**BOMBAY HIGH COURT**

Emperor

Vs

Abasbhai Abdulhussein

(Marten and Madgavkar, JJ.)

26.11.1925

**JUDGMENT**

**Marten, J.**

1. This is an appeal by Government from the decision of the First Class Magistrate of Poona acquitting the three accused, who were charged-as to accused No. 1 under Section 4 and as to accused Nos. 2 and 3 under Section 5 of the Bombay Prevention of Gambling Act-(Act IV of 1887). The learned Magistrate heard the case throughout, bat upheld an objection taken by the accused that the search warrant, which purported to have been issued under Section 6 of the Act, was bad, He accordingly held that an unlawful procedure had been adopted in arresting the accused without complaint and without warrant and that the case could not now be converted into a non-cognizable case and must be dismissed. We are told by the learned Government Pleader that this last point was never argued at the trial but was first taken by the learned Magistrate in the course of his judgment.

2. The question of the legality of the warrant is in the nature of a preliminary objection and we agree with the learned Magistrate that the warrant was bad. The warrant referred only to "House No, 486, Peth Budhwar, Poona City"; whereas the house actually searched was not 486, but 484. The learned Magistrate has himself inspected the locus in quo and we accept his finding on that point. There is no other description of the property as there was in *Emperor v. Krishna Rutna Dalvi*[1] *and Emperor v. Jhunni*[2]. So there is nothing else to identify the property. If there had been, we might have seen our way to reject the number 486 as false demonstrate, and to rely on the rest of the description as one might say in a conveyance.

3. What then are the consequences which follow from the fact that the warrant was an illegal one. We agree with the decision in *Emperor v. Jaffur Mahomed*[3] that if the warrant was bad then the presumption under Section 7 of the Act cannot; be made. But it is important to observe that in the case just cited it was conceded by both sides that the validity of the conviction depended solely

on whether that presumption could be made. I refer in particular to what is said in the judgment of the Court at page 110. In our opinion, in the present case, the mere fact that the presumption under Section 7 cannot be raised does not prevent the prosecution from establishing by evidence in the ordinary way that on the facts proved the accused were guilty of the offences charged.

4. As regards the facts, we have two main branches of. evidence, viz., first, the fact that Namdev was sent to make a bet in the house No, 484 and did so and got a betting slip from accused No. 1, and, secondly, what was found in the house when it was raided by the police. The particulars of the result of that search will be found in the Panchnama of February 28, 1925. They included betting books with counter-foils and documents relating to horse racing. Further, at this search, accused Nos. 1, 2 and 3 were found on the premises according to the evidence for the prosecution.

5. It is contended for the accused that evidence of what was obtained at this illegal raid was inadmissible, In other words that if a search warrant is legal, then what is found as a result of that search cannot be put in evidence in a criminal case. That is far reaching proposition for which no authority has been cited to us by counsel for the accused. In our opinion, it is not well founded, and we may refer to *Emperor v. Allahdad Khan*[4] where Sir Harry Griffin and Mr. Justice Chamier in effect decided exactly the contrary. They say (p. 360):-It is doubtful whether the case is one which cornea under the provisions of Section 60 of the Excise Act, and we would have some hesitation in holding that the search was legal. Whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine, which is an excisable article under the provisions of the Excise Act, for possession of which the accused had no licence. On the facts found we are satisfied that the accused must have known that the cocaine had been unlawfully imported and that no duty had been paid on it.

6. In the present case, therefore, we think that evidence is admissible against all the accused of what was found at the search. As already pointed out, as regards accused No. 1 there is in addition the evidence of the bet with Namdev, which is irrespective of the search by the police.

