

decree was passed by the same judge in his Small Cause Court jurisdiction for recovery of Rs. 184-8-0. In *Narayan v. Nagindas*⁽¹⁾ two houses were attached in execution of the decree under the ordinary jurisdiction of the First Class Subordinate Judge, and defendant No. 5 applied for removal of the attachment on the ground that he and the husband of the deceased were united brothers and the attached property belonged to him. In these circumstances I am of opinion that no second appeal will lie, and it is unnecessary to go into the merits. There is no question of jurisdiction, and the appeal must therefore be dismissed with costs.

Appeal dismissed.

J. G. R.

⁽¹⁾ (1905) 30 Bom. 113.

CRIMINAL REVISION

Before Mr. Justice Patkar and Mr. Justice Baker.

EMPEROR *v.* SYED A. M. VAZIRALLY, ACCUSED.*

Indian Penal Code (Act XLV of 1860), section 294A (second part)—Lottery—Publishing a proposal for distribution of prizes by chance—“Drawing,” meaning of.

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The accused, who was the agent of a Cigarette Company at Belfast, published a pamphlet advertising a prize of Rs. 5 which could be automatically obtained by purchasers of Park Drive Cigarettes. The accused sent ten currency notes of Rs. 5 each to the manufacturers of Park Drive Cigarettes at Belfast, who put each note in a separate packet of cigarettes, mixed those packets with other packets which contained no notes, and sent them out to the accused in India. On a prosecution of the accused under second part of section 294A of the Indian Penal Code :—

Held, (1) that the scheme published by the accused for distribution of prizes by lot or chance amounted to a lottery :

Barratt v. Burden⁽¹⁾; *Hunt v. Williams*⁽²⁾ and *Taylor v. Smetten*,⁽³⁾ relied on ;

(2) that as there was no proposal to pay any sum on any event or contingency relative to the *drawing* of any lot the publication of handbills did not fall under section 294A (second part) :

Emperor v. Mukandi Lal,⁽⁴⁾ followed.

The word “drawing” is used in the first and second part of section 294A of the Indian Penal Code in its physical sense and that the actual drawing of lots is an essential ingredient of the offence under section 294A.

* Criminal Revision Application No. 128 of 1928.

⁽¹⁾ (1893) 68 L. J. M. C. 33.

⁽³⁾ (1888) 11 Q. B. D. 207.

⁽²⁾ (1888) 52 J. P. 821.

⁽⁴⁾ (1917) 18 Cr. L. J. 768.

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THIS was a Criminal Revision Application against the conviction and sentence passed by H. P. Dastur, Presidency Magistrate, Third Court, Bombay.

The accused was a trader in tobacco carrying on business under the name and style of "The British Cigarette and Tobacco Company," at Bombay. He was the sole agent of "Park Drive Cigarettes, Gallahar Limited, Belfast." In order to popularise the brand, the accused got 22,000 handbills printed and distributed them throughout the City. The material portion of the handbill was as follows:—

Park Drive Cigarettes

PRIZE OF Rs. 5 AUTOMATICALLY OBTAINED

UNPRECEDENTED OFFER

NO MORE TROUBLES: ALL WORRIES REMOVED

Hello; Everybody, here's the most amazing offer of the day. There's money in it, so get in your supplies of PARK DRIVE Cigarettes, and stand a chance of having Rs. 5 to spend on an evening's entertainment by investing 0-3-0 on a packet of the finest Virginia Cigarettes.

* * * * *

All troubles removed, no Cross Word Puzzles to solve, no vexatious conditions, no collection of Prize Tickets, Coupons, or Empty Packets, no chance of mistaying your collection after months of patient gathering, no trouble to exchange them for presents, all your worries ended by this sensational offer.

NOTES OF Rs. 5 have been inserted in packets of Park Drive Cigarettes, and plain paper has also been inserted in those packets that do not contain a note, so as not to give the game away. Every packet is banded and similar to one another, and all you have to do is to buy a packet of Park Drive, see that the band is not broken and chance your luck. If fortune favours you the prize of Rs. 5 is automatically in your hands, with no need to worry about collecting the empty packets.

