(1928) 09 BOM CK 0015

Bombay High Court

Case No: Criminal Revision Application No. 212 of 1928

Emperor		APPELLANT
	Vs	
Tribhdvan Motikam		RESPONDENT

Date of Decision: Sept. 29, 1928

Acts Referred:

- Bombay Prevention of Gambling Act, 1887 - Section 12, 5, 6, 7

Citation: (1929) ILR (Bom) 137

Hon'ble Judges: Mirza, J; Baker, J

Bench: Division Bench

Advocate: M.T. Patel and K.V. Patel, for the Appellant; P.B. Shingne, Government Pleader for Crown, for the Respondent

Judgement

Mirza, J.

The applicant along with three others was summarily tried before the Sub-Divisional Magistrate, First Class, Broach, for offences under Sections 4 and 5 of the Bombay Prevention of Gambling Act. 1887 (Bom. Act IV of 1887), was convicted and sentenced to pay a fine of Rs. 125 or in default to undergo one month''s rigorous imprisonment. He applies for revision of the order of conviction and sentence.

2. Mr. Patel on behalf of the applicant contends that the warrant under which the gaming house was entered and searched the persons arrested and the things seized was illegal. He also contends that the arrest and search of the applicant were likewise illegal. The ground for the first contention is that the warrant was issued by the District Superintendent of Police not upon a complaint on oath as required by Section 6 of the Act, but only on credible information received. For the second contention, Mr. Patel relies upon an additional circumstance that the arrest of the applicant was made not by the officer named in the warrant but by an officer to whom the officer named in the warrant had delegated his powers of arrest. He relies also on the further circumstance that the arrest of the applicant was not made

in the gaming house but on the public road outside the house. Mr. Patel further contends that the currency notes and cash found on the person of the applicant and the books and vouchers found in the house are not instruments of gaming within the meaning of that term in the Act.

3. This having been a summary trial the notes of the learned Magistrate are necessarily meagre. It appears, however, from the complaint filed by the Sub-Inspector of Police, Manilal Joitaram, on behalf of the Crown, that on obtaining information to the effect that Kanayalal Nathalal, the original accused No. 1, had kept a common gaming house to which he and others resorted for gambling, the Sub-Inspector of Police obtained a warrant from the District Superintendent of Police authorising him to enter the house, arrest persons found there and seize all instruments of gaming and articles suspected to have been used or intended to be used for the purpose of gaming. The Sub-Inspector proceeded with the warrant to the house of the accused No. 1 accompanied by certain Police officers and the Panch. When he was at a distance of ten paces from the house of accused No. 1, he saw the applicant and two others, being the original accused Nos. 2, 3 and 4, coming out of the house. The Sub-Inspector with his party followed the applicant and accused Nos. 3 and 4 and arrested them at some distance from the house. He then asked Police Sub-Inspector Baburao, who was with him. to take search of their persons and himself proceeded with some of the Panch to the house of accused No. 1 which he entered and took search of, in the presence of the Panch. He arrested accused No. 1 and seized certain articles produced before the Court as being instruments of gaming found in the house. Baburao later on rejoined him and handed over to him the articles he had found on the persons of the applicant and accused Nos. 3 and 4. The complaint further stated that the applicant and accused Nos. 3 and 4 were found in the gaming house gathered for the purpose of gambling.

4. The complaint is silent on the point of there having been a sworn complaint before the District Superintendent of Police on the strength of which the warrant was issued by that officer. The complaint on oath referred to in Section 6 does not appear necessarily to be a complaint in writing on the filing of which process is to issue as in ordinary criminal trials. No condition is imposed that it must be in writing. It may therefore be either oral or in writing. When made to a District Superintendent of Police, it does not in my judgment stand on a higher basis than an information given to the Police and the provision that it must be made on oath before a District Superintendent of Police is to deter Police informants from making false or reckless complaints of this nature and to make sure that action is being taken on the responsibility of the informant. It is not necessary in my judgment that the complaint on oath contemplated by Section 6 should be recited in the warrant or set out in any complaint that may be subsequently filed before the Magistrate. The fact that the warrant has been issued would raise a presumption that " omnia rite esse acta." Illustration (e) to Section 114 of the Indian Evidence Act seems to be to

