CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

EMPEROR *v.* TRIBHOVANDAS BRIJBHUKANDAS.*

1902. *March 26.*

Gambling—Bombay Act IV of 1887, sections 3, 4 and 5—Instruments of gaming—Books and telegrams—Game—Procedure—Police officer investigating offence not to conduct prosecution—Criminal Procedure Code (Act V of 1898), sections 495 (clause 4) and 537.

The accused was partner in a shop at Surat in which he ostensibly carried on the business of cloth selling, but in which he also actually carried on a *satta* or wagering business. The wagers were made with regard to the last unit of the figures denoting the prices for which opium was sold at Calcutta on a given day. Information as to these sales was received by telegraph from Calcutta. The firm kept books in which the wagers were recorded. The accused was convicted and sentenced under sections 4 and 5 of Bombay Act IV of 1887.

Held by Candy and Fulton, JJ. (confirming the conviction under section 4), that the books kept by the firm for the purpose of recording the wagers were instruments of gaming within the definition of section 3 of Bombay Act IV of 1887.

Held by Candy, J., that the telegrams received and used for the purpose of determining the result of the bets were also within the definition.

Held, also, (setting aside the conviction under section 5) that the wagering with which the accused was charged was not a "game" and the presumptions under section 7 and clause 2 of section 5 of the Act did not apply.

A Police Inspector, who has taken part in the investigation into an offence, is not qualified to conduct the prosecution of the person charged with that offence (Criminal Procedure Code, Act V of 1898, section 495, clause 4).

APPLICATION under section 435 of the Criminal Procedure Code, 1898, to set aside the conviction and sentence passed on the accused by Ráo Bahádur J. P. Lakhia, City Magistrate of Surat.

The accused was partner in a shop at Surat, in which ostensibly the business of cloth selling was carried on, but which was actually used for the purpose of carrying on a *satta* or wagering business. The wagers made were on the figures denoting the prices at Calcutta of opium at auction sales there. This

*Criminal Application for Revision No. 1 of 1902.

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information was received by the firm by telegraph from Calcutta and the details of the betting were entered in the books of the firm.

The accused were convicted and fined by the City Magistrate of Surat under sections 4 and 5 of Bombay Act IV of 1887. The Magistrate held that the *satta* business carried on by the accused fell within the definition of "gaming" in Bombay Act IV of 1887, that the telegrams and books used by the firm were "instruments of gaming" within the meaning of the Act, and that the shop of the accused was a common gaming house. The accused was sentenced to a fine of Rs. 100 under section 4 of the Act and to a fine of Rs. 50 under section 5.

Against these convictions and sentences the accused applied to the High Court under its revisional jurisdiction.

Scott (Advocate General) (with the Government Pleader) for the Crown.

H. C. Coyaji for the accused.

CANDY, J.:—The applicant, accused No. 2, before the Magistrate is admittedly a partner in a firm ostensibly engaged in cloth selling, and also actually engaged in managing an extensive and elaborate *satta* business, which may be briefly described as wagering on the figures which denote the prices in Calcutta of the auction sales of opium chests.

The main argument before us was whether the books of the firm kept and used in the premises of the firm for the purpose of this wagering, and the telegrams received from Calcutta by the firm giving the necessary information as to the winning numbers, are articles used as a subject or means of wagering within the definition shown in the amended section 3 of the Bombay Prevention of Gambling Act of 1887.

I am of opinion that they are within the definition. We have inspected some of the books which were seized when the house was entered by the Police officers under section 6 of the Act, and it is evident that they are not merely helps to the preservation of evidence relating to the contemplated wagering transactions. The different pages have the various units recorded at the top of each page, and bettors were evidently invited to

inscribe their names under the various units, stating the amount of their wagers and so on. The books were, in short, the means used for inviting the bettors to lay their wagers. To borrow the language of Mr. Justice Jardine in *Queen-Empress* v. *Govind*,[1] the books and the telegrams were only "means" used to stimulate the betting or decide the bet.

In *Queen-Empress* v. *Kanji*[2] Mr. Justice Parsons held that books (which were among the articles mentioned) might be instruments of wagering if they were actually kept or made use of in the place as a subject or means of wagering.

I am of the same opinion and think that the *satta* described in the present case is clearly within the mischief against which the amendment of Bombay Act IV of 1887 was directed.

As to the profit or gain of the partners in the firm there can be no question. The item of brokerage described by the Magistrate is quite sufficient for the purpose. The fraudulent telegrams alluded to by the Magistrate do not add to or detract from this aspect of the case.

The conviction, therefore, under section 4 of the Act was correct.

But as to section 5, the Magistrate, though he was aware of and quoted from the decision of this Court in *Queen-Empress* v. *Govind*, did not apprehend the distinction shown in that decision between wagering and playing any game not being a game of mere skill. It is obvious that the *satta* described in the present case was not in any sense a "game." The presumption, therefore, allowed by section 7 of the Act was not applicable to the present case. And as it is clear that accused No. 2 was not found "during any wagering," the presumption under the second paragraph of section 5 is also inapplicable. The conviction and sentence under section 5 must be set aside and the fine, if paid, refunded.

