
(1946) 11 BOM CK 0003

Bombay High Court

Case No: Criminal Appeal No. 425 of 1946

Emperor

APPELLANT

Vs

Mahomed Dawood

RESPONDENT

Date of Decision: Nov. 25, 1946

Acts Referred:

- Bombay Prevention of Gambling Act, 1887 - Section 4(a), 4(b), 5, 7

Citation: (1947) 49 BOMLR 603

Hon'ble Judges: Lokur, J; Leonard Stone, J

Bench: Division Bench

Judgement

Stone, C.J.

The appellants, who were accused Nos. 1 and 7 in the Court below, were convicted respectively under Sub-section 4 (a) and Section 5 and under Sub-section 4 (b) and Section 5 of the Bombay Prevention of Gambling Act and sentenced to undergo two months' rigorous imprisonment and to pay a fine of Rs. 500, in default to suffer a further one month's rigorous imprisonment by Mr. S.A. Hatteea, Presidency Magistrate, Ninth Court, Bandra.

2. Tried with the appellants were 15 other persons, who were charged u/s 5 only, and were convicted and sentenced to pay a fine of Rs. 100 each. They have not appealed.

3. It is now common ground that on the afternoon of April 21, 1945, which was Easter Sunday, all the accused were playing cards for money in a flat at 111, Chapel Road, Bandra, the tenancy of which is in the name of the wife of the appellant who is accused No. 7, and that Inspector Solomon of the Bandra Police Station, who is an officer specially authorised by order of the Commissioner of Police made u/s 6 of the Act, and a party of about 15 constables raided the flat on that afternoon. Nor can it be disputed that playing cards and a sum of Rs. 365-7-3 were exposed on the floor amidst the 17 accused, and that the pockets of the 17 accused, when they were searched, produced a further total sum of upwards of Rs. 3,300. These circumstances by themselves do not

necessarily constitute an offence (see Reg. v. Davies [1897] 2 Q.B. 199 and Emperor v. Chimanlal Maneklal (1917) 19 Bom. L.R. 693.)

4. Unfortunately the accused, like many other persons who are arrested, were foolish enough to commence their defence by telling obvious untruths, for each of them on July 9, 1946, made statements before the learned Magistrate that he did not gamble at all, but saner counsel having prevailed, each of them on August 15 subscribed to the statement of accused No. 5, from which the following is an extract:-

I therefore wanted to perform Moulud and Kavali on the night of April 20, 1946, and April 21, 1946, and had invited many friends of several communities. I had obtained a police permit for using loud speakers so that the audience might hear and enjoy the kavali songs at a far distance. The kavali went on till 1 a.m. on April 21, 1946, when the audience dispersed, but the friends who had come from Bombay had no train to take them back at that hour. As April 21, 1946, was Easter Sunday I and my friends decided that we should spend the day by playing a game of cards among ourselves at the place of Pascal John Albert (accused No. 7), which is situated in a lonely place in a small gully away from the public road. This place is not likely to attract the attention of the passers-by. We also decided that in the evening we should have a khana before dispersing to go home.

It appears some one among the men that were there must have heard the above talk that took place among us and then must have contacted with the police and given false information, evidently with the idea that in case there was conviction, he stood to get a reward. Acting on this kind of information, the complainant raided the place at about 3 p.m. but this time no game of pat was going on, nor was it gambling, but as stated above, it was a play among friends to while away time till the khana was ready in the evening.

5. Before proceeding further it is necessary to examine some of the sections of the Bombay Prevention of Gambling Act, 1887. Section 3 is the definition section, and defines "gaming" as: including wagering or betting, except in certain circumstances upon horse races, "Instruments of gaming" are defined as including any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming and winnings or prizes in money or otherwise distributed or intended to be distributed in respect of gaming.

6. 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, using or keeping 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.

7. It is Section 4 which creates the offence, and so far as it is material it provides by Sub-section (a) that whoever opens, keeps or uses any house, room or place for the purpose of a common gaming house, and by Sub-section (b) that whoever being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the [purpose aforesaid shall, on conviction, be punished; and then are set out in lettered sub-paragraphs the punishments to be inflicted for the first offence, the second offence and for a third and subsequent offences and it is to be observed that for every offence, including a first offence, it is provided that in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, some term of imprisonment and a minimum fine, which in the case of a first offence is Rs. 500, shall be imposed.