The accused had sent ten currency notes of Rs. 5 each to the manufacturers of the cigarettes at Belfast, who put in a note of Rs. 5 in each of the ten packets of cigarettes. These packets were mixed with a large number of other packets and all these were subsequently packed in 50 cases and despatched to the accused.

On the publication of the handbill, the accused was charged under section 294A, second part, of the Indian

Penal Code for publishing a proposal for drawing of a lottery.

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The accused contended that the pamphlet published by him was not a proposal of a lottery; that he did it with a view to popularise the brand; that the cigarettes were sold at the usual price of three annas a packet even before and after the scheme was published; that there were no numbers, special marks or coupons on or in the packets and the customer had not to contribute or adventure or make any stake whatever.

The Presidency Magistrate, Third Court, held that the scheme published by the accused was a lottery and relying on the rulings in *Morris v. Blackman*⁽¹⁾; *Taylor v. Smetten*⁽²⁾; *Willis v. Young and Stenbridge*⁽³⁾; *Hunt v. Williams*,⁽⁴⁾ held that the offence under second part of section 294A of the Indian Penal Code was established. The accused was, therefore, convicted and sentenced to pay fine of Rs. 15. The learned Magistrate's reasoning was as follows :—

“ It is contended, however, that in order to bring this case within the second part of the section it must be proved that the accused published a proposal to pay the prize on any event or contingency *relative to or applicable to* the drawing of any ticket, lot, number or figure in any such lottery. It is contended that there is no drawing at all.

I fail to see the point. There was certainly no drawing of any ticket of cigarettes. The purchaser when he buys the packet buys or draws the packet and the chance of the prize contained in it. The distribution of the prizes would not be according to a number of coupons. The distribution of the prize is by chance and depends upon the purchaser drawing the right packet.”

The accused applied to the High Court.

J. G. Rele, for the accused :—I submit that two points arise for consideration : (1) whether the proposal to pay the sum was a lottery; (2) whether the publication of the proposal depended on any event or contingency relative or applicable to the drawing of any ticket, lot, number

⁽¹⁾ (1864) 2 H. & C. 912.

⁽²⁾ (1883) 11 Q. B. D. 207.

⁽³⁾ [1907] 1 K. B. 448.

⁽⁴⁾ (1888) 52 J. P. 821.

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or figure in a lottery within the meaning of section 294A, clause 2, of the Indian Penal Code.

I submit that the proposal was not a lottery. Lottery is described as a scheme for distributing prizes by lot or chance. In its simplest form the adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an agreed event: see Halsbury's Laws of England, Volume XV, page 299. According to this definition the proposal was not a lottery, because the customer here had not to contribute for getting the prize nor was there any stake or adventure on his part. It was one-sided proposal according to which the accused voluntarily offered to give prizes to customers out of his own pocket and it was not dependent upon drawing or casting of a lot. It is held in *Kamakshi Achari v. Appavu Pillai*⁽¹⁾ that a transaction is not necessarily a lottery because a matter of whatever kind is agreed to be decided by lot: see *Shanmuga Mudali v. Kumaraswami Mudali*.⁽²⁾ In the English cases of *Taylor v. Smetten*⁽³⁾ and *Willis v. Young and Stembidge*⁽⁴⁾ the distribution of prizes depended upon the collection of coupons or medals with certain numbers to be collected by customers. There was nothing of the kind here.

[BAKER, J.:—The case of *Hunt v. Williams*⁽⁵⁾ is on all fours with the present case and there distribution of half-penny in caramel packets was held to be a lottery.]

Yes, but there the accused was convicted under 42 Geo. III, chapter 119, section 2, of keeping a lottery.