7. That being so, is the evidence sufficient to prove that there was gaming in a common gaming house within the meaning of Section 4 and 5 of the Gambling Act. Taking into consideration the fact that Namdev was a stranger and went into the house and obtained a bet on a horse race, coupled with the documentary evidence which was found when the police searched the house very shortly afterwards, we think that the proper inference is that this was a common gaming house, and further that it was carried on by accused No. 1 within the meaning of Section 4, and that accused Nos. 2 and 8 were persons found in it for the purpose of gaming within the meaning of Section 5.

8. I will next deal with the technical objection, which the learned Magistrate took and which is really in the nature of a preliminary objection. His view is that as the warrant was illegal this was a non-cognizable case, and as the procedure actually followed was that of a cognizable case, the whole proceedings were bad and he could not begin de novo and treat the case as a non-cognizable case.

9. The prosecution, however, contend that in any event this is a cognizable case because it is one in which the police might arrest without warrant within the meaning of Section 4 (1), Sub-section (f) of the Criminal Procedure Code, It is argued that the words "a police-officer may arrest" do not mean every or any police officer, and that provided one finds that by law a superior police-officer may arrest without a warrant then the offence is a cognizable offence. It is further pointed out that the words in the definition are 'may arrest' and not 'does arrest' and that consequently the test is not whether in fact the arrest is effected but whether it may be effected. In other words the actual fact of arrest is irrelevant to the consideration whether a particular offence is a cognizable offence.

10. It is pointed out that under Section 6 of the Gambling- Act the Commissioner of Police and certain other persons have power to issue special warrants of search and also of arrest, and that consequently what they may authorise by special warrant they may do personally. It is said, therefore, that this class of offence is one where the police may arrest without a warrant because the superior officer himself such as the Commissioner of Police may do so without a warrant. We have considered this argument and in our opinion it is well founded. It is directly supported by a decision of the Calcutta High Court in *Queen Empress v. Deodhar Singh*[5] which was a gambling case where it became material to consider whether the offence was a non-cognizable one. At page 150 the judgment says :-It is contended that the offence is a non-cognizable one within the meaning of Clause (1) (n) of Section 4 of the Code of Criminal Procedure. Now, under the Gambling Act, it) is not every Police Officer who can arrest without a warrant. It is only the District Superintendent of Police who can arrest or by warrant direct the arrest of persona gambling in a house. The District Superintendent being a Police Officer who may, under a law for the time being in force, viz., the Gambling Act, arrest without warrant, we think that the requirements of Clause (1) (f) of the above section are satisfied, and that the offence in question is, therefore, a 'cognizible offence'. We cannot accept the contention that the words in that clauses Police Officer' mean 'any and every' Police Officer, It is sufficient if the Legislature has limited the power of arrest to any particular class of Police Officers.

11. So too in *Emperor v. Kaitan Dunning Fernad*[6] it was held by a Division Bench of this Court in an Abkari case that as a First Class Magistrate has, under Section 6 of the Act, power to give special warrants of arrest and search to certain police officers, the legislature must be presumed

to have intended that the Magistrate should have the authority to make the arrest and the search himself, if necessary.

12. In the view then, which we take, it is not necessary to consider what would be the case if in fact this offence was a non-cognisable one. That led to an interesting argument in the course of which *Bhairab Chandra Barua v. Emperor*[7] was cited to show that even if the offence wan a non-cognizable one still on the facts the charge-sheet put before the learned Magistrate must be either a complaint within the meaning of Section 4 (1) (h) or else a report in writing; that in the former case the Magistrate can take cognizance of it as a complaint under Section 190(1) (a) but that alternatively if the charge-sheet is looked upon as a police report and so within the exception of the definition of a complaint mentioned in Section 4(1) (h) then the Magistrate can take cognizance under the alternative clause in Section 190 (1) (b), viz., "upon a report in writing of such facts made by the police officer." It was accordingly argued that one way or the other the Magistrate had power to try the case.

13. The accused, on the other hand, on this further point relied upon the decision in Emperor v. Ghandri of Mr. Justice Fawcett and myself which was a case under the Prevention of Prostitution Act. But as, in our opinion, this present point does not arise for decision in this particular case I think I need not further refer to the arguments on this branch of the case, interesting though they were for the Court to listen to.