8. Section 5 provides that whoever is found in any common gaming house gaming or or present for the purpose of gaming, shall, on conviction, be punishable with fine which may extend to Rs. 500 or with imprisonment which may extend to one month, and then, there is a presumption that any person found in a common gaming house during any gaming therein shall, unless the contrary is proved, be presumed to be there for the purpose of gaming.

9. Section 6 provides for the authorisation of certain police-officers by the Commissioner of Police, "to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any house, room or place which he has reason to suspect is used as a common gaming house".

10. This section is important as it has a distinct bearing on the onus of proof, because Section 7 provides:

When any instrument of gaming has been seized in any house, room or place entered u/s 6 on 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.

11. The conjoint effect of Sub-section 6(ii)(a) and Section 7 is to create a wholly artificial method of proof, i.e. in cases in which entry is effected by an Officer duly authorised, he having "reason to suspect" that the place entered is a common gaming house, and in which an instrument of gaming is found on his entry taking place; the seizure of such instrument shall be, "until the contrary is proved", evidence, that the place: "is used as a common gaming house and that the persons found therein were present for the purpose of gaming". The result is that all the persons found therein are guilty of an offence u/s 5

until the contrary is proved, but in the absence of something more, the artificial method of proof does not extend to making any one of them or any one else, guilty of an offence or liable for the penalties imposed by Section 4.

12. The true construction of this Act, in my opinion, creates the following position:

(1) If the Police Officer making the entry is duly authorised in that behalf, and if previous to entry he had, "reason to suspect" that the place "is used as a common gaming house," and

(2) If on such entry any instrument of gaming is seized; then until the contrary is proved the instrument of gaming itself, shall be the evidence that the place is a common gaming house, and that all the persons found therein, whether present for the purposes of gaming or not, commit an offence and are liable u/s 5. But the artificial method of proof does not extend to incriminating any particular person with an offence u/s 4, though it may not need very much evidence to prove who is the person who u/s 4(a) "opens, keeps or uses the place for the purpose of a common gaming house," or who u/s 4(6) "being the owner or occupier knowingly or wilfully permits the place to be opened, occupied, kept or used by some other person for the purposes aforesaid.

13. Three witnesses were called for the defence, one of them being Mr. Patel who installed the loud speakers for the Quavalli parties at the residence at Boran Road of accused No. 5. From his evidence it is clear that the party took place, and that it went on till 1 a.m. on the morning of April 21. The witness further says:

The people who were there (i.e. at the party) were discussing that next day being Easter Sunday they should have some party on that day.

14. There has also been put in evidence the permit dated April 20 given by the Commissioner of Police to accused No. 5 for the installation of loud speakers at the singing party to be held in the compound of his house at 501 Boran Road, Bandra.

15. The other two defence witnesses are neighbours of accused No. 7, one of whom occupies the ground floor below the flat where playing cards for money was taking place. He visited accused No. 7 on this Easter Sunday, to wish him the compliments of the season, and he saw the play in progress at about midday, and this witness concludes his evidence by saying:

I never saw any gambling going on there on the previous day or on any other day previous to that. I used to visit accused 7 sometimes. I did not see any gambling.

16. On that piece of evidence he was not cross-examined.

17. The other neighbour lives next door, and he visited accused No. 7 at about 11 a.m. on the same day. He also saw the play in progress and he asked accused No. 7 what the

reason of this crowd was, and received the reply that accused No. 7 was having a party. This witness concludes his evidence by saying:

I have been staying in this house for a long time. I have not heard or seen any gambling going on in accused 7's place previously.

He was not cross-examined by the prosecution at all.

18. The case for the prosecution stands as follows. Inspector Solomon, whose evidence was accepted by the learned. Magistrate and is also accepted by us, says that he received information that pat gambling with cards was taking place at 111 Chapel Road:

I verified the information and found it to be correct.

So on April 21, 1946, I gave Rs. 50 in Government Currency Notes, four notes of rupees ten and two of Rs. five to the bogus punter Khan Mahomed in presence of panch and instructed him to go and gamble at that place. That was at 2 p.m. I with one panch and my staff and the punter went together up to Chapel Road, a short distance from the house. Then the punter went ahead, I could not see him enter the place as the lane is narrow. He returned after half hour and stated that he had gambled at the place and lost the money. He told me that "pat" gambling was going on there.

