CRIMINAL REVISION.

Before Mr. Justice Mya Bu.

AH SEIN AND OTHERS *v.* THE KING.*

1938

Nov. 15.

Gaming house, common—Record by magistrate or District Superintendent of Police—Credible information, or grounds of belief—Validity of warrant—Proper exercise of discretion—Accused's right to point out deficiencies—Strict compliance with provisions of law—Report as to gambling—Presumptions against and burden of proof on accused—Criminal Procedure Code, s. 103—Burma Gambling Act, ss. 6, 7.

In order to comply with the provisions of s. 6 of the Burma Gambling Act what must be recorded is either the information received by, or the grounds of belief of, the magistrate or the District Superintendent of Police that a house or place is used as a common gaming house. This means that if the magistrate or the District Superintendent of Police believes on credible information he has to record such information, or if he believes on sufficient grounds other than credible information he has to record such grounds in order to render valid the warrant that he issues. The intention of the Legislature appears to be to ascertain whether the magistrate or the District Superintendent of Police has properly exercised his discretion in issuing the warrant, and if he has not, it is open to the accused to point it out from the record. A mere report that illegal gambling is going on at a certain place is not sufficient.

The provisions of s. 6 must be strictly observed ; otherwise a house or place cannot be said to have been entered under the provisions of that section, and the presumption specified in s. 7 cannot be made although the warrant may be carried out in accordance with the provisions of s. 103 of the Criminal Procedure Code.

Crown v. *Majun*, 1 L.B.R. 120 ; *Crown* v. *Tun Wa*, 1 L.B.R. 289, referred to.

Campagnac for the applicants.

MYA BU, J.—This is an application for revision of the conviction and sentence passed on the first petitioner Ah Sein under section 12 (*a*) of the Burma Gambling Act and convictions and sentences passed on the remaining petitioners under section 11 of the Act. The case arose out of a raid made on the Chinese joss house in Merchant Street, Zigôn, on the night of the 11th March last by U Maung Maung, Circle Inspector of Police, armed with a warrant issued by the

* Criminal Revision No. 395B of 1938 from the order of the Headquarters Magistrate of Tharrawaddy in Cr. Reg. Trial No. 12 of 1938.

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Township Magistrate of Zigôn and accompanied by two respectable inhabitants of the locality as witnesses of the search. In conducting the raid due compliance was made with the provisions of section 103 of the Criminal Procedure Code. All the petitioners were found in the joss house and certain instruments of gaming and cash altogether amounting to about Rs. 50 were found and seized by the Circle Inspector of Police. An element common to the charges against all the petitioners is that the Chinese joss house in question was used as a common gaming house.

The conviction of the first petitioner under section 12 (*a*) involves the finding of the trial Court that the first petitioner being the owner or occupier or having the use of the Chinese joss house opens, keeps or uses the same as a common gaming house which under section 3 (*1*) of the Act for the purpose of the present case means a house in which instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house whether by way of charge for the use of the instruments of gaming as such or of the house or otherwise whatsoever for gaming purposes. It has been one of the grounds of revision that there is no evidence whatever to show that the first petitioner was the owner or occupier or the person having the use of the Chinese joss house in question. The judgment of the trial Court does not bear any indication of how this fact has been proved. In fact the learned magistrate has expressed no finding to the effect that the first petitioner was such owner or occupier or person having the use of the house. On my perusal of the record of the evidence in the case too I fail to find sufficient material in proof of the fact. The first petitioner stated that he was staying in the house being a paid servant of the Chinese joss house on a salary of Rs 25 a month. In the absence of proof

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that the first petitioner was either the owner or occupier or the person having the use of the house his conviction under section 12 (*a*) of the Act must be held to be bad in law. He would, however, be liable to be convicted of the same offence as the other petitioners would be liable to be convicted of if the latter are liable to be convicted of any of the offences under the Act. As I have said before the other petitioners were convicted of an offence punishable under section 11 of the Act, that is as persons who played in a common gaming house or were there present for the purpose of gaming.

There is no direct evidence of the fact that instruments of gaming were kept or used for the profit or gain of the person owning, occupying, using or keeping the Chinese joss house whether by way of charge for the use of the instruments of gaming as such or of the house. As in most cases of this kind, the prosecution relies on the presumption arising under section 7 of the Burma Gambling Act. This section provides :

"When any instruments of gaming are found in any house enclosure, room, place, vessel or vehicle, entered under the provisions of section 6, or about the person of any of those who are found therein, it shall be presumed, until the contrary is proved, that such house, enclosure, room, place, vessel or vehicle, is used as a common gaming-house, and that the persons found therein were there 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."

Section 6, sub-section (*1*) provides that a Magistrate of one of the categories mentioned in the section or the District Superintendent of Police, who, on credible information or on other sufficient grounds has reason to believe that any house, enclosure, room, place, vessel or vehicle is used as a common gaming house, may, after recording in writing such information or grounds, either himself do or by warrant authorize any officer of

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police not below the rank of Sub-Inspector or officer in charge of a police station to do the acts enumerated in clauses (*a*), (*b*), (*c*) and (*d*) of the sub-section.

