40/72

SUPREME COURT OF VICTORIA

ELLIS v MISSAILIDIS

Adam J

27 November 1972

LOTTERIES GAMING AND BETTING – DEFENDANT CHARGED WITH BEING THE OCCUPIER OF PREMISES DID USE SAME FOR THE PURPOSE OF UNLAWFUL GAMING – INFORMANT OBSERVED A NUMBER OF MEN PLAYING CARDS IN THE CAFE-CLUB TYPE PREMISES EACH WITH DIFFERENT AMOUNTS OF SILVER AND PAPER MONEY BESIDE THEM – DEFENDANT SAID THAT HE WAS OBTAINING A PERCENTAGE OF THE MONEYS WHICH WERE BEING WAGERED – DEFENDANT FOUND GUILTY – WHETHER MAGISTRATE IN ERROR: *LOTTERIES GAMING AND BETTING ACT* 1966, SS11(11), 12(b).

HELD: Order nisi discharged.
1. Not only did the evidence raise a *prima facie* case, but it was open to the Magistrate on the evidence that he heard and all the circumstances of the case to be satisfied beyond reasonable doubt that these premises were used by the defendant for the purpose of unlawful gaming.

2. Accordingly, the Magistrate was not in error in convicting the defendant on the information which he heard and determined and that the order nisi was discharged with costs.

ADAM J: This is the return of an order nisi to review an order of the Magistrates' Court at Footscray on 1 April 1971 whereby the Stipendiary Magistrate convicted the defendant on an information that he, on 1 February 1971, at Footscray, being the occupier of premises situated at 84 Charles Street, did use the same for the purpose of unlawful gaming being carried on therein contrary to the provisions of s12(a) of the *Lotteries Gaming and Betting Act* 1966.

The learned magistrate ordered the defendant to pay a fine of $500, in default to be imprisoned for three months. At the same hearing another information laid under s12(b) of the Act relating to the same offence was adjourned to a day to be fixed.

The order nisi was obtained on the 21 May 1971, on the ground that there was no or, no sufficient evidence that the premises had been used for the purposes of unlawful gaming being carried on therein either by the defendant or by any other persons, and that the Stipendiary Magistrate had erred in deciding that the evidence led on behalf of the informant was sufficient to establish a *prima facie* case in relation to the information, and that the Stipendiary Magistrate should have dismissed the information.

The section of the *Lotteries Gaming and Betting Act* under which the information was laid was that the defendant "being the owner or occupier or having the use of any house or place who opens keeps or uses the same for the purpose of unlawful gaming being carried on therein."

The evidence upon which the Magistrate convicted the defendant provided direct evidence only of one instance of gaming; it appears in the evidence given by Constable Ellis, the informant. He was a constable stationed at Footscray, and he deposed to an incident on Monday 1 February at 9.25 in the morning when he went to the premises here in question at 84 Charles Street, Seddon. These premises were conducted as a cafe-club type premises with the normal provision for serving customers with meals as well as selling soft drinks, cigarettes and the like.

With the two other constables, Constable Ellis approached these premises from the rear, and as he approached he heard the sounds of men's voices from the premises. There was a window at the rear and as the constable approached this he saw inside a number of men seated around a table, each of them with different amounts of silver and paper money beside him. There was also an amount of money, including paper money, in the centre of the table. Each of the players appeared to be playing cards. Each player had two cards in his hand and on the table in front of

him there were several cards lying face-up in the centre of the table. Then the constable went to the rear door of the premises. It was opened by the defendant, and he went to the rear where the men were playing cards. The constable followed him, and on looking into this room he observed the men whom he had seen earlier all moving away from or still sitting around the table, taking the money and cards off the table.

On this evidence being given, counsel for the defendant made the admission to the Magistrate that the men were playing a game known as manila, and also that the defendant was obtaining a percentage of the moneys which were being wagered, and accordingly, although the game in itself was not unlawful, it was rendered an unlawful game within the meaning of the Act by s11(11) which declared as an unlawful game "any game with cards or other instruments of gaming wherefrom any person derives a percentage or share of the amount or amounts wagered."

After these admissions were made, and on the basis of these admissions which the Magistrate accepted as admissions for the purpose of the case, the constable continued his evidence; he said that the defendant admitted that he was the person in charge of the premises, gave his name and address, and when asked by the constable whether he had observed these people playing cards for money, admitted he had and that they were playing manila. Asked how the game was played, he gave a description of it. Asked, "how much money was each player betting?" he said, "Maybe a dollar." Asked whether he received any percentage of the amounts wagered in each game, he replied, "Ten cents in the dollar." Then the constable said to him, "how long has this game been played tonight?" The defendant replied, "Long time, All night maybe." The constable said, "Do you own these premises or rent them?" and the defendant said, "Rent them." Then he was asked, "What is your reason for allowing cards to be played for money and for receiving a percentage of the bets laid?" and the defendant replied, "No reason." Corroborating evidence was then given by Constable Henry which did not carry the case any further. Then the evidence for the prosecution closed.