Secondly, the proposal did not depend on any contingency relative or applicable to the drawing of any ticket, lot, number or figure in a lottery. In fact there was no 'drawing' at all in this case. 'Drawing' is mentioned

⁽¹⁾ (1863) 1 Mad. H. C. 448.

⁽²⁾ (1925) 48 Mad. 661.

⁽³⁾ (1883) 11 Q. B. D. 207.

⁽⁴⁾ [1907] 1 K. B. 448.

⁽⁵⁾ (1888) 52 J. P. 821.

as "that which is drawn or obtained by drawing," Murray's Dictionary; or "an act of taking lots," Webster's Dictionary. So drawing is used in its physical sense, that is the winning numbers are actually drawn out of an urn, box or other receptacle. This is clear by reference to clause (1) of section 294A of the Indian Penal Code, under which it is an offence to keep any office or place for drawing any lottery: see also *Emperor v. Mukandi Lal*.⁽¹⁾

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In this case the cigarette packets were distributed over several places in India, and a shopkeeper on payment of the price handed over a packet to a customer. It cannot be said that a customer in buying a packet drew a lot. He pays the price and receives the packet through the hand of the shopkeeper. No drawing is effected. Thus there was no proposal to pay any sum on any event or contingency relative to the drawing of the lot. The English cases of *Morris v. Blackman*,⁽²⁾ *Willis v. Young and Stenbridge*,⁽³⁾ *Taylor v. Smetten*,⁽⁴⁾ and *Hunt v. Williams*⁽⁵⁾ have no application as they are cases arising under 42 Geo. III, chapter 119, section 2, under which a person is dealt with for keeping a lottery. The wording of section 294A, clause (2), is "drawing of any ticket, lot, number or figure in any such lottery."

P. B. Shingne, Government Pleader, for the Crown:— I submit that the publication of the handbill was a proposal, and the proposal was sufficient to show that it was a lottery. It held out a proposal that "there is a chance of your getting something for nothing." Lottery is defined as a distribution of prizes by lot or chance. So in this case. In the case of *Taylor v. Smetten*,⁽⁴⁾ there were coupons in tea packets entitling the purchaser to a prize. It was held that in purchasing a tea packet,

⁽¹⁾ (1917) 18 Cr. L. J. 768.

⁽²⁾ [1907] 1 K. B. 448.

⁽³⁾ (1864) 2 H. & C. 912.

⁽⁴⁾ (1883) 11 Q. B. D. 207.

⁽⁵⁾ (1888) 52 J. P. 621.

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he purchased the tea coupled with the chance of getting something of value by way of prize and this amounted to a lottery. So also *Hunt v. Williams*⁽¹⁾ shows that the act of including half penny in caramel packets and inducing the purchaser to buy them was a lottery. I also rely on *Morris v. Blackman*.⁽²⁾ Secondly, whenever the purchaser bought a packet, he drew a lot out of so many packets offered for sale and automatically got a note of Rs. 5 if per chance the packet he purchased contained a note. It can, therefore, be said that the proposal depended on a contingency relative or applicable to the drawing of a lot, which in this case was a cigarette packet containing a Rs. 5 note.

The case of *Emperor v. Mukandi Lal*⁽³⁾ is distinguishable. In that case there was no drawing at all in the second lottery and the prize depended upon the average price at which the various sales of opium had taken place in a particular month and prizes were awarded to these persons who had predicted the last or the last two figures of that price. Such is not the case here. Here the drawing is actually effected by the purchase of packet by a customer on the chance of getting a Rs. 5 note.

PATKAR, J. :—In this case the accused is tried on a charge under section 294A (second part) of the Indian Penal Code for publishing a proposal for the drawing of a lottery. The accused, who is the proprietor of the British Cigarette and Tobacco Co., published 22,000 handbills advertising a prize of Rs. 5 which could automatically be obtained by purchasers of Park Drive Cigarettes. Exhibit B is one of such handbills. It appears that tea currency notes of Rs. 5 each were sent to the manufacturers of Park Drive Cigarettes at Belfast, who put in a note of Rs. 5 in each of ten packets

⁽¹⁾ (1888) 52 J. P. 821.

