APPELLATE CRIMINAL.

Before Mukherjea J.

1937

Aug. 30; *Sep.* 2.

ABDUL LATIF

v.

EMPEROR.*

Gaming-house—Common gaming-house, What is—Discovery of instruments of gaming on search, Effect of—Betting slips, when instruments of gaming—Calcutta Police Act (Ben. IV of 1866), ss. 46, 47.

To constitute a common gaming-house as defined in s. 3 of the Calcutta Police Act, not only there must be instruments of gaming used or kept in the place, but such instruments must be kept or used for the purpose of gain or profit of the person owning, occupying or using such place.

Under s. 47 of the Act, discovery of instruments of gaming in a place on a proper search, as contemplated by s. 46 of the Act, would be evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming-house, but it would also be evidence on the point as regards the making of profit or gain by the owner or occupier of the place, although, according to the ordinary law, such discovery cannot be treated as an evidence of the latter fact. An accused can explain away the whole circumstance, but, in the absence of any explanation or evidence to the contrary, a duty is cast upon the Court to weigh such evidence and the Court may, if he thinks proper, convict the accused on this evidence though he is not bound to do so.

Rangi Lal Sen v. *Emperor* (1) explained.

Slips of paper, if they are used for the express purpose of facilitating betting operations, are instruments of gaming. Slips containing names of horses and certain small fractional amounts against each name which could not be wagered at the authorised tote were correctly held to be instruments of gaming in the absence of any explanation coming from the accused.

That such slips do not show on the face of them that the owner of the place derived any profit out of the transactions or that they bear a date earlier than the date of search do not affect the question, though the latter fact may have an important bearing on the question of the weight to be attached to these pieces of evidence.

CRIMINAL APPEAL.

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

*Criminal Appeal, No. 409 of 1937, against the order of R. Gupta, Chief Presidency Magistrate of Calcutta, dated June 28, 1937.

(1) I. L. R. [1937] 1 Cal. 610.

Manindra Nath Mukherji and *Satyendra Nath Banerji* for the appellant.

Cur. adv. vult.

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

MUKHERJEA J. The appellant in this case is one Abdul Latif, who has been convicted by the Chief Presidency Magistrate, Calcutta, under s. 44, Calcutta Police Act (Bengal Act IV of 1866), and sentenced to pay a fine of Rs. 250 only. In default, he has to suffer rigorous imprisonment for a period of one month.

There is not much dispute about the facts of this case, which lie within a short compass. On September 5, 1936, Sub-Inspector Jennings of the Calcutta Police, who is the first witness for the prosecution, searched a shop room in premises No. 7, Ripon Lane, Calcutta, which is admittedly in occupation of the accused, and the search was made under a warrant issued under s. 46, Calcutta Police Act, signed by the Deputy Commissioner of Police, Southern Division. The Sub-Inspector found the accused and several other persons at the shop room, and on search of the premises, certain race books, race handicap sheets, and other papers were seized by the police. The learned Magistrate found most of the papers to be innocuous, but he held that certain slips of papers, forming exs. 3 and 6, were betting slips, which did come within the definition of "instruments of gaming" in the Calcutta Police Act. The Chief Presidency Magistrate was of opinion that, as the search was made in conformity with the provision of s. 46, Calcutta Police Act, and the instruments of gaming were found in the shop room, a presumption would arise under s. 47 of the Act, that the room or place was used as a common gaming-house, which the accused would have to rebut. As there was no reliable evidence

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on the side of the accused to rebut this presumption, he was convicted under s. 44, Calcutta Police Act.

Mr. Mukherji, who appears in support of this appeal, has assailed the propriety of the decision of the Chief Presidency Magistrate, substantially on three grounds: He has argued, in the first place, that the learned Magistrate misappreciated the law on the point and erred in law in holding that there was any presumption in favour of the prosecution under s. 47, Calcutta Police Act, from the fact of the search being conducted in accordance with the provision of s. 46, which would shift the burden on to the accused to establish his innocence. He maintains that the presence of the instruments of gaming might at best be taken to be a piece of evidence to show that the place was kept or used as a common gaming-house, but that would not exonerate the prosecution from showing that the other elements necessary to constitute a common gaming-house, as defined in s. 3 of the Act, were present in this case.

The second argument is that the slips of paper, which have been pronounced to be betting slips by the trying Magistrate are not instruments of gaming within the meaning of the Act. Lastly, it is contended, that even if these papers be regarded as instruments of gaming a conviction on the strength of these papers alone is not proper, particularly when there is no evidence to show that any profit was made or expected by the accused by reason of his owning, occupying or keeping the place.

Now so far as the first point is concerned, it cannot be disputed that to sustain the conviction of the appellant under s. 44, Police Act, it must be proved that he has opened, kept or used a room or house, which he owns or occupies as a common gaming-house. To constitute a common gaming-house as defined in s. 3, not only there must be instruments