It only remains to notice the contention that the City Police Inspector had taken part in the investigation into this offence, and that, therefore, he should not have been permitted by the Magistrate to conduct the prosecution. I do not agree with the

(1) (1891) 16 Bom. 283 at p. 290.

(2) (1892) 17 Bom. 184

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Magistrate on his reference to clause (*m*) of section 4 of the Criminal Procedure Code. It is clear that the Inspector did take *some* part in the investigation, for on information received by him he applied for the warrant, arrested the accused, seized the books, &c., and named the witnesses to be summoned by the Magistrate. But he alleged, and his allegation has not been contradicted, that he did not examine any of the witnesses, and that his investigation was confined to an inspection of the books and papers which had been seized, and from which he gained all the necessary information. Though, therefore, the case does technically fall within the provisions of section 495 (4) of the Criminal Procedure Code, it is clear that the irregularity in the Magistrate's proceedings in no way prejudiced the accused persons, and we cannot interfere with the finding and sentence on this ground.

FULTON, J.:—I concur.

I think it is clear that the books in which the bets were inscribed were "instruments of gaming" within the meaning of section 3 of Bombay Act IV of 1887 as amended by Bombay Act I of 1890. They were articles used as a means of wagering. They were books in forms ready prepared for the purpose of the bets being recorded therein, and were apparently the only means whereby the nature of those bets was communicated to the keepers of the house with whom the bets were made. Even if the bets were made orally before being entered in the books, I should still hold that those books were the means of wagering, inasmuch as they were prepared and used for the purpose of facilitating the system of betting that was carried on.

It is unnecessary, then, to express any opinion whether the telegrams received and used for the purpose of determining the result of the bets come within the definition of "instruments of gaming."

The house where these books were found was a common gaming house, inasmuch as the Magistrate has found on ample evidence that it was a house in which instruments of gaming were kept and used for the profit or gain of the persons owning or occupying it.

The Magistrate has further found on sufficient evidence that the applicant was one of the owners or occupiers of the said house and kept it for the purpose of a common gaming house.

The conviction, therefore, under section 4 (*a*) must be confirmed.

I concur, for the reasons given by my learned colleague, in thinking that the conviction of the applicant under section 5 cannot be upheld.

I also concur in holding that the applicant was not prejudiced by any irregularity there may have been in allowing the Police Inspector to examine the witnesses and conduct the prosecution notwithstanding the provisions of section 495, clause (4), of the Criminal Procedure Code. I do not think that a contravention of this clause in itself invalidates the trial altogether even though no failure of justice has occurred within the meaning of section 537. Here it seems impossible to dispute the facts as affecting the applicant or to suggest that the method of conducting the prosecution can have led to any erroneous decision. The case of *Subrahmania Ayyar* v. *King-Emperor* [1] turned on the provisions of section 233. It was there held that a trial contrary to the terms of that section was not a trial constituted in the manner prescribed by law. The trial was prohibited in the mode in which it was conducted. This, however, cannot be said in a case in which there is a violation of section 495. The trial is within the jurisdiction of the Court albeit the Magistrate may have been guilty of a grave irregularity in permitting the prosecution to be conducted by an unauthorised person. It seems to me that there is a distinction between a case in which the trial itself is contrary to law, in which event it is no trial at all under the Code, and a case in which the trial is one within the jurisdiction of the Magistrate and irregularities occur in the method of conducting it. In the latter case the provisions of section 537 are applicable and the finding can only be reversed if the irregularity has in fact occasioned a failure of justice. In the case now under consideration it is obvious that, however irregular the proceedings may have been, the applicant was not prejudiced, for his pleader has not pointed to a single witness whose evidence can have in any way been affected by the fact of his being examined by the Inspector who had taken part in the investigation.

At the same time I think the Magistrate should clearly understand that we consider that in allowing Mr. Pranshankar to

(1) (1901) 25 Mad. 61.

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conduct the prosecution he was contravening the provisions of clause (4) of section 495. The definition of the term "investigation" in section 4 is not exhaustive. It would, I think, be placing an undue limitation on the simple meaning of words to hold that a Police Inspector who had got information that persons were carrying on wagering business, and having satisfied himself had obtained a warrant under section 6 of the Gambling Act and effected the arrest of the accused and the seizure of their books, had not taken any part in the investigation into the offence in respect of which the accused was being prosecuted. Having regard to these facts, it is clear to my mind that before the institution of the prosecution there was an investigation into the circumstances of the offence, and that the Police Inspector who took part in it was not qualified to conduct the prosecution.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

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DINA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NATHU (ORIGINAL PLAINTIFF), RESPONDENT.*

Registration—Notice of prior incumbrance—Transfer of Property Act (IV of 1882), section 81—Marshalling of securities.

Registration of a sale or mortgage is in itself notice to subsequent purchasers or mortgagees. This doctrine is as applicable since the introduction of the Transfer of Property Act (IV of 1882) as it was before.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, First Class Subordinate Judge, Appellate Powers, at Dhulia, reversing the decree passed by Ráo Sáheb K. R. Natu, Subordinate Judge of Yával.

The plaintiff, as mortgagee under a mortgage deed dated 26th December, 1879, sued to recover the amount due to him by sale of the mortgaged property.

The first five defendants pleaded that the mortgage had been satisfied.

* Second Appeal No. 237 of 1901.