CRIMINAL REVISION.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR v. JUSUB ALLY.*

1905.
February 22.

Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 3, 4, 12†—Gambling in a machhwa—Public place—Bombay Harbour.

The accused, fourteen in number, chartered a *machhwa* (boat), and, having got it anchored in the Bombay Harbour a mile away from the land, carried on gambling there. For this they were convicted of an offence under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) for gaming in a public place:

Held, that the accused were not guilty of an offence under section 12 of the Act, since they cannot be said to be gambling in a public place.

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* Criminal application for Revision No. 305 of 1904.

† The Bombay Prevention of Gambling Act (Bom. Act IV of 1887), sections 3, 4 and 12 run as follows:—

3. * * * In this Act "common gaming house" means a house, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room or place, whether by a charge for the use of the instruments of gaming or of the house, room or place, or otherwise howsoever.

4. Whoever

(*a*) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming house;

(*b*) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid;

(*c*) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid;

(*d*) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room or place,

shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

12. A Police officer may apprehend without warrant—

(*a*) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare;

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Any such person shall, on conviction, be punished with fine which may extend to fifty rupees, or with imprisonment which may extend to one month.

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PER BATTY, J. :—The word "place" which is patient of many different meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) or in section 3 of 36 and 37 Vict., c. 38, in connection with such words as roads, streets and thoroughfares, it has a very different meaning from that which it bears in section 4 of the Act, and from that given to it in connection with section 3 of 16 and 17 Vict., c. 119, by judicial decisions.

The mischief aimed at in section 4 of the Act is a mischief clearly distinct from that aimed at in section 12 of the Act. In the former, the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the latter, the offence is not that the individual members are making a profit at all but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence.

Section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) aims at gambling *in* a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against convictions and sentences recorded by Karsondas Chabildas, Third Presidency Magistrate of Bombay.

The accused, fourteen in number, chartered a *machhwa* (a boat licensed for hire), and got it anchored opposite Gun Powder Bunder in the Bombay Harbour, a mile away from the land. They were found there gambling with dice and money on a canvas which was stretched out in the centre of the boat.

They were tried by the Magistrate for an offence under section 12 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), and were convicted and sentenced each to undergo three weeks rigorous imprisonment.

The accused applied to the High Court under its criminal revisional jurisdiction, chiefly on the grounds that the lower Court erred in law in holding that the said boat was a "public place" within the meaning of section 12 of the Act, notwithstanding the fact that it had been exclusively engaged by the accused,

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and that the lower Court erred in holding that the part of the harbour where the *machhwa* was cruising was a "thoroughfare" or a "public place" within the meaning of section 12.

Branson (with him *H. C. Coyaji* and *F. Olivera*), for the applicants.

Raikes (acting Advocate General) with the Public Prosecutor, for the Crown.

BATTY, J.:—The only question in this case is whether gambling in a *machhwa* which was chartered by the accused and was used by them for the purpose in the Bombay Harbour, could be said to be gambling in a public place, street, or thoroughfare, within the meaning of section 12 of the Bombay Gambling Act. The first two of these phrases, *viz*, 'place' and 'street' have unambiguous meanings attached to them as legislative expressions by judicial decisions. The second of them, the word 'street,' is manifestly inapplicable in this case. It is contended that the third expression, 'thoroughfare,' is applicable to the Bombay harbour in which the *machhwa* containing the gambling party was found. We do not think that it can be said of the accused that they were gambling in a public place or thoroughfare in the ordinary acceptation of those terms. We think that the word 'place,' which is patient of many different meanings, must necessarily, in each instance in which it is used by the Legislature, be construed with reference to the intention to be inferred from the context. Thus, it is obvious that when used as in section 12 of the Bombay Gambling Act, or in section 3 of 36 and 37 Vict., c. 38, in connection with such words as roads, streets, and thoroughfares, it has a very different meaning from that which it bears in section 4 of the Bombay Gambling Act, and from that given to it in connection with section 3 of 16 and 17 Vict., c. 119, by judicial decisions in *Shaw* v. *Morley*[1]; *Bows* v. *Fenwick*[2]; *Gallaway* v. *Maries*[3]; *Liddell* v. *Lofthouse*[4]; *McInaney* v. *Hildreth*[5]; or in *Powell* v. *Kempton Park Racecourse Company*[6], where the Court of Appeal disapproved *Hawke* v. *Dunn*[7].

(1) (1868) L. R. 3 Ex. 137.
(2) (1874) L. R. 9 C. P. 339.
(3) (1881) 8 Q. B. D. 275.
(4) (1896) 1 Q. B. 295.
(5) (1897) 1 Q. B. 600.
(6) (1897) 2 Q. B. 212.
(7) (1897) 1 Q. B. 579.

