27/92

SUPREME COURT OF VICTORIA

DPP v SCARICA

Byrne J

1 April 1992

GAMING AND BETTING – RESTRICTED MACHINE – PERMITTED TO REMAIN ON PREMISES – ONUS OF PROOF – WHETHER *MENS REA* INGREDIENT OF OFFENCE – WHETHER PROSECUTION REQUIRED TO PROVE GUILTY INTENT – "PERMITS": *LOTTERIES GAMING AND BETTING ACT* 1966, S68(4), (13).

1. Notwithstanding the provisions of s68(13) of the *Lotteries Gaming and Betting Act* 1966 ('Act'), *mens rea* is an ingredient of an offence under s68(4) of the Act.
***Bayly v Scarica* [1990] VicRp 63; (1990) VR 731, adopted.**

2. Accordingly, it was open to a magistrate to dismiss a charge under s68(4) of the Act on the ground that the prosecution had not established that the defendant knew that the machine the subject of the charge was a restricted machine within the definition in s68(1) of the Act.

BYRNE J: [1] This is an appeal brought under the *Magistrates' Court Act* 1989, s92, against the order of the Magistrates' Court of Victoria at Melbourne on 18 June 1991. Before the Court on that occasion was the respondent, Ivana Scarica, charged with two offences against the *Lotteries Gaming & Betting Act* 1966:

(1) possess a machine for gaming on 17 August 1989;

(2) permit a restricted machine in premises on 17 June 1989.

The former charge was struck out and I am no longer concerned with it. The second charge was dismissed and it is the order dismissing the information which is appealed against by the informant, Gregory Michael Donoghue.

I have determined to dismiss the appeal for the following reasons: The offence is that created by s68(4) of the Act, which is in the following terms:

> "The owner or occupier of any premises, not being a private dwelling, who permits a restricted machine to remain in a place on or near the premises where it is accessible to a person other than the owner, occupier or a person employed to work on the premises is guilty of an offence."

Subject to one matter, the various ingredients of the offence created by this section were found against the respondent. At the close of the informant's case, the respondent did not call evidence but made a number of submissions, including one which was ultimately successful. This was that the appellant had failed to prove that the respondent had any knowledge of the illegality of her acts or that the "mens rea" element of the offence had not been proved.

[2] The ruling of the learned Magistrate is set out in para 21 of Mr Jones' affidavit, and I quote:

> "The learned Magistrate accepted the submission by counsel for the defendant and dismissed the information. The learned Magistrate stated that there was nothing from which he could draw a reasonable inference as to the knowledge of the illegality of the machine by the defendant. The learned Magistrate then stated that he was satisfied that s68(13) of the said Act, as at 1991, was equivalent to the statement at common law that ignorance of the law is no excuse and that the principles of *mens rea* as expounded in *He Kaw Teh's* case [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 apply to the *Lotteries Gaming & Betting Act*, having regard to the seriousness of the offence and the penalties able to be imposed."

The respondent's affidavit put it this way:

> "It was submitted by my counsel on my behalf that the *mens rea* that the prosecution was required to prove was that the machine was illegal in the sense of it being a "restricted machine" according to the definition in s68(1) of the *Lotteries Gaming & Betting Act* 1966. The Magistrate upheld this submission and ruled that the evidence was insufficient to satisfy him beyond reasonable doubt, that I knew that the machine was an illegal machine."

The questions of law raised in the appeal, as set out in the order of Master Evans of 18 July 1991, are twofold:

> (a) Is evidence of *mens rea* necessary in order to prove an offence pursuant to s68(4) of the *Lotteries Gaming & Betting Act* 1966?;
>
> (b) If *mens rea* is an element of the offence created by that section, was it necessary for the prosecution to establish that the defendant knew that the machine the subject of the charge was an illegal machine?

Is *mens rea* an ingredient of the offence under s68(4)?

The starting point for an examination of this question is the recent decision of the High Court in **[3]** *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. In the judgment of the Chief Justice at p528, His Honour cites with approval the relevant principle which derived from the English case *Sherras v De Rutzen* (1895) 1 QB 918 at 921; 11 TLR 369.