⁽²⁾ (1864) 2 H. & C. 912.

⁽³⁾ (1917) 18 Cr. L. J. 768.

of cigarettes. The ten packets were mixed with other packets and subsequently packed in 50 cases and despatched to the accused who is the sole agent for the cigarettes in India. The question is whether the whole scheme is a lottery.

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In *Taylor v. Smetten*⁽¹⁾ Hawkins J., accepting the definition of lottery as a distribution of prizes by lot or chance, held that selling of packets of good tea at a price worth the money but in each packet of which was a coupon entitling the purchaser to receive a prize (whatever it might turn out to be) mentioned on such coupon, was a lottery within the Statute 42, Geo. III, chapter 119. It was further held that it was utterly immaterial whether a specific article was or was not conjoined with the chance and as the subject-matter of the sale. In *Willis v. Young and Stembridge*,⁽²⁾ it was held that the scheme of distribution of chances could amount to a lottery when all chances were paid for by the general body of purchasers although an individual purchaser may not have paid for his chance. The present case closely resembles the case of *Hunt v. Williams*,⁽³⁾ where a person kept a sweetstuff shop and sold penny packets of American caramel of which several packets contained a half-penny in addition to a fair penny worth of sweets, it was held that that amounted to an offence of keeping a lottery. We think, therefore, that the scheme of the accused in the present case of distribution of prizes by lot or chance amounted to a lottery.

The question is whether the act of the accused falls within the second part of section 294A. The first part of section 294A refers to keeping any office or place for the purpose of *drawing* any lottery not authorised by Government. The second part of section 294A refers to publishing any proposal to pay any sum on any event

⁽¹⁾ (1883) 11 Q. B. D. 207.

⁽²⁾ [1907] 1 K. B. 448.

⁽³⁾ (1883) 52 J. P. 821.

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or contingency relative to the drawing of any such lot in any such lottery. It is urged on behalf of the accused that there is no drawing of a ticket, lot, number or figure in the lottery in question. Reliance is placed on the decision in the case of *Emperor v. Mukandi Lal*,⁽¹⁾ where it was held that the word "drawing" is used in the section in its physical sense and the actual drawing of lots is an essential ingredient of the offence provided for in section 294A, Indian Penal Code. The learned Magistrate held: "There was certainly no drawing of any ticket of cigarettes. The purchaser when he buys the packet buys or draws the packet and the chance of the prize contained in it. The distribution of the prizes would not be according to a number of coupons. The distribution of the prize is by chance and depends upon the purchaser drawing the right packet." It was held in *Kamakshi Achari v. Appavu Pillai*,⁽²⁾ that lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the persons concerned, is made wholly dependent upon *the drawing or casting* of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils. The first part of section 294A refers to keeping an office or place for the purpose of *drawing* any lottery. The second part refers to a proposal to pay any money, etc., on any event or contingency relative to the *drawing* of any ticket, lot, number or figure in a lottery.

The ingredients of the offence under the second part of section 294A are, firstly, there must be a lottery, secondly, there must be a drawing of any ticket, lot, number or figure in such lottery, and thirdly, there must be a publication of a proposal to pay any money or to deliver any goods or to do or forbear doing anything for

⁽¹⁾ (1917) 18 Cr. L. J. 768.

⁽²⁾ (1863) 1 Mad. H. C. 448.

the benefit of any person or any event or contingency relative or applicable to such drawing.

Having regard to the decisions in *Barratt v. Burden*,⁽¹⁾ *Hunt v. Williams*⁽²⁾ and *Taylor v. Smetten*,⁽³⁾ it appears that the scheme published by the accused amounts to a lottery.

On the second question whether there is a drawing of any ticket, lot, number or figure, I agree with the view in *Emperor v. Mukandi Lal*⁽⁴⁾ that the word "drawing" is used in the first and second part of section 294A in its physical sense and that the actual drawing of lots is an essential ingredient of the offence under section 294A.

