

REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

MAHADEO PRASAD VISHNU (APPLICANT) *v.* KING-
EMPEROR (COMPLAINANT-OPPOSITE PARTY)*

1933
December, 8

Public Gambling Act (III of 1867), sections 5, 10 and 11—Criminal Procedure Code (Act V of 1898), section 103—Search witnesses residing in another mohalla less than half a mile from the house searched—“Locality”—Section 103, Criminal Procedure Code, meaning of—Search under the Gambling Act—Section 103, Criminal Procedure Code, whether applies to searches under the Gambling Act—Entry into the house of accused by police officer at midnight by scaling the walls, legality of—Magistrate granting pardon to an accused and using his evidence against a co-accused, legality of—Conviction upon approver’s evidence unless corroborated in material particulars, validity of.

The word “locality” used in section 103 of the Code of Criminal Procedure is a comprehensive word and if a search witness is residing in another mohalla of the city less than half a mile from the house searched, it will be covered by the provisions of that section. *King-Emperor v. Mast Ram* (1), relied on.

A search under the Gambling Act is not covered by the provisions of section 103 of the Code of Criminal Procedure. *Khilanda Ram v. The Crown* (2), relied on.

The entry into the house of the accused at midnight by the police officer scaling the walls of a neighbouring house in a case under the Gambling Act where the police officer had the necessary search warrant for searching the accused’s house is perfectly legal. *Ali Abbas v. King-Emperor* (3), relied on.

Sections 10 and 11 of the Public Gambling Act make it clear that the whole procedure of the act is a special one and overrides the general law as to the procedure connected with pardons laid down in the Code of Criminal Procedure. A Magistrate acts quite correctly in pursuance of the provisions of those sections in granting a pardon to an accused and using his evidence against a co-accused.

Where an accomplice accepts the pardon tendered to him by the trying Magistrate under section 10 of the Public Gambling Act in order to save his own skin, his evidence must be viewed

*Criminal Revision No. 110 of 1933, from the order of Ch. Akbar Husain, I.C.S., Sessions Judge of Lucknow, dated the 19th of July, 1933.

(1) (1930) I.L.R., 6 Luck., 172. (2) (1922) I.L.R., 3 Lah., 359.

(3) (1925) 6 O.W.N., 1198.

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with great care and caution, and it will not be safe to act upon his evidence unless corroborated in material particulars.

Mr. *A. N. Mulla*, for the applicant.

The Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

NANAVUTTY, J.:—This is an application for revision against an appellate order of the learned Sessions Judge of Lucknow upholding the conviction of the applicant Mahadeo Prasad Vishnu for offences under sections 3 and 4 of the Public Gambling Act (III of 1867) as subsequently amended.

I have heard the learned counsel for the applicant as also the Assistant Government Advocate and examined the file of the case. The first point of law argued before me is that the search was illegal, inasmuch as the provisions of section 103 of the Code of Criminal Procedure were not complied with, the search witnesses being alleged to be neither respectable nor of the locality as required by that section. The witnesses who were present at the time of the search of the applicant's house were Ahmad Husain and Abdus Samad. Abdus Samad has not been produced but Ahmad Husain has been examined as a witness in the case. It has been urged that Abdus Samad once appeared as a search witness in another case and therefore that he is a witness under the control of the police. I cannot for a moment accept this contention. Against Ahmad Husain it has been urged that he lives in Subhannagar, which is about three furlongs from the house of the applicant, and that he is a friend of Head Constable Amanant Husain. There is no force in this contention either. In *King-Emperor v. Must Ram* (1) it was held by a Bench of this Court that the word "locality" used in section 103 of the Code of Criminal Procedure is a comprehensive word and may well include villages within three or four miles of the village where the search took place. In the present case the search witness was residing in a mohalla of

(1) (1930) I.L.R., 6 Luck., 472

Lucknow City, which is less than half a mile from the applicant's house. It is further to be noted that a search under the Gambling Act is not covered by the provisions of section 103 of the Code of Criminal Procedure. In *Khilanda Ram v. The Crown* (1) it was held by a learned Judge of the Lahore High Court that the provisions of section 103 of the Code of Criminal Procedure did not apply to a search conducted after the issue of a warrant under section 5 of the Public Gambling Act.

