

ALLAHABAD HIGH COURT

State of U.P

Vs.

Lal Bahadur

Criminal Appeal No. 664 of 1965. against order of Magistrate 1st Class Lucknow
(Mahesh Chandra, J.)

29.05.1965. 03.04.1967

JUDGMENT

Mahesh Chandra, J.

1. This is a Government appeal against the acquittal Lal Bahadur, Jagat Singh, Har Prasad, Lalta Prasad, Rajdeo, Bishambar Bahadur, Gaurang Abdul Gani, Abdul Hamid, Sant Ram, Ram Nath and Shyam Bihari were prosecuted under Sections 3 and 4 of the U.P. Public Gambling Act. On 4-11-1964 a search warrant was obtained by the Station Officer. Police Station Alambagh under Section 5 from the Superintendent of Police (City), Lucknow and Lal Bahadur's house raided and the persons mentioned above arrested from the house while they were alleged to have been gambling. The Instruments of gaming are also said to have been seized. After investigation a charge-sheet was submitted on 1-5-1965 the case was received by transfer in the Court of Sri Hukum Singh, Magistrate I Class, Lucknow. On the same day copies were given to the accused and 7-5-1965 was fixed for their statements. On that day the S. O. was absent and the accused moved an application to the effect that the offence under Sections 3 and 4 of the U.P. Gambling Act was non-cognizable and the report of the Police Officer be treated as a complaint. According to the accused, the public prosecutor had no locus standi to appear in the case and they prayed that they be acquitted in accordance with the provisions of Section 247, Code of Criminal Procedure. The case was adjourned to 17-5-1965 for arguments. Nobody was present on behalf of the complainant or the prosecution on that date, and the case was adjourned to 19-5-65. On that date the A.P.P. sought an adjournment and the case was adjourned to 22-5-1965. The A.P.P. again sought another adjournment. On 27-5-1965

arguments were heard and the accused were acquitted by the order dated 29-5-1965.

2. The first contention on behalf of the State is that Section 5 of the U.P. Public Gambling Act permitted issue of a warrant by the District Superintendent of police to any police officer, not below such rank as the State Government shall appoint in that behalf to enter any house, walled enclosure, room or place upon credible information that it is used as a common gaming house. The contention is that in this case the Superintendent of police (City) issued the warrant of arrest, even then the provision of Section 5 of the U.P. Public Gambling Act has not been satisfied. In Lucknow there is a Superintendent of police (City) and also a Superintendent of police (Rural) and then there is a Senior Superintendent of police who is really the District Superintendent of police. The issue of a warrant by the Superintendent of police (City) cannot, therefore, be said to be the issue of one by the District Superintendent of police. The said recovery of articles of gaming and also the consequential arrest by the S. O., Alambagh were, therefore, without legal authority and caused prejudice to the respondents. A similar view was taken by my brother Gyanendra Kumar, J. in *Baboo Lal v. State of U.P.*,¹ with which I respectfully agree.

3. The next contention on behalf of the State was that since under Section 5 of the U.P. Public Gambling Act, the District Superintendent of Police may himself take into custody the persons whom he finds therein, the case under Sections 3 and 4 of the U.P. Public Gambling Act would be one of a cognizable offence and not of a non-cognizable offence. This contention is without force in *Jai Prakash v. State of U.P.*,² Desai, J. observed : "Offences of Sections 3 and 4 of the U.P. Public Gambling Act are not cognizable offences." He followed the earlier decision reported in *State of Rajasthan v. Tarachand*,³ Before the Division Bench of Rajasthan High Court, the cases reported in AIR 1941 Nagpur 338 and (1900) ILR 27 Calcutta 144 relied upon on behalf of the State were also cited. Section 5 of the Rajasthan Gambling Ordinance was for all material purposes in the same terms as Sections of the U.P. Public Gambling Act.

4. A non-cognisable offence has been defined in Section 4 (1)(n) Criminal Procedure Code as follows.

"Non-cognizable offence means "an offence for", and "non-cognizable case" means a case in which a police-officer, within or without a presidency town,

may not arrest without warrant."