The third question is whether there is any proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure. The putting of the five rupees note would amount to a proposal to pay a sum, but I think that that proposal to pay a sum is not on the event or contingency relative to the drawing of any lot. I do not agree with the view of the Magistrate that by the mere fact of drawing the packet, the customer draws the lot and automatically gets a note of Rs. 5 if per chance he purchases the packet containing the note. There is no drawing of any lot, nor is there any agreement to pay any sum of money on any event or contingency relative to such drawing of the lot. There must first be the drawing of the lot, and there must be a proposal to pay any sum or deliver any goods, etc., on the event or contingency of such drawing. In the present case, there is no proposal to pay any sum on any event or contingency relative to the drawing of any lot. In the English Act the offence is of keeping any lottery. The wording of the second part of section 294A, in my opinion, excludes a lottery in which there is no drawing of any ticket, lot, number or figure, and there

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⁽¹⁾ (1893) 63 L. J. M. C. 33.⁽²⁾ (1888) 52 J. P. 321.⁽³⁾ (1883) 11 Q.-B. D. 207.⁽⁴⁾ (1917) 18 Cr. L. J. 768.

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is no proposal to pay any money which is dependent on the event of such drawing of a ticket, lot, number or figure. In *Emperor v. Rachappa*⁽¹⁾ it was held that a mere publication on a trade handbill that tickets in an unauthorised lottery can be had at a particular place is no offence under paragraph 2 of section 294A, since it does not constitute a publication of a proposal to pay any sum on any event or contingency relating or applicable to the drawing of any ticket in any lottery not authorised by Government. In *Madan Gopal v. The King-Emperor of India*⁽²⁾ it was held that the words "any office or place for the purpose of drawing any lottery" in the first part of section 294A mean an office or place intended to be the scene of the actual drawing of the lottery. In that case the offence under section 294A was held proved as there were actual drawings of prizes.

I, therefore, think that the conviction and sentence of the accused is not sustainable. I would, therefore, reverse the conviction and sentence and order the fine, if paid, to be refunded.

BAKER, J. :—The accused was convicted under the 2nd paragraph of section 294A of the Indian Penal Code, of publishing a proposal relating to a lottery. The facts are that the accused, who is a dealer in cigarettes, had caused five-rupee notes to be placed in some packets of cigarettes, pieces of plain paper being placed in the remaining packets so that it was impossible to distinguish the packets containing the notes from those not containing them, and any purchaser of a packet of the cigarettes sold by the accused stood a chance of getting a packet containing a five-rupee note. The accused published a pamphlet, which is given in detail in the judgment of the learned Magistrate, in which these facts were set out. On these facts he was convicted under section 294A.

⁽¹⁾ (1924) 26 Bom. L. R. 968.

⁽²⁾ (1910) P. R. No. 17 of 1910.

clause (2), of publishing a proposal relating to a lottery, and was fined Rs. 15. The accused applies in revision, and on his behalf two points are raised: first, that the transaction in question does not amount to a lottery, and secondly, that even if it does, it does not amount to publishing a proposal relating to a lottery under section 294A, latter part. There is no definition of lottery in the Indian Penal Code, but in view of the definition which has been laid down by the Courts in England there can be no doubt that the transaction in question is a lottery. In *Taylor v. Smetten*,⁽¹⁾ which is very similar to the present case, it was laid down that a lottery is a distribution of prizes by lot or chance, and that it makes no difference that the distribution is part of a genuine mercantile transaction. The learned Magistrate has pointed out that the case is exactly on all fours with *Hunt v. Williams*.⁽²⁾ That report does not seem to be available, but the facts are given with sufficient detail in Ratanlal's commentaries to show that it is exactly similar to the present case. The accused in that case sold packets of sweets at a penny each, some packets containing a half-penny, and the purchasers therefore stood the chance of getting half their money back. This is precisely similar to the present case in which a purchaser of a packet of cigarettes had a chance of getting a packet containing a five-rupee note, the odds according to the learned Magistrate being 50,000 to 1. I entertain no doubt, therefore, that on the rulings of the Courts in England the transaction in question amounts to a lottery, but it is contended that the publication by the accused of the terms of this transaction is not within the terms of paragraph 2 of section 294A. That section says:

“ And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on

⁽¹⁾ (1888) 11 Q. B. D. 207.