the point. If the opponent relied upon the illegality of the warrant on the ground that no complaint on oath was previously made before the District Superintendent of Police, he should, in my opinion, have questioned the complainant Manilal about it when he gave evidence in the case. There is no evidence in the case which would rebut the general presumption arising in favour of the validity of the warrant. Mr. Patel, however, contends that there could not have been a complaint on oath before the District Superintendent of Police as that officer is not empowered under the Indian Oaths Act (Act X of 1873) to administer oaths. u/s 4 of the Oaths Act, the authority to administer oaths and affirmations is given to Courts and persons having by law, or consent of parties, authority to receive evidence. Section 6 of the Bombay Prevention of Gambling Act confers the power inter alia on the District Superintendent of Police to receive a complaint on oath in cases contemplated by the Section. Such a power in my judgment necessarily implies that the District Superintendent of Police is competent in cases contemplated by Section 6 to administer an oath to the person making the complaint before him.

5. The next point to consider is whether on the facts recited in the complaint and presumed to have been proved before the learned Magistrate it can be said that the applicant was found in any common gaming house or was present there for the purpose of gaming within the meaning of Section 5 of the Bombay Prevention of Gambling Act. The term " found gaming " has been interpreted in the case of Reg. v. Nana Moroji, (1871) 8 Bom. H.0. (Cr. C.) 1. with reference to Section 57 of Act XIII of 1856, which was in similar terms to Section 5 of the Bombay Prevention of Gambling Act now in force. In construing the term, Green, J., remarked (p. 8):

The seeing of the gaming going on by the Inspector and the arrest of those who were engaged in it, must, I think, be considered to form part of one transaction and as a connected series of facts constituting the finding; and it would, in my opinion, be an unreasonable construction of the Act to hold that persona are not found gaming when they are seen doing BO by an Inspector of Police and are forthwith arrested by police officers assisting the Inspector who so saw them, though the arrest may not have taken place in the very house or room where the gaming was seen to take place.

6. In that case the Police Inspector had before entering the house looked through a window and had seen accused in the place in question playing with dice, cards and money. Only two of the accused were arrested in the room itself, the others being arrested elsewhere and with the exception of one of the accused not in that house at all but in closely adjoining places and none of them was actually arrested by the officer who had seen the gaming going on. In the present case, the facts are somewhat different. The Police Sub-Inspector did not see the applicant gaming in the house, but only saw him coming out of the house. It would be unreasonable, in my judgment, to construe the Section as requiring that the person " found " in the gaming house should be actually arrested in the place where the gaming has been

going on. The Sub-Inspector of Police was acting on a warrant which authorised him to arrest any person " found " in this house. Had he looked into the house through a window, as was done by the police officer in the case before Green, J. and seen the applicant inside the house, it would not be contended, that he had not " found " the applicant in the house. In my judgment it makes no material difference whether the applicant was seen inside the house or was seen coming out of the house, if the door through which the applicant was seen coming out of the house was a means of ingress and egress to this particular house and no other. An inference could legitimately be drawn from that circumstance that the person so seen coming out had previously been inside the house. Soon after the arrest of the applicant the Sub-Inspector and the Panch entered the house and found gambling going on there. They also found instruments of gaming. The books seized on the occasion showed that the Applicant and the accused No. 1 were partners in the gaming house. From these circumstances a presumption arises u/s 7 of the Act and a legitimate inference could be drawn that the applicant was in the house when gambling was in progress and was present there for the purpose of gaming.

