

(1947) 05 CAL CK 0010
In the Calcutta High Court

Superintendent and Remembrancer of Legal Affairs

APPELLANT

Vs

D.E. Wilsone

RESPONDENT

Date of Decision : 27-05-1947

Acts Referred:

Calcutta Police Act, 1866 — Section 3, 46

Criminal Procedure Code, 1898 (CrPC) — Section 417

Citation : AIR 1947 Cal 429

Judgement

1. This is an appeal under the provisions of Section 417, Criminal P.C. An anonymous letter was received by the Calcutta Police as a result of which Sergeant F. Watt arranged with the telephone company to tap the line of D.E. Wilsone of Suit Nos. 19, 23 Central Avenue, Calcutta and to listen into his conversations. On 29th December 1945 Sergeant Watt listened in and heard bets being made on the races. He made a note of the bets made and submitted a report to the Deputy Commissioner. A warrant to search the premises was issued under the provisions of Section 46, Calcutta Police Act, by H.N. Sircar, Deputy Commissioner of Police and the premises were duly searched between 12-30 P.M. and 1-45 P. M. on 29th December 1945 by Inspector M.A. Rahman and Sergeant Watt in the presence of two search witnesses. The police officers found among other articles a typewriter with a piece of paper in it, bearing name of horses and amounts of money; khata books with names of horses and amounts of money written in them, slips of paper on which were written or typed the names of horses and amounts of money; a book-maker's betting card No. 762 in the name of M.R. Agarwal, race books and letters and cables from H.A. Cocks of Bombay referring to betting transactions with Wilsone and containing a promise to help Wilsone over a book-maker's licence.

2. As a result Wilsone was prosecuted for an offence punishable u/s 44, Calcutta Police Act. Three prosecution witnesses were examined, they proved that Sergeant Watt had listened into telephone communications, and they proved the search. The accused pleaded not guilty and filed a written statement in which he denied having done any business on horse racing at his residence. He admitted a

keen interest in racing and explained the presence of the articles found by the Police by saying that he was a contributor of Bating Notes to the "Sporting Times" of Bombay and also that he occasionally obliged his particular friends by putting their money on horses at the Totalizators and collecting their winnings for them. No defence witnesses were examined.

3. On this material the learned Presidency Magistrate held that the slips of paper recording bets, were "instruments of gaming" as defined in Section 3, Calcutta Police Act, but he held further, relying on the decision of a Division Bench of this Court in *Dr. Ranga Lal Sen Vs. Emperor*, that it was necessary for the prosecution to establish that the profit or gain to the accused should accrue otherwise than as a result of betting, and that u/s 47, Calcutta Police Act, there was no presumption that the place was a common gaming house merely because instruments of gaming had been found therein, in the course of a search on a warrant duly issued u/s 46 of the Act. He accordingly acquitted the accused.

4. The Superintendent and Remembrancer of Legal Affairs appealed against the acquittal, on behalf of the Government of Bengal, and the appeal came up for hearing before a Division Bench. The Judges of the Division Bench expressed the opinion that *Dr. Ranga Lal Sen Vs. Emperor*, had been wrongly decided and they referred two questions to the Full Bench, viz.,

(1) Where the person owning, occupying, using or keeping a house, room, tent, walled enclosure, space, vehicle or place in which instruments of gaming are kept or used for his profit or gain obtains his profit or gain or seeks to obtain them solely from the part he takes in the actual gaming, is such house, room, tent, enclosure, space, vehicle or place, a common gaming house within the meaning of the definition in Section 3, Calcutta Police Act, (4 [IV] of 1866)?

(2) Was the case in *Dr. Ranga Lal Sen Vs. Emperor*, rightly decided in so far as it determined that the answer to the above question is in the negative?

5. By a subsequent order, according to the rules of this Court, the Division Bench referred the whole appeal to the Full Bench for disposal. When the appeal was heard, Mr. Mukherji, for the respondent made it clear that he did not support the decision in *Dr. Ranga Lal Sen Vs. Emperor*, . But he contended that his client had been rightly acquitted because it was necessary, in a case u/s 44, Calcutta Police Act, for the prosecution to prove that the owner, occupier, etc., had actually made a profit out of the instruments for gaming kept on the premises, and that such proof was lacking in the present case.

6. It was not disputed that the accused Wilson was the occupier of the flat in question. The questions for consideration were whether, that flat constituted a common gaming house as defined in the Calcutta Police Act, and whether the accused kept or used it as such. In Section 3, Calcutta Police Act, we find these definitions-

"gaming" includes wagering or betting (except wagering or betting upon a horse-

race when such wagering or betting takes place - (a) on the day on which such race is to be run, and (b) in an enclosure which the Stewards controlling such race have, with the sanction of the Local Government, set apart for the purposes), but does not include a lottery.

