

BOMBAY HIGH COURT

Emperor

Vs

Chimanlal Sankalchand

(Divatia, C.J. Lokur, J.)

13.09.1944

JUDGMENT

Lokur, J.

1. This is an appeal by the Government of the Province of Bombay against an order of the Additional Sessions Judge, Ahmedabad, acquitting the accused of an offence punishable under Section 4 of the Bombay Prevention of Gambling Act, 1887. On May 14, 1942, the Sub-Inspector of Police obtained from the Assistant Superintendent of Police a warrant under Section 6 of the Act to raid and search the room occupied by the accused. Armed with that warrant, the Sub-Inspector sent a bogus punter with six marked rupees and some slips on which figures for American future were entered. As instructed by him the bogus punter went to the room of the accused, offered him those six rupees and offered bets on the figures which he had taken down on the slips. The accused accepted the bets and wrote out the figures on the cover of a book of songs. The bogus punter then gave a signal and the police raided the shop along with panchas. The marked coins and the book were then found by the panchas lying near the accused. A panchnama was drawn up and after some further investigation a charge-sheet was sent up against the accused both under Sections 4 and 5 of the Act. The learned Magistrate convicted him under both the sections and sentenced him to pay a fine of Rs. 200 or in default to suffer rigorous imprisonment for six weeks under Section 4 and to pay a fine of Rs. 25 or in default to suffer rigorous imprisonment for one week under Section 5. The accused having appealed to the Sessions Court, the learned Additional Sessions Judge confirmed the appellant's conviction and the sentence passed on him under Section 5, but set aside his conviction and sentence under Section 4 on the ground that the accused was not proved to have been using the room to make a profit out of the gambling there. He observed that there was no evidence worth the name to prove that the accused made any profit or gain by the use of his room for the purpose of gambling. In his opinion the accused who received bets would be a mere gambler, but what is required for conviction under Section 4 is not a mere proof that he is a gambler but that he made some profit

by making use of his room for gaming.

2. In Section 3 of the Act a common gaming house is defined as meaning a house, room or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying or keeping such house, room or place or of the person using such house, room or place whether he has a right to use the same or not, such profit or gain being either by way of a charge for the use of the instruments of gaming or of the house, room or place or otherwise howsoever.

3. The question whether it is necessary to prove expressly that the person charged with keeping a common gaming house made a profit or gain out of the gambling: carried on in that house has been discussed in various rulings of different High Courts. In *Lachchi Ram v. Emperor*¹ the Allahabad High Court, interpreting the corresponding definition of a common gaming house in Section 3 of the United Provinces Public Gambling Act, 1867, which is similarly worded, held that it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or at least that he manipulates the conditions in such a manner that he cannot possibly lose. The correctness of that decision was doubted in a later case - and the question was referred to a full bench in *Emperor v. Atma Ram*² The question referred to the full bench was whether the words "for the profit" necessitated proof that profit was certain to result or whether it was sufficient that the instruments were used in the hope of profit. But that question was not decided by the full bench as it found that in the particular case profit was certain to result and, therefore, in any event the particular case came within the more strict interpretation, assuming that interpretation was the correct one. The ruling of the full bench was considered by Boys J. in *Emperor v. Ismail*³ and he observed (p. 564): If I had to decide the point I should unhesitatingly hold that it was not necessary to prove that profit was certain to result. In my opinion a mere expectation of profit would suffice.

4. Lachchi Ram's case was considered by a division bench of this Court in *Emperor v. Dattatraya*, and was dissented from. It was held that to constitute a common gaming house it was sufficient if it was one in which instruments of gaming were kept or used for the profit or gain of the person keeping or using such place, i.e. where the person keeping or using the house knew that profit or gain would in all probability result from the use of the instruments of gaming. The profit or gain may not actually result from such use. But if profit or gain is the probable and expected result of the game itself and if that is the purpose of keeping or using the instruments, it would be sufficient to bring the case within the scope of the definition.

5. It is argued by Mr. Pochaji on behalf of the accused that even in that case it was observed that "the prosecution must establish that the purpose was profit or gain and that that might be done either by showing that the owner was charging for the use of the instruments of gaming or for the

use of the room or place or in any other manner." The words "or in any other manner," (which were used there instead of the words appearing at the end of the definition "or otherwise howsoever") cannot be regarded as restricting the profit or gain of the owner or occupier of the house to profit or gain in a manner ejusdem generis with what precedes those words, and hence even the hope of making a profit out of the gambling itself is sufficient to satisfy the requirement of the definition of common gaming house. It may happen that the occupier of a house may allow it to be used by the public for gambling and he himself may take part in it in the hope of making a profit, although he may not necessarily make it every time. Such a hope is sufficient to make the house a common gaming house and the occupier liable for keeping such a house.

6. In this case there is also a presumption under Section 7 of the Act that the house was a common gaming house, since a search warrant was obtained by the Police Sub-Inspector under Section 6 of the Act and in execution of the warrant instruments of gaming were found in the house. It is true that where the conviction rests entirely on the bare presumption under Section 7, arising from the discovery of instruments of gaming under a lawful warrant, it is necessary to consider carefully whether the legal presumption is rebutted by the circumstances of the case and by the evidence produced for the defence. In this case the accused has not only not produced any evidence but has failed to account for the finding of the instruments of gaming in his room. As held in *Emperor v. Sita Ram*¹⁴ where a house is searched on the authority of a warrant duly issued, and gambling is found going on in the house and instruments of gaming are also found therein, the presumption under Section 7 of the Act arises and dispenses with the necessity of direct evidence that the gambling was being carried on for the profit of the keeper of the house. Mr. Pochaji argues that the presumption applies only to the house and not to the occupant of the house. If under Section 7 the house is to be presumed to be a common gaming house as defined in Section 3, it means that the house is being used by its occupier for the purpose of profit or gain. It, therefore, follows that even the purpose of the occupier of the house is to be presumed under that section, and once that presumption is attracted, it is for the accused to rebut it. There are no circumstances in this case which may be regarded as rebutting the presumption arising under Section 7 that the appellant was using his room as a common gaming house. He is, therefore, liable to be convicted under Section 4 also.

7. The learned Magistrate sentenced the accused to a fine of Rs. 200 only and has given no reason why the minimum sentence of imprisonment for one month and a fine of Rs. 500 was not inflicted as required by Section 4(a). We do not, however, think that we should interfere with his discretion with regard to the sentence.

8. We, therefore, set aside the order of the Additional Sessions Judge acquitting the accused of the offence punishable under Section 4. We convict him also under Section 4(a) of the Bombay

Prevention of Gambling Act, 1887, and restore the sentence imposed on him by the learned Magistrate.

Cases Referred.

1[1922] A.I.R. All. 61

2(1924) I.L.R. 46 All. 447 F.B

3(1927) I.L.R. 49 All. 562

4(1923) I.L.R. 45 All. 671