7. With regard to Mr. Patel''s contention that the arrest of the applicant was made not by Sub-Inspector Manila!, mentioned in the warrant, but by Sub-Inspector Baburao, that contention is not borne out by the evidence. From the complaint it appears that the arrest was made by Manilal and after the arrest Baburao was delegated by him to search the persons of the applicant and accused Nos. 3 and 4. This is supported by the Panchnama which shows that the search was made by Baburao in the presence of the Panch. No mention is made in the Panchnama that Baburao had arrested the Applicant and accused Nos. 3 and 4.

8. Mr. Patel''s next contention is that the currency notes and cash found on the person of the applicant are not " instruments of gaming." He relies upon the Full Bench decision in Queen-Empress v. Govind, (1891) 16 Born. 283. where the Court held that a coin was not an " instrument of gaming " within the meaning of Section 12 of Bombay Act IV of 1887, as amended by Bombay Act I of 1890 and that the expression " instrument of gaming " as used in Section 12 of the Act of 1887 means an implement devised or intended for that purpose. No doubt the currency notes and cash found on the person of the applicant cannot in themselves be regarded as " instruments of gaming," but if they were used as a subject or means of gaming they would fall within the definition of " instruments of gaming " as now contained in the Bombay Prevention of Gambling Act as since amended. By a clause added by Bombay Act VI of 1919, Section 2 (6), " instruments of gaming " now include any article " used as a subject or means of gaming." This clause did not form part of the definition of " instrument of gaming" in Bombay Act IV of 1887 as amended by Act I of 1890, which was the definition the Full Bench was construing. In the light of the evidence in the case, it can be legitimately inferred that the currency notes and cash found on the person of the applicant were articles used by him as a subject or means of gaming.

9. Mr. Patel has also contended that the books seized under the warrant cannot be said to be " instruments of gaming." The books to which objection is taken disclose that the applicant and the accused No. 1 were partners in the common gaming house. The books in my judgment would fall under the last clause of the definition of " instruments of gaming " contained in Section 3 of the Bombay Prevention of Gambling Act, viz., " any document used as a register or record or evidence of any gaming." This clause was also added by Bombay Act VI of 1919, Section 2(b) and was not part of the definition which the Full Bench had to construe. The books in question showed that transactions in American futures were registered in them. In my opinion there was no illegality in seizing the books. Having regard to these amendments by the Legislature the Full Bench ruling is no longer applicable.

11. On the points urged before us the applicant has failed to show that there was any illegality in the proceedings which would vitiate his conviction. The application fails and must be rejected. The rule granted on July 30, 1928, is discharged.

Baker, J.

12. The applicant was convicted under Sections 4 and 5 of the Bombay Prevention of Gambling Act, IV of 1887 and was sentenced to a fine of Rs. 125. A number of points of law are raised in this case. The warrant in this case was issued by the District Superintendent of Police u/s 6 of the Act to the Sub-Inspector. Broach City. The Sub-Inspector proceeded to the house and saw the present accused and some others who are not before the Court coming out of the house. They were arrested at some distance from it. Subsequently betting slips were found in the house. It is contended, first, that the District Superintendent of Police has no power to issue a warrant, secondly, that such a warrant can only be issued upon a complaint made on oath, a condition which was not complied with in the present case, thirdly, that the power to arrest u/s 6 can only be exercised by the person to whom the warrant was directed, whereas the present accused was arrested by some other officer, fourthly, that the accused not being found in the house, no presumption u/s 5 could arise and the conviction is therefore illegal.