"instruments of gaming" includes any article used as a means or appurtenance of Or for the purpose of carrying on or facilitating, gaming; and "common gaming house" means any house, room, tent or walled enclosure, or space, or vehicle, or any place whatsoever, 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, tent, enclosure, space, vehicle or place whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, place or instruments or otherwise howsoever.

7. Section 46 of the Act provides for the issue of warrants for the search of premises believed to be a common gaming house. Section 47, Calcutta Police Act reads:

When under the provisions of the last preceding section, any cards, dice, gaming table or cloth, board or other instruments of gaming, are found in any house, room or place, or about the person of any of those who are found therein, it shall be evidence until the contrary is made to appear that such house, room or place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming although no play was actually seen by the police officer or any of his assistants.

Mr. Mukherjea at first argued that the articles found in the search of the flat of the accused were not instruments of gaming as defined in the Act, but when we drew his attention to the letters of H.A. Cocks, he did not press this argument further. It is sufficient for us to say that we are satisfied that these articles are instruments of gaming.

8. The questions for our consideration are : (1) Do the words "for the profit or gain of the person owning &c., &c.," in the definition, of "common gaming house" imply that it must be proved that profit has been made by the owner or that profit to the owner is inevitable, or is it sufficient if the owner or occupier etc., expects or hopes to make a gain or profit from the use of the instruments. (2) Do the words "whether by way of charge for the use of such house &c, or instruments or otherwise" mean that the profit to the owner &c, must accrue by way of charge for the use of the house &c, or instruments, and that profit simply from the gambling is not enough. Before considering the decisions of this Court, it is interesting to see how the sections have been interpreted by other High Courts in India.

9. Three decisions of the Allahabad High Court were placed before us. All deal with a form of gambling known as Satta. The prosecutions were under the Public Gambling Act (Act 8 [III] of 1867) as amended by the United Provinces Public Gambling Amendment Act (Act 1 [I] of 1917). The definition of common gaming

house in that Act is word for word the same as in the Calcutta Police Act.

10. In *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, , it was found that Lachchi Ram was the occupant of a shop which was raided by the police while wagering was actually in progress, and that tickets were found in the shop which were used as forms of memoranda on which to record wagers. It was held by a Division Bench that the tickets were instruments of gaming, "but in themselves" they could not be said to be used for his profit or gain.

In order to sustain the conviction the words for the profit or gain of would have to be read as meaning for the purpose of carrying on the gaming. But they cannot be read in that way as such an interpretation would make the words a meaningless redundancy.

The Court therefore concluded that it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gambling, or at least that he manipulates the conditions in such a manner that he cannot possibly lose.

11. *Emperor v. Atma Ram* 11 AIR 1924 All. 338 is a decision by a Full Bench; and the reference to a Pull Bench was made in view of the decisions in *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, and *Emperor v. Durga Prosad* 10 AIR 1923 All. 192. The learned Judges referred to previous decisions of their Court, in particular *Raghunath v. Emperor* 5 AIR 1918 All. 100, and observed:

"It will thus be seen that although the views of all the Judges of this Court may not agree, three Judges have definitely ruled that the words "used for the profit or gain of the person owning the house" must be strictly proved by evidence.

They then suggested for the consideration of the local Government a slight amendment of the section, and proceeded to hold that inasmuch as a warrant had been issued u/s 5 of Act 1 [I] of 1917 by the District Magistrate, the conviction of Atma Ram was justified even under the restricted meaning given to the section in the case of Lachchi Ram in view of the presumption arising u/s 6 of the Act.

12. In *Ismail and Others Vs. Emperor* Boys J. held that the Full Bench in *Emperor v. Atma Ram* 11 AIR 1924 All. 338 had not accepted as correct the view in *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, and he dissented from *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, in these words.

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.

13. The Bombay High Court has consistently refused to accept the restricted interpretation-placed on the definition of a common gaming house, in *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, . The Bombay cases arise out of prosecutions under the Prevention of Gambling Act (Bombay). Common gaming

house is defined in Section 3 of the Act in terms which are essentially the same as in the Calcutta Police Act.