Counsel for the defendant then addressed the Magistrate, submitting that the informant had not made out a *prima facie* case. The basis of the submission was that for the purpose of the defence under s12(a) it must be shown that there had been a "use" of the premises for the purpose of unlawful gaming.

He relied on a number of cases to indicate that something more than usage on the one occasion was necessary before there was a user within the meaning of this Act. The Senior Constable who prosecuted replied, and the Magistrate concluded that there was a case for the defendant to answer. Counsel for the defendant intimated that he did not intend to call any evidence. The Magistrate found the case proved and convicted the defendant. He did not state any reasons for his conclusions or for his rejection of the submissions of counsel for the defendant.

Before me Mr Abraham for the defendant seeking to have the order made absolute, emphasised that the expression "using premises for the purposes of unlawful gaming" in s12 (a), involved something more than an isolated incident or instance of using premises for that purpose. In other words, playing for unlawful gain on one occasion, or in one instance, did not amount to either the opening, keeping or using the premises for the purpose of unlawful gaming.

In support of that proposition, he relied on a number of cases, the most significant of which was the *R v Davies* (1897) 2 QB 199, and also he referred to *Duncan v Harris* [1895] VicLawRp 93; (1895) 21 VLR 438, *McManamny v McMahon* (1897) 3 ALR 14; 18 ALT 164; *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485; 13 ALR 352; 29 ALT 23 and *Cavanagh v Bernasochi* [1924] VicLawRp 74; [1924] VLR 457; 30 ALR 341; 46 ALT 56.

The decision or *dicta* in these cases make it clear in this class of legislation which reproduces in substance legislation in the United Kingdom and in other States here, the "user" of premises for unlawful gaming is not established by proof of a single instance of gaming, and something in the nature of habitual use or repetition of use must be established to answer the description of an unlawful or contravening user of the premises. In addition, to the above cited cases he referred to Bourke's *Summary Offences Act*, Second Edition, p287, and *Halsbury's* Third Edition, Volume 18, p192.

The ultimate conclusion Mr Abraham invited me to reach was that when examined the evidence adduced went no further than to prove one isolated instance of unlawful gaming in the premises in question. Therefore, it could not be said the defendant or any other person used the premises within the meaning of the word "use" in s12(a).

For the informant, Mr Uren urged in the first instance that as used in s12(a), there was no justification for requiring proof of any use beyond an isolated instance where a person in effect played or was the occupier of a house in which an unlawful game was played. I did not understand him to press this proposition, and I think it would be very difficult, in view of the authorities, now to have maintained such a definition to be given to the word "use", but he did urge that, at any rate, to have a "use" of premises there need not be more than one occasion, as distinct from one instance where the premises are used in what I might call a contravening manner. It was sufficient, for instance, if over a substantial period gaming was proceeding upon premises for the premises to be "used" for the purposes of gaming, although one single instance witnessed of gaming at the premises would not in itself prove any user of the premises for purposes of gaming.

In other words, Mr Uren said it was ultimately a question of fact, in the light of all the evidence, as to whether the premises were being used for the contravening purposes to arrive at this conclusion of fact, frequency of use for the purpose and the nature and quality of the user were material circumstances. But the ultimate question is whether, as a matter of fact, it is proper to say from the evidence that the premises were being so used. This is consistent with treating the case of a single isolated instance as outside any reasonable definition of user, but conceding that it then became a question of fact in all the circumstances whether the conduct did amount to user.

It was not necessary for direct evidence as to the user relied on by the informant, because it was not only the nature of such user as was witnessed directly, but also any admissions and the surrounding circumstances which were to be taken into proper consideration in inferring whether the premises were being used by the defendant.

Among circumstances which Mr Uren contended were relevant was the fact, for instance, that this was not merely a private home where one may have one's own friends present for a game of cards; it was a cafe, of the nature of a cafe-club. He relied on the fact that the playing of cards was discovered at 9.30 in the morning, which was certainly an unusual time at which to find men playing cards, and at least under the circumstances would excite suspicion there was some questionable business going on.

Then he relied on the admission, in effect, by the defendant when asked how long this had been going on "It may be a long time, it may be all night," and that having regard to the nature of the game and the length of time it had been going on there was a reasonable inference that the game had not been played between the same people all the time, but there had been a change of players.

He submitted that one circumstance which should be taken into account was the premises were apparently being used for no other purpose than for the playing of cards. When the police arrived and the game was inherently of the nature of a business because the defendant, the occupier of the premises, was taking a percentage of the winnings, according to his own admission. This was not to be expected in the isolated instance of a game of cards. He submitted that it was a reasonable inference, that at this time of the morning and in view of what had been said by the defendant, that there had been a repetition of the playing of games of cards over very many hours throughout the night sufficient to constitute a "user" of the premises.

There was one further matter, I think, that is not altogether irrelevant: that was when asked for an explanation for what was happening, the playing of the game and the taking of the percentage, the defendant said, "There is no reason."