I therefore raided the place.

19. The Inspector continues by describing that all the accused were seated on the floor on, blankets in a circle and that in their midst were the cards and the money. He then sent for another panch, and after his arrival counted the money on the floor and searched the pockets of the accused with the result that I have already stated, and he concludes his evidence in chief by saying:

I had sent the punter twice before, the previous night and on the morning of the raid with Rs. 25 each time. He reported he had lost the money. Accused No. 1 was the banker. All the time the punter was in according to him. Accused No. 7 is occupier of the room. The other accused do not stay there.

20. In cross-examination he was asked about the punter he had employed, and he said that the C.I.D. branch had used him once before to his knowledge and that he himself had known it since February, Whether the information given to the Inspector by the punter be true or false, there can, in our opinion, be no doubt that the Inspector had reason to suspect that the premises were being used as a common gaming house within the meaning of Section 6 of the Gambling Act, and accordingly, as indisputably, instruments of gaming were found at the time of the raid, the presumption contained in Section 7 arises, so that the onus of showing that the premises were not at the time of the raid being used as a common gaming house, and that the persons found therein were not present for the purposes of gaming is placed on all the accused. But without the evidence

of the punter employed by the Police, there is no evidence that accused No. 1 was committing an offence under Sub-section 4(a), viz., that the instruments of gaming were used for the profit or gain of the person (that is to say accused No. 1) "using such place", for there is no suggestion that he was either the owner, the occupier or the keeper of the place, and if there is no evidence against accused No. 1, then it follows that there is no evidence against accused No. 7 under Sub-section 4(b), who admittedly was an occupier, for having knowingly and wilfully permitted accused No. 1 to use the place for an offence under Sub-section 4(a). The evidence of the two witnesses who are neighbours of accused No. 7 shows that the place was not previously used, so far as their observation went, for gaming, and unless the evidence of the punter with regard to his visit on the evening previous (Saturday the 20th) is believed, there is no evidence of previous use at all,

21. The case against accused No. 1 under Sub-section 4(a) rests as follows: The punter says that on the occasion of his three visits the game played was "pat" and that accused No. 1 was always the banker. Further it is said that the game of pat inevitably results in the banker or conductor of it making some profit or gain beyond the chances of the other players. It is necessary therefore to consider what constitutes this game. Pat or andhar bahar, which means "inside and outside" had been demonstrated in this Court by the learned Government Pleader. It is a very simple game which is sometimes called "Card Roulette". A set of 13 cards is exposed face upwards and constitutes the board on which the stakes are laid. A complete pack of cards is then dealt, the cards falling alternatively to the left and to the right, those to the left being "inside" and those to the right being "outside", so that if a card of the same denomination, irrespective of its suit, as the exposed card upon which a stake has been laid falls "inside" the player wins and if it falls "outside" he loses. The stakes are even money. It follows that unless the dealer of the cards, whom I will call "the banker", retains some special advantage or imposes some charge for the privilege of playing, be it direct or indirect, he plays on an exact equality with all the other players, and there would be no profit or gain to the banker within the definition of "common gaming house" in Section 3 of the Act (see the leading English case of *Jenks v. Turpin* (1884) 13 Q.B.D. 505). But it is suggested by the prosecution, and Inspector Solomon has filed an affidavit to that effect in this Court, that pat is always played by the banker having the advantage of the first and the last two cards in the pack and that the first card is not only the banker's card but is dealt on the "inside" so that the card secondly dealt, and which is the first card in play, of necessity falls on the outside with the inevitable result, if this be so, that the odds in favour of the banker are 7 to 6.

22. The whole position turns on the evidence of Khan Mahomed Abdulla Jan who was employed by the Police as the punter to enter the flat and to play with money provided by the Police. The evidence of Inspector Solomon is that he gave him in all two sums of Rs. 25 each and one sum of Rs. 50 to enter the flat and play on three different occasions, the last occasion being immediately before the raid. Although we accept the Inspector's evidence, there is considerable room for doubt whether the Police punter did in fact carry

