a common gaming house implies that, altogether apart from money which may be made or lost at the actual gaming, some sort of profit must be made by the person referred to in the definition. In the present case, if persons merely bet with Sen, that would not be sufficient to make the place a common gaming house; on the other hand, if admission fees are levied or if Sen pays money to Banerji that he may allow the room to be used as a place for carrying on betting, the terms of the definition show that the place is a common gaming house.

In order to determine whether s. 47 of the Act applies it is necessary to see whether there was a proper search within the provisions of s. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted.

Now in the present case the prosecution produced the warrant issued by Mr. Duckfield, Deputy Commissioner. It purports to be in full conformity with the requirements of s. 46 and the question which remains for consideration is whether the Court may presume that the necessary formalities were complied with. In the case of *Walvekar* v. *Emperor* (2) cited above the learned Judges refused to draw any presumption. But in that case from the warrant itself, on its very face, it did not appear that the Deputy Commissioner had any reason to believe that the premises searched were a common gaming house and on that ground it was

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held that a presumption ought not to be drawn. The last two sentences in the judgment of C. C. Ghose J. might support an inference that such a presumption ought never to be drawn. But when the passage is carefully read it is clear not merely that the main part of the discussion was directed to the defect in the warrant but that in this sentence the learned Judge mentions "other cases of this description." He was dealing with a case in which the warrant was, on the very face of it, defective and we do not think his judgment was really intended to lay down that no presumption may be drawn in a case such as the present where the warrant is in proper form. In our opinion, in a case such as the present, the Magistrate is entitled to draw a presumption in accordance with the provisions of s. 114 of the Indian Evidence Act, illustration (*e*).

Of course it is for the Magistrate to say whether he will draw this presumption or not. In the present case there is also the evidence of Sergeant Clarke that a sworn information was taken by the Deputy Commissioner. That being so, in our opinion the matter ends. It is not open to the Court to go behind the warrant and look into the information in order to see what inference might be based upon it. The Deputy Commissioner is not really concerned with the eventual proof of the case. He is merely deciding whether there ought to be a search of certain premises or not and, provided that it is upon information upon oath, that he makes an enquiry, if he thinks it necessary, and has reason to believe that the place is used as a common gaming house, the search warrant is legal and s. 47 automatically comes into play. Upon proof of such facts the legality of the warrant cannot be called in question.

The next question for consideration is what is the exact meaning of the words "it shall be evidence, "until the contrary is made to appear" in s. 47. It is of course useful to refer to this provision as a presumption in the loose way in which this term is

sometimes employed; for example, it is often used in this way in connection with questions about the permanency of a certain tenure although the term "inference" might perhaps be a more happy expression. But we are not prepared to say that this section creates a presumption in the technical sense in which that term is used in the Indian Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case it would be difficult, if not impossible, for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Now packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of card in a house would be evidence that that house is a common gaming house. In our opinion, this section was intended to create a special rule of evidence, because in view of the preliminary provisions there is not this absurdity in a case where there has been a proper search under s. 46.

The only difficulty in the way of this interpretation is the use of the words "until the contrary is "made to appear" which might suggest that the intention was to create a presumption in the technical sense. Now supposing these words were not there, it might have been contended that the intention of the section was, not to indicate a presumption, but to make the finding of such articles conclusive proof. The draftsman may have inserted these words to prevent such a contention being put forward. The law with regard to presumptions in the Indian Evidence Act is well known and if the intention was to create such a presumption we see no reason to suppose that the ordinary language would not have been employed.

We have reached the conclusion that this section provides that something which would not otherwise

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be evidence is made evidence and it is for the Magistrate to take it into consideration. He may, if he likes, convict upon it or in certain cases he may say that it is not sufficient.

If we were dealing with this case in revision, that would be sufficient to dispose of it. But we are, in fact, hearing appeals and we must reach a conclusion upon the evidence ourselves. Turning to the facts of the present case the learned Magistrate has come to a finding that Banerji was entirely ignorant of the fact that betting went on in this consulting room. Now if this is a correct finding, it is very unlikely that the room is used as a common gaming house. There is no direct evidence to show that it is and the investigation stopped short at the search. We see no reason to suppose that if a fuller enquiry had been made, evidence of a positive character might not have been forthcoming. In view of this finding of the learned Magistrate we are not prepared to say that the case is one of more than suspicion and the appellants ought to be acquitted.

We therefore allow these appeals, set aside the convictions and sentences and direct that the fines, if paid be refunded. The order confiscating the money found on the table must also be set aside.

R. C. Mitter J. The appellant, Dr. Ranga Lal Sen, has been convicted of offences punishable under ss. 44 and 45 of the Calcutta Police Act (Ben. Act IV of 1866) and sentenced to pay fines of Rs. 200 and Rs. 100, respectively, and in default of payment, to suffer rigorous imprisonment for one month under each of the aforesaid sections. The appellant, Jacob, has been convicted of an offence punishable under s. 45 and sentenced to pay a fine of Rs. 100 and in default of payment to suffer one month's rigorous imprisonment.