These cases just cited construe the word when used with such words as house, room, or office, as meaning a "defined" or "ascertained fixed spot," that is with certain circumscribing limits and so far *ejusdem generis* with a house, room or office. And in *Snow* v. *Hill*(1) where the appellant had been "simply walking about the field" it was held that he did not come within the purview of the Act 16 & 17 Vict. c. 119. That Act treats of houses, rooms, offices or other places opened, kept or used for the purpose of the owner etc. betting with persons resorting thereto. The mischief aimed at in section 3 of that Act and in section 4 of the Bombay Gambling Act is a mischief clearly distinct from that aimed at in 35 & 37 Vict. c. 38 and in section 12 of the Bombay Gambling Act. In the first two enactments mentioned the mischief aimed at is the practice of individuals making a profit by providing a spot of their own selection known as a place where gambling is to be carried on, and making a livelihood by attracting people to a place which they would not otherwise frequent. In the other two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. Thus, the very fact that special accommodation and privacy had been furnished, which would be essential in a case under section 4 of the Bombay Gambling Act, would be a ground for excluding the case from the purview of section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if whether for private gain or not, they expose temptation where the general public have a right to come. Thus an omnibus may be a public place for the purposes of an enactment aiming at acts committed *ad commune nocumentum*: *Queen* v. *Holmes*.(2)

(1) (1885) 14 Q. B. D. 583.

(2) (1853) 22 L. J. (N. S.) M. C. 122.

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So may a roof at the back of a house, exposed to view, where the offence consists in exposure: *Queen* v. *Thallman*.[1] But gaming in a railway carriage which was not being used or travelling along the line, but was shunted away in a yard or warehouse, was held not to be playing or betting in an open and public place: *Ex parte Freestone*.[2] The obvious ground of distinction is that the public had no right of access to the carriage and that the gaming was not so exposed as to be patient to the passer-by. In *Langrish* v. *Archer*,[3] on the other hand, where the railway carriage in which gaming was going on was travelling on its journey, it was held to be a public place within the meaning of 36 & 37 Vict. c. 38, section 3, because the public had access thereto. And obviously any person getting into such a carriage would at once have the fact, that gambling was going on there, forced on his notice. But we think that in the case of a *machhwa* chartered by a private party, the public had not such right of access as would suffice to bring the gambling carried on in it within section 12 of the Bombay Gambling Act. It is true the *machhwa* was in the harbour which may be regarded as a thoroughfare for certain purposes. But a *machhwa* is not exposed to the public view of persons using that particular kind of thoroughfare in the same way as a carriage is in a public street. It is rather of the nature of an enclosure, and we do not think it reasonable to suppose that anybody using the harbour as a thoroughfare in the ordinary way could have known the use to which the *machhwa* was being put. In the case of *Queen-Empress* v. *Sri Lal*,[4] a *chabutra*, a terrace or platform adjoining a public thoroughfare, was held not to be a public place within the meaning of section 159 and 160, Indian Penal Code, because the public had not a right of access thereto, though "it was visible from the thoroughfare and the public could see what was taking place." But the case of a *machhwa* in the harbour is, we think, much stronger, for it would be, in our opinion, unreasonable to suppose that the public in the ordinary exercise of their right of user of the harbour could have known that gambling was going on in it. Section 12 aims at gambling

(1) (1863) 33 L. J. (N. S.) M. C. 58.
(2) (1856) 25 L. J. (N. S.) M. C. 121.
(3) (1882) 10 Q. B. D. 44.
(4) (1895) 17 All. 166.

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in a public place or thoroughfare, ordinarily with no intervening obstruction to the public view, where there is voluntary publicity. In our opinion, without straining words, the *machhwa* must be considered to have been a place within the meaning of section 4 rather than of section 12, being more of the nature of a house or room than of a place *ejusdem generis* with a street or thoroughfare. Had it been so used for the profit or gain of any person owning, occupying, using or keeping it, then the case would, we think, have come within sections 3 and 4 of the Bombay Gambling Act. But what the party apparently aimed at was seclusion and not publicity, and we think that their manifest object of avoiding notice would have been attained as far as the public was concerned and that, save for the exceptionally close scrutiny of the police, the structure sufficed to exclude both the access and the observation of the public. We desire to add that the view we take in this particular instance by no means involves as a corollary that people gambling in a carriage in a street or ordinary thoroughfare would be exempt from liability under section 12. We do not think that the accused in this particular case were in a similar position, and reverse the convictions and sentences passed on the accused.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Aston.

1905.
March 7.

VITHAL NARAYAN KALGUTKAR (ORIGINAL DEFENDANT 11), APPELLANT, *v.* HIS HIGHNESS RAJE BAHADUR SHRIRAM SAVANT *alias* RAO SAHEB BHOSLE, SIR DESAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Lease—Assignment of lease—Mortgage of lease—Liability of the mortgagee to the landlord—Possession of the mortgagee.

The plaintiff, the Sávantvádi State, leased certain lands to defendants 1 to 10. Of these, defendants 1, 2, 3 and 9 mortgaged their shares in the lands to defendant 11; the mortgagee was not put in actual possession of the lands, but subsequently to the execution of the mortgage-deed the tenants of the mortgagor passed *kabulâyats* to the mortgagee under which they agreed to pay the mortgagee (defendant 11) Rs. 36 per annum. The plaintiff thereafter

* Second Appeal No. 585 of 1904.