5. Obviously when no police officer below the rank of District Superintendent of police can arrest a person without warrant under Section 5 of the U.P. Public Gambling Act, it cannot for a moment be contended that an offence under Sections 3 and 4 of the U.P. Public Gambling Act is not a non-cognizable offence, for Section 5 expressly excludes arrest without warrant by all officers below the rank of a District Superintendent of police.

6. I would, therefore, respectfully agree with the view taken by Desai, J. in AIR 1961 Allahabad 377 (supra). In fact the position appears to have been accepted on behalf of the State and at one stage application for examination from personal attendance of the S. O. concerned was moved by the A. P. P.

7. The next contention on behalf of the State is that it was incorrect for the Magistrate to acquit the respondents on the ground that the complainant was absent when the S.O. was present on 27-5-1965. This contention is also without substance. If after the absence of the complainant on 7-3-1965 and again on 17-5-1965 the Magistrate had proceeded to convict the respondents without there being any reason for adjournment and without exempting the S.O. from personal attendance, the action of the Magistrate would not have been proper. Section 247 Criminal Procedure Code runs as follows :

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate, shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day :

Provided that where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance, and proceed with the case."

8. It would be obvious from an analysis of the wording of the section that the normal course on non-appearance of the complainant is to acquit the accused. The Magistrate has the discretion to adjourn the hearing of the case if for some reason he thinks it proper. He has also the discretion to exempt the complainant from personal

attendance. But this discretion has to be exercised judicially. It is not a matter merely of whim of the Magistrate to adjourn the hearing of the case or to exempt the complainant from personal attendance. In the present case the S. O. was not exempted from personal attendance. So the only question is whether there was reason for the Magistrate to adjourn the hearing on the absence of the S. O. We have already seen that the case was non-cognizable. It would, therefore, be treated as a case of complaint vide AIR 1961 Allahabad 377 (Supra).

9. The Magistrate could, therefore, adjourn the hearing only if there was some reason which he thought proper for the adjournment. There was evidently no such reason for adjournment on at least 17-5-1965. On 7-5-1965 the date fixed for hearing, the complainant failed to appear and the case was fixed for 17-5-1965 for arguments on the application moved by the accused for acquittal on the ground of the absence of the complainant. On 17-5-1965 again the complainant was absent. There was then no further reason for any adjournment. Even the A.P.P. was not present on 17-5-1965. These respondents should, therefore, have been acquitted firstly on 7-5-1965 and at least on 17-5-1965 when even on that date the complainant failed to appear.

10. In *Hansraj Chawala v. District Magistrate, Allahabad*,⁴ Gyanendra Kumar, J. observed :

"The District Magistrate is not in any privileged position. In a summons case he has to be present on every date of hearing or also he must seek exemption from personal attendance from the court concerned. It is equally open to the trying Magistrate suo motu to exempt the attendance of the District Magistrate or any other servant from attending his court in suitable cases.

Where in a summons case neither the District Magistrate sought exemption of his attendance nor did the trial court suo motu grant such exemption, tendering of unsought for advice by the trying Magistrate to the District Magistrate, who was no better than any other complainant, to instruct the D.C.C. or A.P.P. to apply for his exemption and to adjourn the case just to convey this information to the District Magistrate cannot be considered to be a legal or adequate reason for postponement of the case within the meaning of Section 247, Criminal Procedure Code. In such a case the trial court is bound to dismiss the complaint and acquit the accused, as there was no legal or appropriate reason to adjourn the case."

11. With respect I entirely agree with the observations made by my learned brother Gyanendra Kumar, J. in that case. In the present case the S.O. evidently did not consider it worthwhile to apply for any exemption from personal attendance on 7th, 17th 19th and 22nd May 1965. It is preposterous for the police officers to expect the Magistrate to go on waiting for their personal attendance when they do not themselves take care to apply for exemption from personal attendance. The Magistrate cannot certainly be blamed for taking the right course of acquitting the accused in such circumstances. If he had convicted the accused without there being any proper reason for adjournment, he would have been at fault. When he took the right course of acquittal it is surprising that the State has been advised to file an appeal against the acquittal.

12. The appeal is accordingly without substance and is dismissed.

Appeal dismissed.

Cases Referred.

1. 1963 All. W.R. 740
2. AIR 1961 All 377
3. AIR 1958 Raj 108
4. 1965 All LJ 710: (1966 Cri LJ 320)