13. Taking these points in order, Section 6 of Bombay Act IV of 1887 specifically authorises any District Superintendent of Police outside the city of Bombay to issue a warrant on complaint made before him on oath. It is contended that a Superintendent of Police is not one of the persons empowered to administer oaths under the Oaths Act, X of 1873 and that an enactment of the local Legislature cannot override an Act of the Imperial Legislature. u/s 4 of the Oaths Act authority to administer oaths and affirmations is granted to all Courts and persons having by law or consent of parties authority to receive evidence. If the receiving of a complaint on oath is regarded as receiving evidence, then a District Superintendent of Police is a person who has by law authority to receive evidence, namely, u/s 6 of the Bombay Prevention of Gambling Act. I am, however, of opinion that the power to administer oaths mentioned in the Oaths Act refers only to the taking of evidence, as is shown

by Section 5, which refers to witnesses, interpreters and jurors. u/s 14 of the Code of Criminal Procedure the Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally in any local area outside the presidency-towns and under the old Code of Criminal Procedure (Act X of 1872), certain powers under Sections 83, 86, 96, 98, 99, 101, 143, 144 and 176 were conferred on all District Superintendents and Assistant Superintendents of Police. In view of this power possessed by the Local Government and of the express power conferred by Section 6 of the Bombay Prevention of Gambling Act, I am of opinion that the District Superintendent of Police has power to receive a complaint on oath in cases contemplated by that Section.

14. It is next contended that the Section requires that before the issue of a warrant there should be a complaint made on oath and that no such complaint was made in the present case. The present case was tried summarily and there is only a summary of the evidence. It is true that the warrant contains the words '' on creditable information ''. It does not appear from the record whether or no a complaint was made on oath, but there is no statement that it was not so made. u/s 114 of the Indian Evidence Act, the presumption is that judicial and official acts are regularly performed. This is a question of fact. The accused were defended by pleaders and if as a matter of fact no complaint was made on oath, the complainant Sub-Inspector, who has been examined in the case, should have been asked this question. No such question appears to have been put to him and in the absence of anything to show that the warrant was not issued in accordance with the provisions of Section 6 of the Act, I am not prepared to assume that the provisions of law have been disregarded.

15. Then it is argued that u/s 6 the power which is given to search and arrest is given to the officer acting under the warrant and cannot be delegated and that the present accused were arrested not by the Sub-Inspector, but by some other officer. From the complaint and from the panchnama it will appear that the actual arrest of the accused was made by the Sub-Inspector, although they were searched by another Sub-Inspector. The actual entry into the house was made by the Sub-Inspector to whom the warrant was directed. No question was put in cross-examination to the Sub-Inspector Manilal as to by whom the actual arrest was made, but it appears that he was present when they were arrested and I do not think that there is anything in this argument.

16. Then it is contended that the accused were not found in the house. The Sub-Inspector, however, has given evidence that he saw all the accused come out of the house and stand in the verandah and it has been held in Reg. v. Nana Moroji, (1871) 8 Bom. H.C. (Cr. C.) 1. that it is sufficient if they are seen in the house. There is a Punjab case, Vir Singh v. Queen-Empress, (1895) P.R. No. 22 of 1895 (Cr.). which lays down that it is not necessary that the accused should be actually found in the

house if he is seen there. Cf. also Velinker''s Law of Gaming and Wagering, 137. It would be unreasonable to hold that when a police officer armed with a warrant sees a person come out of a house and he escapes or is arrested as he comes out, that he was not found in the house. ''Found in the house'' does not mean ''arrested in the house.'' It must mean,'' seen in the house'' or ''coming out of the house,'' which amounts to the same thing. In this house were found betting books which were before the Court, in which the accused''s name appears. The Magistrate held that the entry shows that he was a partner in the gambling in American futures which went on there, which is a finding of fact based on documentary evidence and is not open to argument in revision. The finding of the books, which are instruments of gaming, raises the presumption u/s 7 that the persons found therein were there present for the purpose of gaming and the evidence of the complainant shows that his agent gave a marked rupee and a marked note and a chit to accused No. 3 in the presence of the panch and accused Nos. 2 and 4 were standing in a circle with accused Nos. 1 and 3 at the time the money and the chit were given to accused No. 3, who passed on the money to accused No. 1. In these circumstances I am of opinion that the conviction was correct and the rule should be discharged.