⁽²⁾ (1888) 52 J. P. 821.

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any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

The section was drafted long ago, and probably the Legislature had not then in contemplation such commercial developments as are indicated by the present case. Undoubtedly there is a proposal to pay a sum, viz., Rs. 5, on the contingency of the purchaser buying a packet of cigarettes containing a five-rupee note. The question is whether the purchase by the purchaser of a packet of cigarettes can be regarded as amounting to the drawing of any ticket, lot, number or figure in the lottery. No doubt the section primarily contemplates the ordinary form of a lottery in which success depends on the drawing of a particular number or ticket from a receptacle provided for the purpose, which is the usual principle on which lotteries, sweepstakes, etc., are conducted. It is not in evidence that the packets of cigarettes bear any particular number or figure, and it is of the essence of the competition that each packet should be indistinguishable from another, measures being taken to ensure this by inserting pieces of plain paper in those packets which did not contain a five-rupee note. The notes and the paper were put in by the manufacturers at Belfast, and the accused himself was, therefore, equally in the dark as to which were the prize packets. As to whether the handing of a packet of cigarettes to a customer from the general stock in a shop would amount to the drawing of a lot, as mentioned in the section, there is a somewhat similar case in *Emperor v. Mukandi Lal*,⁽¹⁾ in which it was held by the Punjab Chief Court (p. 771): "Though there is ample authority for holding that a lottery does not cease to be a lottery because the winners are determined by a method other than the actual drawing of the winning numbers, still we have no doubt that in the offence provided for in section 294A of the Code the actual

⁽¹⁾ (1917) 18 Cr. L. J. 768.

drawing of lots is an essential ingredient. The word 'drawing,' we think, is used in the section in its physical sense and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle." This being a penal provision must be strictly construed, and I agree with the view taken by the learned Judges in *Emperor v. Mukandi Lal*.⁽¹⁾ It follows, therefore, that the act of the accused in publishing the particulars with which he is charged, does not fall within the terms of section 294A of the Indian Penal Code. I agree, therefore, that the conviction and sentence should be set aside, and the fine, if paid, refunded.

Conviction and sentence set aside.

J. G. R.

⁽¹⁾ (1917) 18 Cr. L. J. 768.

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Before Mr. Justice Patkar and Mr. Justice Baker.

SHANKAR TULSIRAM NAVALE (ORIGINAL ACCUSED No. 1), APPLICANT *v.*
KUNDLIK ANYABA YADAW (ORIGINAL COMPLAINANT), OPPONENT.*

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Criminal Procedure Code (Act V of 1898), section 403—Trial for the offence of adultery—Acquittal by a Court without jurisdiction—Subsequent prosecution in a Court of competent jurisdiction—Previous acquittal no bar—Offence of adultery not a continuing offence—Indian Penal Code (Act XLV of 1880), section 497.

When an accused person is tried and acquitted of an offence by a Court having no jurisdiction to try the offence, a subsequent trial for the same offence by a Court of competent jurisdiction is not barred under the provisions of section 403 of the Criminal Procedure Code, 1898.

The offence of "adultery" under section 497 of the Indian Penal Code is not a continuing offence. Every act of sexual intercourse amounts to an offence of adultery.

Queen-Empress v. Emaji,⁽²⁾ relied on.

THIS was a Criminal Revisional application against the order of A. C. Wild, Sessions Judge of Poona.

* Criminal Revision Application No. 145 of 1928.

⁽¹⁾ (1880) Ratanlal's Cri. Cas. 150.