Having condescended to reply to that, if it had been innocent one would certainly not have expected the answer, "There is no reason", but the innocent explanation would be given; or there would have been simply a refusal to answer the question at all relying on his constitutional rights. But the defendant showed no reluctance to answer the questions put to him by the police.

He did not purport to exercise his rights not to say anything incriminating against himself. The conclusion, Mr Uren submitted, from such evidence as was given was sufficient to warrant the Magistrate, while giving full weight to the judicial interpretation of the word "use" holding that there was a case to answer and that in that respect the Magistrate's decision was upholdable.

There was a further ground relied upon by Mr Uren. This was that even if he were wrong and the evidence as it stood warranted the inference that there had been a user of these premises contrary to law within the meaning of s12(a), that reading s43 and s70 of the Act together, one would reach the conclusion on the evidence given that there was a user of the premises by the defendant sufficient to convict him under s12(a). I may say I have found this branch of Mr Uren's argument subtle, but I must say I consider it unconvincing. Shortly put, the argument was that under s43(b), these premises are to be deemed a common gaming house because they are a house where an unlawful game is played, and an unlawful game may be said to have been played on these premises because of the admission by the defendant that he took a percentage of the wagers, and under s11(11) a game of cards where any person derives a percentage or share of the amount wagered is declared to be an unlawful game. Then Mr Uren, as I understood him, said under s43(b) as cards were played which would be an unlawful game that the premises were a common gaming house as appears from the words in s43, “deemed and taken to be and to be used as a common gaming house or place" and so, by force of s43, on the evidence given these premises are deemed and taken to be and to be used as a common gaming house. Then he relied on s70(1)(e) which says for the purposes of this Act:

> "the finding of instruments of gaming used in playing any unlawful game in any house or place or about the person of any of those who are found therein shall be *prima facie* evidence that the house or place is used as a common gaming house or place...."

Relying on these two sections, as I understood Mr Uren, he said that not only do they establish *prima facie* that the house was a common gaming house, but, that it was used as a common gaming house. Although this prosecution is under s12(a) of the Act he submitted this was evidence that the defendant was guilty of using the premises for the purpose of unlawful gaming being carried on therein.

I think there are a number of answers to this. It is perhaps sufficient for me to say I would certainly not be prepared to give any final decision in favour of Mr Uren on this point because in the view I take of the evidence and what was open to the Magistrate, I think it is unnecessary to have recourse to this. But as at present advised, I would think there are a number of answers to this proposed use of s43 and s70. One is that I am disposed to think that the definition or extended definition of common gaming house by s43 is applicable only to Division 7 of the Act which deals with a number of offences and provisions concerning common gaming houses, that being the heading to that Division. So I would be disposed to the view that it was not open to Mr Uren to rely on s43 in aid of proof that the defendant was using this house for the purposes of unlawful gaming. As to s70, I am far from persuaded that the statutory presumption in s70(1)(e) that from the finding of instruments of gaming used in playing any unlawful game the house or place is used as a common gaming house has any application except in connection with offences involving the use of premises as a common gaming house.

Although the legislation has, to some extent, changed in the course of its history, I am disposed to agree, with all respect, with the observations in *O'Donnell v Dodd* [1910] VicLawRp 79; [1910] VLR 482; 16 ALR 539; 32 ALT 87 by the then Chief Justice on the general effect of such a provision as s70(1)(e), which would mean that it had no application to such a charge as the one that we are here concerned with under s12(a). There is the step to be taken that s12(a) requires sufficient proof that the defendant is "using" the premises for the purpose of unlawful gaming, and at most what we get from these other sections is that the premises are being used as a common gaming house, and the statutory presumptions do not go so far as to say by whom. I think the exceptions are directed to a different purpose and I would not be prepared to rely on them as assisting the case of the informant.

The Magistrate having found, as I think it was open to him to find, that there was a case to answer then proceeded, when the defendant declined to call any evidence, to convict. Of course it is well established that a decision that there is a case to answer, even though no evidence is

called in rebuttal, does not inevitably mean that the Magistrate must convict because a case to answer means only that there is a *prima facie* case and it is still for the Magistrate to be satisfied, beyond reasonable doubt, taking the evidence as a whole, that the offence has been established.

The Magistrate, unfortunately, has not given us his reasons for convicting, but I think one must assume the correctness of his decision unless the contrary is shown, if there was a basis on which he might reasonably have acted as he did. In my opinion, not only did the evidence raise a *prima facie* case, but I think it was open to the Magistrate on the evidence that he heard and all the circumstances of the case to be satisfied beyond reasonable doubt that these premises were used by the defendant for the purpose of unlawful gaming.

In the result then as to the grounds of the order nisi, I hold that the grounds for attack of the conviction on the information on which the informant succeeded have not been established; that is to say, I hold that there was sufficient evidence that the premises had been used for the purpose of unlawful gaming being carried on by the defendant. I hold that the stipendiary magistrate did not err. Evidence led on behalf of the informant was sufficient to establish a *prima facie* case and I hold that the Magistrate was not in error in convicting the defendant on the information which he heard and determined. So the result must be that the order nisi is discharged with costs.