14. There are, however, two other points which I should mention which were taken on behalf of the accused. It was said that Namdev's evidence was not admissible under Section 136 of the Indian Evidence Act because you must first prove that this was a common gaming house before you can let in evidence as to any particular person having frequented it or made a bet there. That contention, in my opinion, is a wrong one. Namdev's evidence is clearly admissible as part of the evidence of the Grown to show that this was a common gaming house. We are not to divide the case into water-tight compartments in the manner suggested by the learned pleader for the accused.

15. Lastly, it was said that this was a joint trial of different offences, namely of accused No. 1 under Section 4 and of accused Nos. 2 and 3 under Section 5 and that accordingly it was bad. There again we think there is no substance in that contention, and that the past practice of this Court in hearing similar cases supports the view which we take in the present case.

16. In the result, therefore, we allow this appeal and convict the accused of the charges brought against them. As regards the question of sentence that will be dealt with after my learned brother has given judgment.

**Madgavkar, J.**

1. The facts of this case are hardly in dispute. The police suspected a house in Poona city occupied by accused No. 1, Abashbhai Abdul Hussein, and actually numbering municipal No. 484. Mr. Gumbleton, the Assistant Superintendent of Police, duly authorised under Section 6 of the Bombay Act IV of 1887, on sworn information, issued a warrant under that section but in respect of house No. 486, as he thought it to be and sent the witness Namdev to the house No. 484 on the morning of the search. He made a bet and received a slip; the house No. 484 was searched and three accused arrested and certain papers and books were found. All these together with the three accused were produced before the Magistrate and accused No. 1 was charged under Section 4 and accused Nos. 2 and 3 under Section 5 of the Bombay Act IV of 1887, It does not appear that any objection to jurisdiction was taken until after the whole evidence was recorded. The Magistrate held that by reason of the inaccuracy in the warrant of the No. 486, whereas the real number was 484, the whole proceedings were void ab initio, and therefore although he was satisfied on the facts as to the guilt of the accused, that they were entitled in Jaw to an acquittal. Government appeals.

2. We have, throughout this case, I think, been to a certain extent in sympathy with the view of the Magistrate in so far as it tends to preserve the sanctity of the house of a citizen inviolate and strictly to confine the powers of the police to search within the limits laid down by law and to extend them not an inch further. It is on this point that we have had the benefit of exhaustive arguments of law on both sides, and I, therefore, proceed shortly to state the reasons why I agree in the conclusion just formulated by my learned brother,

3. Shortly put, it is argued for the Crown that the offence is cognizable, that the inaccuracy at the most prevents a presumption under Section 7 against the accused that the house was a common gaming house under Section 7; but that the Magistrate had jurisdiction and that on the rest of the evidence a conviction was necessary.

4. For the accused it is argued, chiefly on the authority of Emperor v. Ghandri Bawoo , that the warrant was illegal and there was no jurisdiction.

5. It appears to me that from the inaccuracy of a warrant to the point of jurisdiction is a large step which must be strictly scrutinised. The Assistant Superintendent of Police who issued the warrant had admittedly jurisdiction. The house intended to be searched was undoubtedly the house occupied by accused No. 1, where accused Nos. 2 and 3 were found. But as there was no other description in the warrant beyond this number, even on the view in *Emperor v. Chandri*[8] this defect cannot be cured, But this Court has held in *Emperor v. Kaitan Duming Fernad*[9] that a Magistrate can enter even without a warrant; and in *Emperor v. Jaffur Mahomed*[10] a police officer

duly authorised can also do go. It follows, I think, on the view in *Queen Empress v. Deodhar Singh*[11] that the offence is a cognizable offence within the meaning of Section 4 (1) of the Code of Criminal Procedure rather than a non-cognizable offence under sub Clause (n) of that section. If so, the case falls under Section 190 (b) of the Code and the Magistrate had jurisdiction.