14. In *Emperor Vs. Dattatraya Shankar Paranjpe*, reliance was placed by the defence on *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, , but the learned Judges after expressly dissenting from, that decision, observed:

It is sufficient if the house is one in which instruments of gaming are kept or used for the profit or gain of the person keeping or using such place, i.e., whether the person keeping or using the house knows that profit or gain will in all probability result from the house of the instruments of gambling. The profit or gain may not actually result from the 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 in my opinion, to bring the case within the scope of the definition.

15. In *Emperor Vs. Chimanlal Sankalchand*, it was held that "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."

16. A number of Calcutta cases were cited before us. The earliest of these is *B. Walvekar and Others Vs. Emperor*, In that case the defence was that the accused merely charged a commission on bets placed by members of a club but did not otherwise engage in betting, The Court held that the provisions of Section 46, Calcutta Police Act, had not been strictly complied with and that accordingly no presumption arose u/s 47 of the Act. The Court upheld the convictions on the finding that "betting was going on between the appellants who kept the premises and the members of the Club" (Per C.C. Ghose, J.) and that "it was the appellants who were themselves taking bets for their own profit and gain" (per Chotzner J.) Thus instead of the Court holding, as Henderson J., supposed in *Dr. Ranga Lal Sen Vs. Emperor*, that the profiler gain must be made otherwise than from the actual gambling, the defence of the accused and the decision of the Court were exactly the opposite. It was not suggested in this case either that the profit or gain must arise otherwise than from the gambling, or that the profit to the owner or occupier must be "certain."

17. The next case cited is *M.A. Adams and Another Vs. Emperor*, . The material facts of that case are : The police armed with a warrant u/s 46, Calcutta Police Act, raided the premises of the Harelquin Club, 15 Park Street, Calcutta. In one room they found a Billiard Table, bench and locker. In the adjoining room were a card table, chairs, and a small aide board. A number of people and some betting slips were found on the premises. Costello J., found that "M.A. Adams was running this club himself and took the subscriptions of the members, or at any rate he took the profits accruing from the use of the Billiard Table, or from the sale of refreshments, or, money accruing in respect of bar account and so on. "He also held that it was not a case of Adams making a profit by way of charge for the instruments, nor was there any suggestion that any profit or gain accrued

to Adams otherwise than by reason of the fact that he was running this club as one man concern." The Court found that the betting slips were instruments of gaming and that the accused were rightly convicted. In this case there was no occasion to consider whether profit or gain merely from the gambling would be sufficient to justify a conviction.

18. In Phani Bhusan Kumar Vs. Emperor, decided by Nasim Ali J., the accused was an assistant in the office of the Deputy Accountant General Posts and Telegraphs. His desk and his person were searched on a warrant issued u/s 46 and betting slips and money were seized. The conviction u/s 44 was upheld. In this case there could not possibly be any question of a profit by way of charge for the place or instruments, and no suggestion was made that the profit arose otherwise than from the betting.

19. In Dr. Ranga Lal Sen Vs. Emperor, the facts were these : There was a shop at 17 Park Street, Calcutta known as Eastern Drug Stores. Dr. Ranga Lal Sen was allowed by the proprietors of the Drug Stores to use one of the rooms as a consulting room. The police searched that room and found Dr. Ranga Lal Sen actually filling in a betting slip. They found other betting slips in a drawer. In his judgment Henderson J., referred to B. Walvekar and Others Vs. Emperor, and observed:

In that case betting was carried on in the premises and fees were realised by the persons who were in charge of the place,

and he also referred to the judgment of Costello J, in M.A. Adams and Another Vs. Emperor, . He then proceeded,

we respectfully agree with what is stated there. In our opinion the definition of a common gaming house implies that altogether apart from the money which may be made or lost at the actual gaming, some sort of profit must be made by the person referred to in the definition.

20. It seems to us that the findings of fact in 53 Cal. 7189 were not correctly stated by Henderson J., and that there is nothing in Costello J.'s judgment in M.A. Adams and Another Vs. Emperor, from which Henderson J.'s conclusion can be drawn. Mitter J., in his judgment observed:

To satisfy the second element, it is my view that the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him.

But he did not give his reasons for coming to that conclusion nor base the conclusion on any authority.

21. The case in J.B. Beattie and Others Vs. Emperor, , came before Cunliffe and Henderson JJ., Cunliffe J., in his judgment observed:

The views of the Judges of this Court, as I understand are that such premises are not strictly within the meaning of the language of the Act unless some fixed

charge or profit accrues regularly to the person who is occupying or keeping the premises quite apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of the gambling.

