

CRIMINAL REFERENCE.

Before Mr. Justice Ghose.

DURGA PRASAD KALWAR

v.

EMPEROR.*

1904

February 19.

Gambling—Public place—Osara or verandah—Gambling Act, II (B.C.) of 1867, s. 11.

The accused were convicted under s. 11 of the Gambling Act, II (B.C.) of 1867, of gambling in a public place. The place where the gambling was held was an *osara* or verandah, which was enclosed on all sides, but having doors opening towards the road and having a platform between the *osara* and the road.

It was a part of a building which was the private property of certain individuals, and was used during the day as a shop; but not so in the night. The gambling in question took place after midnight.

Held, setting aside the convictions, that the *osara* was not a public place within the meaning of s. 11 of the Gambling Act.

RULE granted to the petitioners, Durga Prasad Kalwar and others.

This was a Rule calling upon the District Magistrate of Saran to show cause why the conviction and sentence in the case should not be set aside upon the ground that the shop in which the gambling took place was not a public place within the meaning of s. 11 of the Gambling Act.

The petitioners were arrested at the shop of one Mohavir Sah, where it was alleged they had been gambling. The place where the gambling was held was an *osara* or verandah, enclosed on all sides, but having doors opening towards the road, and a platform between it and the road. The *osara* was a part of a building, which was the private property of certain persons. It was used

* Criminal Revision No. 63 of 1904 made against the order passed by J. F. Graham, Joint-Magistrate of Saran, dated the 19th of December 1903.

during the day as a shop, but not so at night. The gambling took place after midnight. Some of the petitioners were standing on the roadside looking at the game that was going on inside, while others were among those who were standing inside the *osara*. The petitioners were convicted on the 19th December 1903, by the Joint-Magistrate of Saran under s. 11 of the Gambling Act and fined.

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Mr. Jackson (Babu Dwarka Nath Mitra with him) for the petitioners.

Babu Dharendra Lal Kastgir for the Crown.

GHOSE J. The petitioners in this case have been convicted under s. 11 of the Bengal Gambling Act, and sentenced to a fine. The question raised before me is whether the place where the gambling took place is a public place within the meaning of the said section. It appears, upon the map filed in this case as also upon the evidence, that the place where the gambling was held is an *osara*, which is enclosed on all sides, there being, however, doors opening towards the road, and there being what is called a platform between the said *osara* and the road. The place in question is a part of a building, which is the private property of certain individuals. It is used during the day as a shop, but not so in the night; and the gambling in question took place after midnight on a certain day. It appears that people were standing on the roadside and looking at the game that was going on inside the room. Some of these people, and others, who were standing inside the *osara*, were arrested; and they have all been found guilty of the offence of gambling.

I do not understand how the persons who were standing on the roadside and looking at the game, but were arrested, could be convicted, there being no distinct evidence proving that they took any real part in the gaming. However that may be, having regard to the evidence as to the place where the gambling actually took place, I am unable to find that it is a public place within the meaning of section 11 of the Gambling Act.

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[See two cases of this Court, References No. 24(1) and 25 (2) of 1894 and the case of *Khudi Sheikh v. The King-Emperor*(3).] I accordingly set aside the conviction and sentence

- (1) See foot-note.
- (2) Unreported Reference No. 25 of 1894.
- (3) (1902) 6 C. W. N. 33.

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v.

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The Order of Reference by H. W. Gordon, Sessions Judge of Saran, was as follows:—

Under s. 438, Act X of 1882, I herewith transmit the record of the case noted on the margin to be laid before the High Court with the following report.

1st. The petitioners, twelve in number, have been tried summarily by the Deputy Magistrate of Chapra, and convicted of an offence punishable under s. 11 of Act II of 1867 (B.C.), that is to say of gambling in a public place, and sentenced each to pay a fine of Rs. 10, or in default to undergo two weeks' rigorous imprisonment. It is said the petitioners were gambling with shells on the occasion of the Dewali festival in a verandah (*osara*) belonging to one Babu Lal, and situated alongside the public road.

2nd. I recommend that the convictions and sentences be set aside and that the fines or any portion of them, if realized, be refunded.

3rd. I am of opinion that the whole order is bad in law.

4th. It appears to me that the verandah is not a public place within the meaning of s. 11 of Act II of 1867 (B.C.). The Deputy Magistrate in his explanation says that by public place is meant a "place to which the public have access," and that as the verandah was open towards the road, a person could step into it and therefore it was a public place and accessible to the public. This view is I think not correct. This particular verandah may be literally accessible to the public in the sense that there was no physical obstruction to a person desirous of stepping on to it, but at the same time the public have no right to enter the verandah of a private person. It might as well be contended that any person might step into another person's house because the door opening

* Criminal Reference No. 24 of 1894.

and make this Rule absolute. The fine, if paid, will be refunded.

Rule made absolute.

D. S.

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ou to the road was left open. The house would then be physically accessible to the public, but the public would have no right to walk into the house, and supposing that the house was not used as a "common gaming-house" as defined in s. 1 of the Act, gambling in it would not in my opinion amount to an offence under s. 11. In the present case it is not alleged that the verandah was being used as a common gaming-house.

For the above reasons I think the Deputy Magistrate's order is bad in law.

O'KINEALY AND HILL JJ. We set aside the convictions and sentences in this case for the reasons given by the Sessions Judge, and direct that the fines, if paid, be returned.