The learned counsel for the applicant also pointed out that in the present case the investigating Sub-Inspector, who searched the house of the applicant Mahadeo Prasad Vishnu, entered it after scaling the walls of a neighbouring house at dead of night. In my opinion there is nothing illegal in this act of the investigating police officer. Section 5 of the Gambling Act expressly lays down that any officer of the police, not below such rank as the Lieutenant-Governor or Chief Commissioner shall appoint in this behalf, may enter by night or by day and by force, if necessary, any such house, walled enclosure, room or space, and search any such premises for which he has secured a search warrant from a Magistrate. That being so, the entry into the applicant's house at midnight by the police officer scaling the walls of a neighbouring house was perfectly legal. In *Ali Abbas v. King-Emperor* (2) the late Chief Judge of this Court, Sir LOUIS STUART, held that entrance by a ladder into the house of the accused was not an act explicitly forbidden by the law and that the procedure for making searches under the Code of Criminal Procedure could not be applied in its entirety to the procedure for searches which were made without search warrants. In the present case the police officer had the necessary search warrant for searching the applicant's house. In my opinion the search of the applicant's house was perfectly legal and the objections raised to it by the learned counsel for the applicant are not valid.

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The next point urged before me is that the procedure of the learned Magistrate in granting a pardon to the co-accused Mata Prasad is illegal and contrary to the provisions of the Code of Criminal Procedure. A perusal of sections 10 and 11 of the Public Gambling Act makes it clear that the whole procedure of the Act is a special one and overrides the general law as to the procedure connected with pardons laid down in the Code of Criminal Procedure. I therefore hold that the learned trying Magistrate has acted quite correctly in pursuance of the provisions of sections 10 and 11 of the Public Gambling Act in granting a pardon to Mata Prasad and using his evidence against the applicant Mahadeo Prasad Vishnu.

The applicant Mahadeo Prasad has been convicted not only of an offence under section 3 of the Public Gambling Act, in that he was the owner and occupier of the house where the gambling took place, but he has also been convicted and sentenced under section 4 of the said Act for being actually found gambling at the time when the police party raided the applicant's house. The only evidence upon which the conviction of the applicant for an offence under section 4 of the Public Gambling Act rests is that of the approver Mata Prasad and there is no evidence corroborating in material particulars the evidence of the approver. The learned Assistant Government Advocate points out that the conviction of a co-accused is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice (*see* section 133 of the Indian Evidence Act). This is no doubt true, but illustration B to section 114 of the Indian Evidence Act also lays down that an accomplice is unworthy of credit unless he is corroborated in material particulars, and this rule of evidence has always been followed by all High Courts. In the present case it is clear that the accomplice Mata Prasad accepted the pardon tendered to him by the trying Magistrate under section 10 of the Public Gambling Act in order to save

his own skin. His evidence, therefore, must be viewed with great care and caution, and it will not be safe to act upon his evidence, unless corroborated in material particulars. No such corroboration is forthcoming. I am, therefore, clearly of opinion that the conviction of the applicant for an offence under section 4 of the Public Gambling Act cannot be legally sustained upon the evidence on the record.

For the reasons given above I set aside the conviction and sentence passed upon the applicant for an offence under section 4 of the Public Gambling Act, but uphold the conviction and sentence passed upon him for an offence under section 3 of the said Act. To this extent this application for revision is allowed. For the rest it stands dismissed.

Revision partly accepted.

APPELLATE CIVIL

*Before Sir Wazir Hasan, Knight, Chief Judge, and
Mr. Justice H. G. Smith*

BHAGWAN DIN AND OTHERS (DEFENDANTS-APPELLANTS) v.
MUHAMMAD YUNUS KHAN, PLAINTIFF AND OTHERS,
DEFENDANTS (RESPONDENTS)*

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Transfer of Property Act (IV of 1882), section 43—No fraudulent or erroneous representation by transferor—True facts known to transferee at the time of his taking the transfer—Estoppel under section 43, whether applicable.

Section 43 of the Transfer of Property Act, 1882, merely embodies in a statutory form a rule of estoppel commonly known as "feeding the grant by estoppel." If a man who has no title whatever to a property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. There can, however, be no estoppel in favour of one against the other if both parties knew the true state of

*Second Civil Appeal No. 236 of 1932, against the decree of H. J. Collister, I.C.S., District Judge of Lucknow, dated the 15th of August, 1932, modifying the decree of Pandit Tika Ram Misra, Subordinate Judge of Malhabad at Lucknow, dated the 27th of July, 1931.

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