The warrant in the present case was issued by the Township Magistrate upon receipt of information which he recorded in Exhibit B. The document reads thus :

"The information received is to the effect that gambling is in progress among the Chinese for big stakes, taking commission, at the Chinese joss house situated at Night Stall road, Zigôn, bounded on the north by Night Stall road ; to the east by An Pai's house ; to the west by Daw Pon Lon's house and to the south by back lane."

It has been repeatedly pointed out since the very early days of the operation of the Burma Gambling Act, 1899, that the provisions of sub-section (*1*) of section 6 of the Burma Gambling Act are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that section and consequently the presumption specified in section 7 cannot be made. See *Crown* v. *Majun and twelve others* (1) which was decided in 1901. At that time section 6, sub-section (*1*) stood somewhat differently from how it stands now in consequence of the amendment introduced by Burma Act I of 1905. The amendment did not affect the classes of officers authorized to issue the warrant, but the words "on credible information or on other sufficient grounds, has reason to believe that any house, enclosure, room, vessel or place is used as a common gaming-house, he may, after recording in writing such information or grounds" were inserted by the Act of 1905 in substitution for the words "upon credible information, has reason to believe that any house, enclosure, room, vessel or place is used as a common gaming-house, he may, after recording in

(1) 1 L.B.R. 120.

writing the substance of such information and the grounds of such belief." In *Crown* v. *Majun and twelve others* (1) which was decided in 1901 or about four years before the amendment of the section, as stated above, it was pointed out that a Magistrate or Superintendent of Police before he can issue a search warrant is required (i) to himself record in writing the substance of the information he has received and (ii) to record the grounds of his belief that the information is credible. Again in 1902 Mr. Justice Thirkell White ruled in *Crown* v. *Tun Wa and twelve others* (2) that "the record must show that the provisions of section 6 of the Gambling Act have been strictly observed before the presumption under section 7 can be drawn. The record of the information and the grounds of belief made under section 6 should be filed on the trial record." It seems obvious that the words "may record briefly the substance of such information and the grounds of such belief" in the original section 6, sub-section (*1*) were inserted to provide a means of ascertaining whether the Magistrate or the District Superintendent of Police properly exercised his discretion in issuing the warrant, the effect of which, if carried out, in due compliance with the provisions of section 103 of the Criminal Procedure Code and if instruments of gaming were found in the course of the search, was to throw on the accused person the burden of proving that the house which was raided was not a common gaming house. If the wording of section 6, sub-section (*1*) remains the same as it was before the amendment of 1905, the prosecution in this case must fail because although the Township Magistrate recorded what purported to be the substance of the information upon which he acted by issuing the warrant he never recorded the grounds of his belief in such information. But since the

(1) 1 L.B.R. 120. (2) 1 L.B.R. 289.

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amendment of 1905 it has become unnecessary to record both ; what must be recorded is either the information or the grounds of his belief that a house, enclosure, room, place, vessel or vehicle is used as a common gaming house, that is to say that if the Magistrate or District Superintendent of Police believes on credible information, he has to record such information, or if the Magistrate or District Superintendent of Police believes on sufficient grounds other than credible information, he has to record such grounds in order to render valid the warrant that he issues. It is worthy of note that while under the original wording of the section the substance of the information and the grounds of belief were required to be recorded under the present wording it is the information or the grounds of belief. While the amendment introduced in 1905 did not require the Magistrate or the District Superintendent of Police in issuing the warrant to record both the information and the grounds of belief, it is inconceivable that the Legislature intended thereby not to provide a means of ascertaining whether the Magistrate or the District Superintendent of Police properly exercised his discretion in issuing the warrant. It is only reasonable to suppose that the amendment was designed to enable the accused to point to the information or other grounds of belief which were recorded and thereby to show that the Magistrate or the District Superintendent of Police had not properly exercised his discretion in the issuing of the warrant.

Judged in the light of these principles which I consider to be underlying the provisions of sections 6 and 7 of the Burma Gambling Act the record made of the information upon which the Township Magistrate acted in issuing the warrant in this case is, in my opinion, not sufficient to meet the requirements of the law. It is hardly more than a mere report that illegal

gambling is going on at a certain place. It is so bald as to bear no stamp of credibility. How the informer himself derived the information is not disclosed by the record. Under sub-section (*2*) of section 6 the name of the informer is not to be specified in the record, but there must be something more than a bald statement that there is gambling for money and the taking of commission in a certain house which might be deemed to have made the information appear credible to the Magistrate or the District Superintendent of Police who issues the warrant.

For these reasons I hold that the warrant in this case is invalid and consequently the result of the raid or the search made under that warrant does not constitute a legal basis of the presumption under section 7 of the Burma Gambling Act. The convictions of the petitioners cannot be sustained. They are set aside and it is ordered that they be acquitted so far as this case is concerned. Let the fines, if they have already been paid, be refunded to them.