of gaming used or kept in the place, but such instruments must be kept or used for the purpose of gain or profit of the person owning, occupying or using such room. If the slips found in the room be held to be betting slips, the first requirement is certainly complied with, but, as regards the second, the prosecution has not adduced any evidence, but has relied on solely what the trying Magistrate calls the presumption under s. 47 of the Police Act. It is necessary to consider, therefore, as to how far, s. 47, Calcutta Police Act, absolves the prosecution from proving the elements necessary to constitute a common gaming-house, as defined in s. 3 of the Act, where on a proper search being made in conformity with the provision of s. 46 certain instruments of gaming are found in the place or house in question. The precise point came up for decision before a division Bench of this Court consisting of Henderson and Mitter JJ. in *Ranga Lal Sen* v. *Emperor* (1). Mitter J. expresed his opinion that s. 47 only raised a presumption of fact. The finding of the materials mentioned in the section would be evidence that the place was a common gaming-house, though the effect of that evidence could be nullified by other evidence on the record. Henderson J. used a more guarded language. According to him s. 47 created a special rule of evidence making something evidence, which otherwise would not be evidence in law. It did not strictly speaking create a "presumption" in the sense, in which the expression is used in the Evidence Act, and that the Magistrate is not bound to convict a person upon this evidence alone, even if the accused does not adduce any evidence to the contrary. Though the words "until the contrary is "made to appear" are rather appropriate to a *presumption* in the technical sense of the word, it seems to me that the absence of any words like "may "presume" or "shall presume" in the section is very

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much significant, and I agree with Henderson J. in holding that the discovery of the instruments of gaming in the place on a proper search, which is contemplated by the Act, would be an evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming-house, but it would be an evidence on the other point also, as regards the making of profit or gain by the owner or occupier, *etc.*, of the place, although, according to the ordinary law, it cannot be treated as an evidence of the other fact. When the prosecution relies upon s. 47, the accused can certainly explain away the whole circumstance and "show the contrary", as the section lays down. If the explanation is sufficient, the evidence practically loses its force. If, on the other hand, no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court to weigh and appraise the evidence in the best manner possible, and he may, if he thinks proper, convict the accused on this evidence, though he is not bound to do so. Taking this to be a proper view of the law, I think the learned Magistrate was not quite correct in convicting the appellant simply on the ground that there was in law a presumption under s. 47, which the accused was not able to rebut. It was his duty to consider whether the evidence itself was sufficient to justify the conviction on the facts and circumstances of the case. As, however, I am hearing an appeal, it is open to me to decide the question, on a consideration of the entire evidence on the record, and I propose to deal with the matter in connection with the third point raised by the appellant.

The second point raised by the appellant relates to the question as to whether the slips found on search could be said to be instruments of gaming within the definition of that expression in the Police Act. "Instruments of gaming", according to s. 3 of the Act, "includes any article used as a means or

"appurtenance of or for the purpose of carrying on "or facilitating gaming". As gaming includes wagering or betting, the slips if they are used for the express purpose of facilitating betting operations would certainly come within the mischief of the definition. The slips, which have been held to be betting slips by the learned Magistrate, contain the names or numbers of horses, and certain small amounts against each name or number. It is said that these accounts represent what were betted on the several horses, and the slips were given, as these fractional sums could not be wagered at the authorised totes in the Race Course. This seems to be probable and without any explanation coming from the accused, it must be said that these were rightly held to be instruments of gaming by the trying Magistrate. The learned advocate for the appellant has pointed out two things in this connection: first, that the slips do not show any profit or gain to the appellant, otherwise than as a result of betting by him, and second, that all the slips bear the date August 29, 1936, whereas the search was in connection with bets that the accused was supposed to have received on horses to be run on September 5, 1936. The first point does not impress me much. An instrument of gaming, be it a pack of cards, or gaming table, or dice may not show on the face of it that the person using or keeping such a place where the instrument was found was deriving any profit out of it. It is the special rule of evidence that is laid down in s. 47 of the Police Act which make this fact an evidence to prove that the person, unless he shows the contrary, was getting benefit out of the same. The other point, that the slips were all of an earlier date, would make them none the less instruments of gaming, though this fact has an important bearing on the question of the weight to be attached to these pieces of evidence.

I now come to the third point, which is really the material point in this case, and the question is as to

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whether on the evidence as it stands, the trying Magistrate was right in convicting the appellant. The entire evidence has been placed before me, and I agree with Mr. Bhattacharjya that the evidence of the defence witnesses is not very convincing. Mr. Mukherji also has not laid much stress upon it. The prosecution builds its case upon the betting slips, which were found on search, and which would be evidence under s. 47 to prove that the appellant used the place as a common gaming-house. If, as Mr. Mukherji suggests, these slips were quite innocuous and the appellant had really taken these small sums from the other persons, as their agent for the purpose of laying bets on their behalf, at the races, and he had no advantage or profit to derive for himself, there is nothing which prevented him from giving this explanation at the time of the trial. On the other hand, he denied all knowledge of these papers, and said that he did not know where these papers came from. When there is no explanation, or evidence to the contrary the slips would certainly go in as evidence to prove that the appellant used the place as a common gaming-house and the question narrows down to this whether on these slips alone the Magistrate should have convicted him. The only thing suggested by the appellant in his explanation was that these slips did not belong to him, and must have been brought from outside. Mr. Mukherji lays great stress here on the fact that all these slips were of an earlier date, and consequently valueless. If these slips were really planted from outside, or manufactured to incriminate the appellant and his associates, they would not certainly bear the date August 29, 1936. The date rather shows that the papers are genuine and can be relied upon. In the absence of any other circumstances which might induce me to discredit these papers I am unable to hold that the Magistrate was wrong in convicting the appellant upon these betting slips only. I, therefore, uphold the conviction of the appellant under

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s. 44 of the Police Act. As in spite of the discovery of these instruments of gaming the appellant and his co-accused were all acquitted of the charge under s. 45 of the Police Act, I think that the ends of justice will be sufficiently met by reducing the fine imposed upon him to Rs. 100 only. Subject to this variation in the sentence, the appeal is dismissed.

Appeal dismissed. Sentence reduced.

A. C. R. C.