6. No authority is shown for the proposition that the Magistrate had no jurisdiction or that the evidence adduced was inadmissible by reason of the inaccuracy of the warrant. As was pointed out by Jenkins C.J. in *Barindra Kumar Ghose v. Emperor*[12] defects in warrants do not make evidence inadmissible; and the question of the accused's guilt is entirely different from the question of inaccuracies of the warrant: *Emperor v. Ravalu Kesigadu*[13]. It appears to me that, in the present case, the question whether the offence was cognizable or non-cognizable is not of much importance, as the sub-inspector who conducted the search was examined in this case, unlike the Magistrate in the case of *Emperor v. Kaitan Duming Fernad (1907) I.L.R. 31 Bom. 438*(Supra) Therefore, whether the case is treated as a non-cognizable offence and the report as a complaint requiring the examination of the complainant under Section 190, Clause (1) (a) or as cognizable under Section 190, Clause (1) (b) and not requiring such examination, on the sub-inspector's actual examination and the presence of the accused, the procedure actually adopted is equally good in either case.

7. It is pointed out by the learned Government Pleader that Section 529, Clause (e) of the Code of Criminal Procedure cures defects in respect of Section 190(1) Clauses (a) and (b) unlike defects under Clause (e) which fall under Section 530, with which this case is not concerned.

8. I would myself incline to the view formulated in *Bhairab Chandra Barua v. Emperor*[14] that the report could, if necessary (though I think it was not necessary), have been treated in this case as a complaint.

9. The result, in my opinion, is that the only advantage derived in this particular case and on the facts by the accused by the mis-description of the number is that no presumption can be made under Section 7 of the Gambling Act that the house where the accused were found was a common gaming house. But, on-the other hand, 'the evidence of Namdev and the books recording the bets, which are instruments of gaming Emperor v. Manilal , with the absurd explanation of the accused No. 1 as to the betting books and slips found, suffice. To repeat the words of the learned Magistrate himself, 'I have no doubt that on the facts a conviction could be recorded.' I would, therefore, hold, without in any way desiring to countenance such inaccuracies on the part of the police, indeed while desiring to impress on the police the need of absolute accuracy as far as their information permits, that the defect in the warrant in this particular case is not absolutely fatal. The Magistrate had jurisdiction to consider the case on the merits and to arrive at the conclusion of guilt which that evidence necessitates. On the civil remedy and the

possible criminal remedy, if any, open to persons, whose houses the police or anyone else for that matter illegally enter or search, I express no opinion.

10. For these reasons, I agree that in this particular case the acquittal must be set aside, and, holding as I do that a joint trial was perfectly legal, that all the three accused must be convicted under the respective sections charged against them.

11. Per Curiam. Under all the circumstances of this case and bearing in mind that the trial was as long ago as March 23, 1925, we think it will be sufficient to fine accused No, 1 Ea. 200 and in default a month's rigorous imprisonment. Accused Nos. 2 and 3 we fine Rs. 20 each and in default seven days' rigorous imprisonment.

Cases Referred.

1(1903) 6 Bom. L.R. 52
2(1905) 2 Cr. L.J. 243
3(1912) 15 Bom. L.R. 106
4(1913) I.L.R. 35 All. 358
5(1899) I.L.R 27 Cal. 144, 150
6(1907) I.L R. 31 Bom. 438, S.C. : 9 Bom. L.R. 695
7(1919) I.L.R. 46 Cal. 807
8(1921) 26 Bom. L.R. 1226
9(1907) I.L.R. 31 Bom. 438
10(1912) 15 Bom. L.R. 106
11(1899) I.L.R. 27 Cal. 144
12(1909) I.L.R. 37 Cal. 467, 500
13(1902) I.L.R. 26 Mad. 124
14(1919) I.L.R. 46 Cal. 807