

Bhimrao Trimbakrao Ingle and Others

Vs

State of Maharashtra

Criminal Appeal No. 28 of 1977

(M. P. Thakkar, B. C. Ray JJ)

19.08.1986

JUDGMENT

THAKKAR, J. –

1. Whether or not it was a 'common gaming house' [As defined by Section 3(ii) of the Act] is the question. Not is the answer.
2. The appellants were convicted for an offence under Section 5 of the Bombay Prevention of Gambling Act, 1887 (hereinafter called 'the Act') as it stood in 1972 for being found in a 'common gaming house' where they had assembled for the purpose of gaming. Appellant 6 was also convicted for an offence under Section 4 of the Act, for using a room as a common gaming house. The Sessions Court exercising appellate jurisdiction came to the conclusion that the gaming was taking place in an office of the (Agricultural) Soil Conservation Department and that the room in which the gaming was taking place was not a 'common gaming house' within the meaning of Section 3(ii) [Section 3(ii) : In this Act, 'common gaming house' means : In the case of any other form of gaming, any house, room or place whatsoever in which any instruments of gaming are kept or used for the profit or gain of the persons owning, occupying, using or keeping such house, room or place by way of charge for the use of such house, room or place or instruments or otherwise howsoever] of the Act. On reaching the conclusion that it was not a 'common gaming house', the Session Court came to the conclusion that the offence committed by appellant 6 would not fall under Section 4 of the Act. The Sessions Court, however, recorded a finding of guilt against the appellants including appellant 6 for an offence under Section 5 of the Act seeking support from Section 7 [Section 7 : When any instrument of gaming has been seized in any house, room or place entered under Section 6 or about the person of any one found therein, and in the case of any other thing so seized if the court is satisfied that the police officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming house and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the magistrate or the police officer or by any person acting under the authority of either of them] of the Act which provides for presumptive proof of keeping or gaming in a common gaming house.
3. Even though on an appreciation of evidence adduced by the prosecution the Sessions Court came to the conclusion that the prosecution had failed to establish that appellant 6 was deriving any profit or gain by way of charges for the use of the room in question and that accordingly it was not a 'common gaming house', the court strangely enough held that it was a common gaming house within the meaning of Section 3(ii) of the Act by reason of the presumption under Section 7 of the Act.

What was held to be 'not' a 'common gaming house', having regard to the fact that evidence adduced by the prosecution was considered unacceptable could not have been held to be a common gaming house by recourse to the presumption under Section 7. The presumption is a rebuttable presumption which was not required to be rebutted by the defence inasmuch as the prosecution evidence was discredited and rejected and the presumption stood rebutted on that account. What is not a 'common gaming house' in fact in the light of evidence cannot become a common gaming house by reason of presumption under Section 7. The reason is neither far to seek nor obscure. What the prosecution is required to establish by recourse to the presumption is that the room is a 'common gaming house' as defined in the dictionary of Section 3(ii) that is to say that the occupier is collecting charges for the use of the room. When evidence is adduced and the prosecution fails to establish that such charges are in fact collected, how can the court hold in the face of its own finding, that even so it is a 'common gaming house' because of the presumption ? The Sessions Court was, therefore, in error in convicting the appellants for an offence under Section 5 which can be committed only provided the persons concerned were gaming or were present for the purpose of gaming in a 'common gaming house'. The High Court was in error in failing to appreciate the import of the finding recorded by the court on the basis of the appreciation of evidence that in fact it was not a 'common gaming house' as found by the Sessions Court, and confirmed by the High Court. None of the appellants could therefore be convicted for an offence under Section 5 [Section 5 : Whoever is found in any common gaming house gaming or present for the purpose of gaming shall, on conviction, be punishable with imprisonment which may extend to six months and with fine...]

4. The appeal is, therefore, allowed. The order of conviction and sentence is set aside.

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