

for the loan of the money did not occur until 11th March, 1918. Consequently the suit is not barred by statute.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and that judgment should be entered for the plaintiff for the principal sum, Rs. 10,000 with interest at such rate and for such period and subject to such allowance, if any, for mesne profits during the period during which the plaintiff and her husband were in possession of the land as the Courts in India may determine, and that for this purpose the suit be remitted to the High Court at Rangoon. Their Lordships will also humbly recommend that the plaintiff do have her costs of the suit here and below.

Solicitors for Appellant—*Bramall and Bramall.*

Solicitors for Respondents—*Waterhouse & Co.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Maung Ba.*

KING-EMPEROR

*v.*

WUN NA AND THIRTY OTHERS.\*

1927

Mar. 1.

*Search witnesses—Criminal Procedure Code (Act V of 1898), section 103—Witnesses whether competent to take part in the actual search.*

*Held*, that a search made with the active assistance of the search witnesses is in accordance with the provisions of section 103 of the Criminal Procedure Code.

*Held*, that the object of the section is better achieved by permitting independent witnesses to assist in the search and that, by rendering such assistance, they do not cease to be competent witnesses of the search.

*Ti Ya v. King-Emperor*, 8 L.B.R. 38—*referred to.*

MAUNG BA, J.—This is an appeal by the Crown from an order of acquittal passed by the Headquarters

\* Criminal Appeal No. 1858 of 1926.

1927  
 KING-  
 EMPEROR  
 v.  
 WUN NA AND  
 THIRTY  
 OTHERS.  
 MAUNG BA,  
 J.

Magistrate of Insein in a case where 31 persons were prosecuted under the Gambling Act. The facts of the case briefly stated are as follows :—

The Subdivisional Magistrate of Insein, on receipt of credible information that the house of one Wun Na, a Chinaman, was used as a common gaming-house, issued a search warrant in the name of U Tun Win, Town Inspector of Police. Armed with that warrant the Inspector raided the house at 9-45 p.m. on the night of the 29th August 1926. He took with him two respectable witnesses, Hyder Khan and Yacoob, as well as three Sub-Inspectors of Police and two police constables. It was a double-storeyed house, and lights were seen on the upper storey. Before they entered the house, the two lugyis, at the request of the Police Inspector, satisfied themselves that the Police had nothing on their person. As soon as the raiding party entered the house the lights noticed upstairs were extinguished. The inmates were unable to escape and were all found in a room upstairs. They were the 31 accused persons sent up under sections 11 and 12 of the Gambling Act. The Inspector had a lamp lit and ordered those found in the room to sit down. When they sat down the Inspector read out the warrant. He then asked the two lugyis to search the persons of the accused one by one. Sub-Inspector of Police Tun Nyun wrote out the search list as the lugyis called out the articles found on each person. The lugyis were also asked to look round the room, and the articles found in the room were similarly listed. The crowd found was a mixed one consisting of 18 Burmans, three Burmese women and 10 Chinamen. A small tin box was found between the thighs of a Burmese woman. That box contained some pice and bits. The same woman had in her hands some more money. On the mat were

found 32 *paikkyu* pieces and three dice. 111 Chinese playing cards were also found inside a tin bucket close to the wall. Some silver and nickel coins were found underneath a mat, and scattered on the floor were found more dice and silver and nickel coins. Of course the accused persons were not found actually gambling. This was to be expected because it took some time for the raiding party to get upstairs.

People who break the gambling law usually take precaution not to get caught in the act of gambling. The Legislature has therefore thought fit to provide a special rule of evidence. It permits a presumption that a house, enclosure, room, place, vessel or vehicle entered under the provisions of section 6 of the Gambling Act, is used as a common gaming-house and that persons found therein were present for the purpose of gaming although no play was actually seen by the Magistrate or police-officer or by any one aiding in the entry, whenever any instruments of gaming are found. At the same time the Legislature was alive to the fact that the planting of such instruments of gaming was possible. To remove such a possibility, it has laid down that all searches made shall be made in accordance with the provisions of sub-section 3 of sections 102 and 103 of the Code of Criminal Procedure. Section 103 provides that an officer or other person about to make a search shall call upon two or more respectable inhabitants of the locality to attend and witness the search and that the same shall be made in their persence.

The learned Headquarters Magistrate was of opinion that the search in the present case was not in accordance with section 103 and that the presumption allowed by the Gambling Act should not be drawn. He came to that conclusion by certain remarks made by Young, J., in the Full Bench case of

1927

KING-  
EMPEROR

2.

WUN NAAND  
THIRRY  
OTHERS.MAUNG BA,  
J.

1927

KING-  
EMPEROR

v.

WUN NA AND  
THIRTY  
OTHERS.MAUNG BA,  
J.

*Ti Ya v. King-Emperor* (1). The question referred to the Full Bench was whether ward headmen in towns, other than Rangoon, were competent witnesses of searches under section 103 of the Code of Criminal Procedure. In the course of his judgment the learned Judge laid down this *obiter dictum* :—" It is he (police-officer) and he alone who may make the search, and the duties of the respectable inhabitants are confined to looking on while he searches. There is nothing in the section that entitles them so far as I can see to lend the officer in charge any assistance whatsoever in making the search and I conceive that objection might properly be taken to any such assistance being given whether by actually participating in or pointing out omissions in the search. It is he and he alone who is authorised by the warrant to make the search, and they are to attend and witness it." With all deference to that learned Judge I am of opinion that that construction is too technical. In the present case the search was made in the presence and under the supervision of the Inspector of Police. As has already been pointed out, the object of the section is to ensure that searches are conducted fairly and squarely and that there is no "planting" of articles by the Police. In order to achieve that object the law makes it compulsory that at least two respectable witnesses of the locality should be present. Before entering the witnesses were given an opportunity of satisfying themselves that the Police had nothing on their person. After the entry in order to show to the accused persons who were present that everything was above-board the Inspector requested these elders to look round the room and examine the persons of the accused.

Gaming instruments and coins were found scattered in the room and there was nothing to create suspicion that any of those articles were planted. But the learned Magistrate being influenced by the *obiter dictum* abovementioned remarks that the luyis were searchers and the police were witnesses. He accordingly held that there was no search in accordance with section 103 of the Code of Criminal Procedure. In my opinion an officer who conducts a search with the assistance of the luyis has made the search in accordance with that section. I may even go the length of saying that the object of the section is more achieved by permitting independent witnesses to assist in the search. I do not think it is correct to say that by rendering such assistance the luyis ceased to be witnesses of the search. According to the *dictum* mentioned above, the luyis must fold their arms and simply look on and say nothing. For the above reasons, I hold that the search has been properly conducted in accordance with law and that the presumption under section 7 of the Gambling Act arises. I allow the appeal and set aside the order of acquittal. I convict Wun Na under section 12 (a), Gambling Act, and sentence him to a fine of Rs. 100 or three weeks' rigorous imprisonment; and the other respondents, except Nos. 5, 13, 15, 16, 17 and 21, who have not been found, under section 11 (a) and direct that each of them do pay a fine of Rs. 20 or do suffer two weeks' rigorous imprisonment.

1927

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KING-  
EMPEROR  
V.  
WUN NA AND  
THIRTY  
OTHERS.

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MAUNG BA,  
J.