But later in his judgment the learned Judge observed:

Whereas I do consider myself more or less bound by considered judicial opinion of the Judges of this Court with regard to the view they have taken as to the definition of a common gaming house contained in the Act, I am by no means sure if I had been sitting on one of those Benches of this Court, which considered the exact legal implication of the language that I should have been able to agree with my brother Judges. I think I should have been inclined to take the wider view of the words "otherwise howsoever" which is apparently the law on the Bombay Side.

Henderson J., merely observed that he had nothing to add to his judgment in Dr. Ranga Lal Sen Vs. Emperor, .

22. The next case is Abdul Latif Vs. Emperor, decided by Mukherjee J. Reference is made in the judgment to the decision in Dr. Ranga Lal Sen Vs. Emperor, and the learned Judge certainly did not express any dissent from that decision. But the learned Judge was not impressed with the argument that the finding of betting slips did not show that any profit or again accrued to the appellant otherwise than as a result of the betting by him; and he held that u/s 47 the find of instruments of gaming justified the inference that they were kept or used for profit or gain as contemplated by the section.

23. In Kalicharan v. S.K. Brahmachari ("38) 42 C.W.N. 1232 decided by M.C. Ghose J., the head-note reads:

Obiter. - In order to constitute a common gaming house it is sufficient that the house is kept and used for receiving unauthorised bets; it is not further necessary to prove that the accused made any profit beyond the profits of betting.

24. In Jitendra Bhusan Das and Others Vs. Emperor, Edgley J. held that the warrant was illegal and that accordingly no presumption arose from the finding of instruments of gaming, and he held that it must be proved by independent evidence that the accused made a profit. There is nothing in the judgment to show that the learned Judge considered whether it was necessary to prove that profit was actually made or whether it would suffice if it were proved independently that the instruments were kept or used by the accused in the hope of making profit.

25. It is thus clear that the Bombay High Court has consistently held that it is sufficient to prove that the instruments of gaming were kept or used, in the hope that profit or gain would accrue to the owner, and that the profit or gain might accrue merely from the gaming. The Allahabad High Court originally took a different view but the latest decision is the same as in Bombay. In Calcutta, the

only decisions clearly laying down that the profit or gain must accrue otherwise than from the gambling are the two decisions to which Henderson J. was a party viz., *Dr. Ranga Lal Sen Vs. Emperor*, and *J.B. Beattie and Others Vs. Emperor*, The decision of Nasim Ali J. in *Phani Bhusan Kumar Vs. Emperor*, is inconsistent with those decisions; and in *Kalicharan v. S.K. Brahmachari* ("38) 42 C.W.N. 1232 M.C. Ghose J. expressly dissented from the decision in *Dr. Ranga Lal Sen Vs. Emperor*, . In *J.B. Beattie and Others Vs. Emperor*, . Cunliffe J. reluctantly agreed with Henderson J. in the belief that he was following decisions accepted generally in this Court. In *Dr. Ranga Lal Sen Vs. Emperor*, Henderson J. appears to deduce the result from Costello J.'s judgment in *M.A. Adams and Another Vs. Emperor*, and from the judgment in *B. Walvekar and Others Vs. Emperor*, but there is nothing in those judgments to justify this. R.C. Mitter J. gave no reasons and no authority as the grounds for his decision.

26. It is clear, therefore, that there has been divergence of opinion on the subject, that the view expressed by Henderson and R.C. Mitter JJ. has not been generally adopted, and that no arguments in support of the view are to be found in any of the judgments except *Bhagirathi Shuku Vs. Chandra Harihar Patak and Others*, . Such being the case, it is necessary to examine the words of the section and decide what is their ordinary meaning.

27. In the first place, it is to be observed that betting for the purposes of this Act is merely a form of gaming, and the words of the definition of "common gaming house" must apply equally to a house where betting is carried on as to a house where other forms of gaming flourish. Thus the terms must have the same meaning when applied to a house where betting is carried on, as to a casino where there is gaming on roulette or other games of chance, or a house where machines such as fruit machines are kept.

28. Reference to Sections 44 and 45 shews that a distinction is made between the person using the place and persons frequenting the place, and that by the term "person using such house" in the definition is meant some one such as a licensee or tenant of the building who is running a gaming den and not merely one of the people who frequent it. The definition merely requires that instruments of gaming should be kept or used on the premises for the profit or gain of the person who runs the place "whether by way of charge for the use of such house, room, tent, enclosure, space, vehicle, place or instruments or otherwise howsoever."