out his instructions. To sum up his evidence it is this: First Occasion: that he was given Rs. 25 by the Inspector at 9 p.m. on the evening of Saturday the 20th, that he went to the flat, was admitted by accused No. 14, that all the accused were present inside and were playing and that accused No. 1 was the banker and that he (the punter) played and lost the Rs. 25; Second Occasion: that the next day at about 11 a.m. he received a further Rs. 25 and accompanied by a Police Constable who stayed somewhere outside, he again went in, played and lost and that accused No. 1 was again the banker; Third Occasion: that afternoon he was given Rs. 50 in marked notes by the Inspector and that he again entered the flat at about 2-30 p.m. when all the accused were inside, including one additional man, that again accused No. 1 was the banker, that he played for 20 minutes, lost all his money and then went out and reported to the Inspector and the raid took place and that subsequently he identified all the accused at Bandra Police Station. Under cross-examination he stated that he learnt pat gaming in this flat for the first time.

23. We are quite unable to accept his evidence with regard to the first occasion, because it is obvious that if he only received the Rs. 25 from the Inspector at 9 p.m., on Saturday the 20th, he could not have got to this place till some time later, and his statement that all the accused were present is very improbable having regard to the fact that accused No. 5 must have been at his own house in Boran Road as he was host at the singing party above mentioned, and it is impossible to believe that accused No. 5 would be in somebody else's house playing cards at the very time when the guests were assembling at his own house, even if the party was not then in progress. The Police permit for the loud speakers provides accused No. 5 with a very strong alibi. It is obvious that the punter, to whom, in all Rs. 100 had been entrusted, for which he could not be called to account, was subject to the strong inducement of keeping the money for himself and returning to the Police and saying that he had lost it in gambling. It is also to be observed that on the first occasion he was not accompanied by any Police Constable, nor with regard to the second occasion has the Police Constable been called as a witness. There remains the fact that the marked notes on the third occasion were found on the blanket in the midst of the players. The accused charges the Inspector with drawing up a false panchnama, but this allegation we do not accept. However it is obvious that in the confusion of the raid, when in all there were about 35 persons in a comparatively small room, that is to say the 17 accused, the 16 Police Officers and one panch and when, as is to be found in the evidence of the Inspector, some of the accused attempted to escape, there was every opportunity for the punter to follow up the raiding party and introduce the marked notes on to the blanket. There is no evidence, as there should have been, as to the whereabouts of the punter during the raid and before he identified the accused at the Police Station. But we do not think it necessary to decide how the marked notes came on to the blanket, because we are unable to accept the story of the accused that the playing of cards was first thought of during the concert party on the previous evening. The total money, excluding the Rs. 50 provided by the Police, which was found on the premises and in the pockets of the accused and in play, means that on an average each of the accused must have come to the concert party with over Rs. 200 in his pocket, which fact

strongly indicates that the intention to gamble did not originate after the concert party. But for this fact we should have felt disposed to hold that the accused had rebutted the artificial evidence raised against them by Section 7 of the Act and that they were not even guilty u/s 5. However, there is sufficient doubt cast on the punter's veracity for us to accept his story that it was accused No. 1 who acted as banker and therefore made himself liable as using the premises as a common gaming house, nor was there any evidence at all in the trial Court that the game of pat always results in a special advantage to the banker or that it was in fact so played in this case. That being so, there is no reason why the position of either accused No. 1 or, for the reasons given above, of accused No. 7, should be differentiated from those of the remaining accused. Accordingly, whilst upholding the convictions u/s 5 of the Act, we acquit accused No. 1 and accused No. 7 respectively under Sections 4(a) and 4(b) and we reduce the sentence in each case to a fine of Rs. 100.

24. The point was raised that Inspector Solomon was not, by virtue of the coming into operation of the Greater Bombay Scheme (see the Greater Bombay Laws and the Bombay High Court (Declaration of Limits) Act, 1945); duly authorised by order made u/s 6 to search a house at Bandra, by virtue of the fact that his order of authority is dated in 1986, this point was ultimately given up by Mr. Baptista on behalf of the accused, since an examination of the provisions of the Greater Bombay Act (see Section 3) clearly shows that an antecedent order is not only saved, but made to apply to the wider area.

25. Accordingly the conviction and sentence of accused No. 1 under Sub-section 4(a) and of accused No. 7 under Sub-section 4(b) are set aside. The convictions u/s 5 are upheld and a sentence of Rs. 100 is imposed on each of the accused under this section. If the fines of Rs. 500 have been paid Rs. 400 will be refunded to each of the accused.