In pursuance of a warrant issued by the Deputy Commissioner of Police, Detective Department, Calcutta, the Eastern Drug Stores at No. 17, Park

Street, was searched in June last and in the consultation room of the said premises the two appellants were found seated. A writing pad (Ex. 2) and some slips of torn up paper were seized, as also a sum of Rs. 11-8. I have no doubt that Ex. 2 is a piece of paper which contains the record of bets on horse races, and that both the appellants were at the time betting in that room. The appellants, however, cannot be convicted under these sections simply because they were betting there. The convictions can be maintained only if the place where they were betting was a common gaming house. To confine to the case of Ranga Lal Sen, who had the use of that room he being a doctor attached to the said drug shop, he can be convicted under s. 44 if he kept or used the same as a common gaming house. Both the appellants can be convicted under s. 45 only if they are gaming or betting in a common gaming house.

Common gaming house is defined in s. 3. To make a house, room, place, *etc.*, a common gaming house two things are necessary, namely,—

(*i*) instruments of gaming must be kept or used there, and

(*ii*) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room, place, *etc.*

In *Adams* v. *Emperor* (1), slips of paper used for the purpose of facilitating betting operations, *e.g.*, papers on which bets had been recorded were held to be instruments of gaming. In the case before us the first element is satisfied by reason of Ex. 2 being found in that room.

To satisfy the second element, it is my view that the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit of, or the actual profit made by, the successful gambler

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is not such gain as the section contemplates. To take instances, an entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes a profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. In my judgment the chance of winning wagers is not the gain which the section contemplates. In this case there is no evidence that Dr. Sen or anybody else intended to gain anything in that sense. The facts establish only this, that Dr. Sen and Jacob were betting on horse races in the consultation room. The conviction of both the appellants cannot stand on the evidence on the record unless the Crown can get and retain the benefit of s. 47 of the Act. In my judgment that section only raises a presumption of fact, and so a rebuttable presumption. If a search warrant is issued under s. 46 and if on a search made on the basis of the said warrant instruments of gaming are found at the place or on the person of men found there at the time of the search, the fact that such instruments of gaming are found would be evidence of the further fact that the place is a common gaming house. The effect of such evidence may be nullified by other evidence on the record. That I understand is the effect of s. 47.

For taking the benefit of s. 47, the Crown, in my judgment, has only to show that the warrant in pursuance of which the place was searched was a legal warrant, that is, one which was issued in terms of s. 46. The Crown has to show, if at all, by evidence, that the warrant issued by the authority mentioned in that section was issued after that authority had received information on oath and after such enquiry

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which it deemed necessary. The warrant must state, as it usually does, that that authority on information on oath and on materials found on further enquiry (if any) had reason to believe that the place intended to be searched is a common gaming house. I cannot accept the contention of the learned advocate for the appellants that the Crown is to lead a further evidence touching upon the nature of the information on oath received by the authority issuing the warrant or upon the nature of enquiry made by it. All that the Crown is required, if at all, is to prove that an information on oath was in fact made, and, where the warrant recites an enquiry, that such an enquiry was in fact made. As the Court has no right to require proof by the Crown of any other fact, it follows *a fortiori* that it has no power to embark upon an enquiry as to whether the authority issuing the warrant could on the materials before it, *e.g.*, the information on oath and the facts coming out of the enquiry, if any made, have reasonably come to believe that the place intended to be searched is a common gaming house. This seems to be to me a fundamental principle. I am, however, inclined to the view that where such a warrant issued by a competent authority recites the fact that an information on oath had been received and that an enquiry had been made, and then states that that authority had reason to believe that the place sought to be searched is a common gaming house the presumption attaching to the regularity of official acts would be attracted and it would not be incumbent on the Crown to lead evidence on the point indicated above. I would not, however, decide the point definitely, as it is not necessary in this case and as it would involve a careful consideration of the observations made by one of the learned Judges in *Walvekar* v. *Emperor* (1).

Whatever evidence the warrant (Ex. 1) affords on the point as to whether the Eastern Drug Stores

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was a common gaming house or not, the entire evidence on the record leads me to the conclusion that the prosecution has failed to establish that it was a common gaming house. Surendra Nath Banerji, one of the proprietors of the said drug shop, was examined as a witness. He attends his shop regularly. He said that he did not know that betting goes on or was going on in his shop. He has been believed by the learned Magistrate. His evidence belies the case that his shop or any part of it was used for the purpose of "gain" by Dr. Sen or anybody else in the sense in which the word has to be understood in connection with the definition of common gaming house. I accordingly agree with my learned brother that the convictions on both the appellants cannot be sustained. I agree with the order which my learned brother has made.

Conviction set aside.

A. K. D.