29. The ordinary meaning of the words "kept or used for the profit or gain of the person" is simply "kept or used with the object of making profit or gain for the person." There is nothing in the ordinary use of the words to suggest that profit or gain must have been made or even must inevitably be made. It is obvious that in all games of chance there must be a chance of gain and a chance of loss; otherwise people would not gamble. In the case of roulette, the punter must occasionally win, otherwise he would not punt. But the roulette wheel is so constructed that in the long run the Bank will win. Similarly, with a fruit machine,

the gambler must occasionally win, otherwise he would not gamble. But the machine is so constructed that over a period, the gamblers are almost certainly bound to lose. In gambling with a book maker, experience shews that the position is similar. The book-maker who accepts bets on every horse in a race, cannot expect all of them to lose and must therefore expect to lose on some of the bets, yet expects to make a profit as a result of the sum-total of the betting, and, in general, is able to make his book so that he does so. It seems to us impossible to read into the words of the definition a requirement that a profit has actually been made or that it must inevitably be made. It would ordinarily be quite impossible to adduce evidence to prove that profit had actually been made; and there seems to be no reason for assuming that the Legislature meant to impose an impossible condition. Nor could it even be said in connection with most forms of gambling that a profit must inevitably be made within a limited period. The most that can be said is that the prospects of profit to the Bank in the case of roulette, and to the owner of a fruit machine are extremely rosy. In our opinion, the phrase "kept or used for the profit or gain of the person" simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such a profit has been made or most inevitably be made.

30. The next question concerns the meaning of the phrase "whether by way of charge...or otherwise howsoever." Now it is obvious that the object of Sections 44 and 45 of the Act is to restrict or suppress gambling in some forms, and for the purpose to prevent places being run as "gaming dens." It would be strange if the Legislature in attempting to attain such an end, were to restrain only conduct which may accompany the gambling, but which does not necessarily do so. It would be passing strange if the Legislature were to approve of a casino to which everybody including the very poorest could enter freely and gamble at roulette or on fruit machines, and were to disapprove of a similar place from which the poorer classes were kept away by the imposition of an entrance fee.

31. It seems to us clear that the Legislature, without interfering with ordinary gambling among friends, sought to prevent (otherwise than at the places and times mentioned in the exception in the definition of gambling) people making a business of gambling, and attracting others with the hope of making a profit out of them.

32. The definition of "common gaming house" would be quite intelligible if the phrase "whether by way of charge...or otherwise howsoever" were deleted. In that case, a question might arise whether the profit or gain accruing indirectly from the use of the instruments of gaming was covered; but it would not be possible to argue that profit arising directly from the use of those instruments would be insufficient.

33. The phrase "whether by way of charge etc." is obviously explanatory, and it seems unreasonable to hold that an explanation should be added to a definition, which is entirely inconsistent with the definition. Moreover, if it was intended that

by adding such an explanation the application of the definition should be restricted, it is strange that words of such wide import as "or otherwise howsoever" should be used. The only reasonable interpretation of the addition of this phrase to the definition is that the Legislature wished not to restrict the meaning of the words used but to give them their widest meaning, and to make it clear that the profit or gain might accrue to the person either directly or indirectly.

34. We are definitely of the opinion that it is sufficient if the person referred to in the definition expects to make a profit or gain from the actual gambling. We therefore answer the first question submitted by the Division Bench in the affirmative and the second question in the negative.

35. At the same time, we respectfully agree with the learned Judge who decided *Lachchi Ram v. Emperor* ("22) 9 AIR 1922 All. 81 that the words "instruments kept or used for the profit or gain of the person...." are not simply equivalent to "instruments...kept or used for the purpose of gaming," though we are unable to agree with the conclusions they deduced. The position of the person, (i.e., the owner, occupier, user or keepsr of the place) must be such that his prospects of profit or gain are not merely the same as those of the persons who visit the establishment.

36. But, in all cases, in which a warrant has been issued after strict compliance with the provisions of Section 46, Calcutta Police Act, and "cards...or other instruments of gaming" have been found on the premises, the presumption may be made u/s 47 of the Act, that the cards etc., were kept or used for the porfit or gain of the. person owning or occupying the premises, within the meaning of the section, and it will then be for the accused to prove that he did not hope for or expect such profits.

37. Turning now to the facts of the present case, we are satisfied that instruments of gaming were found on the premises and that the respondent was the occupier of those premises. As the accused was unable to rebut the presumption arising u/s 46 of the Act, we are further satisfied that the instruments of gaming were kept or used for the profit or gain of the respondent. In this view, the respondent ought to have been convicted.

38. We therefore order that the appeal be allowed, the acquittal be set aside and that the respondent be convicted and sentenced u/s 44, Calcutta Police Act to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for three months. Let the typewriter be returned to the accused and the other instruments of gaming be destroyed.