The principle is expressed as follows:

> "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Whether *mens rea* is therefore an ingredient of this statutory offence depends upon the proper construction of the section, its purpose, its context, the mischief which it seeks to remedy and the effect of such a conclusion upon the administration of the legislation in question.

In my opinion, the charge under consideration does carry within it the requirement of proof that the defendant knew that the machine on his or her premises was a machine of the type within the definition of restricted machine. This conclusion stems largely from the use of the word in the section, "permits". Unlike other sections in this Act, the section with which this appeal is concerned imposes criminal liability upon a person who does not take an active part in the gaming activity with which the legislation is concerned but is in a sense a passive, or permissive accessory to that activity. In these circumstances and in accordance with the ordinary principles, it seems to me reasonable that that person should not be fixed with criminality unless it is shown that the permission was a knowing permitter and for that reason, I conclude that the word "permits" in the section carries with it that element of mental knowledge – that **[4]** the person charged is shown to have known what it was that he or she was permitting. It is, of course, not necessary that this knowledge include a knowledge of the statute. With respect, I adopt the exposition of Jordan CJ in *R v Turnbull* (1943) 44 SR (NSW) 108; 61 WN (NSW) 70, which has been quoted with approval in *Teh's* case at p531, and which is in these terms:

> "Assuming his mind to be sufficiently normal for him to be capable of criminal responsibility, it is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing."

I refer also to the decision of the Full Court of South Australia in *Collett v Bennett* (1986) 21 A Crim R 410; (1986) 3 MVR 141, especially at 144-5, and to the decision of the House of Lords in *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470, where a section to some extent in similar terms to the present was in question.

Given the evidence before the Magistrate and the finding of fact which he made, it seems to me inescapable that the informant did not discharge the burden of proving this mental element.

Was it necessary for the informant to prove the state of mind? Normally, it is incumbent upon the informant to prove each ingredient of the offence to the criminal standard. In the present case, however, the appellant relies upon s68(13), which is in the following terms:

> "In any prosecution for an offence against this section, it is not necessary for the prosecution to—
> (a) prove that the person charged knew that he or she was committing an offence; or
>
> (b) exclude the operation of any defence available to the person charged?"

[5] This is a mysterious sub-section which was introduced into the legislation by Act No 88 of 1987. No light, I have been told, is shed on it by the parliamentary debates and counsel have been unable to point to its provenance, nor to the mischief which it was concerned to remedy. The section on its face relieves the prosecutor in proceedings for an offence against s68 including, I might add, offences other than that created by s68(4), from proving that the person charged knew that he or she was committing an offence. The difficulty is that, so expressed, the prosecution does not bear this burden and I refer to Turnbull's case again and to the sentences following the passage which I have quoted above, where Jordan CJ said:

> "If this be established, that the defendant knew all the facts constituting the ingredients necessary to make the act criminal, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of some essential factual ingredients of the crime charged."

Mr Ross, one of Her Majesty's counsel who with Mr Gibson appeared for the respondent, argued that this was merely declaratory of the common law and was therefore of no further effect. Mr Gebhardt of counsel who appeared for the appellant said that its function was to relieve the informant from proving any mental element of the offence. In my opinion, Mr Gebhardt's argument cannot be correct. There is an illogicality in the case of an offence which includes a mental element to say that the informant may prove the offence without having proved that element. Moreover, I do not consider that such a conclusion, which is to disturb the traditional onus imposed on a prosecutor, should be reached without clear **[6]** words. This Act abounds with specific provisions whose effect it is to relieve the prosecutor of burdens in very specific terms (see, for example, ss69, 70, 47).

It is perhaps not necessary for me to venture an opinion on what role, if any, is then to be given to s68(13); it may be declaratory, as Mr Ross submits; it may be an inept attempt to achieve what Mr Gebhardt urged. It is sufficient for the present purposes in the case of a charge of permitting under s68(4) for me to conclude that it did not relieve the informant of the burden of proving the mental ingredient implicit in the word "permitting".

I make mention also of the decision of this Court in *Bayly v Scarica* [1990] VicRp 63; (1990) VR 731 and particularly at 736-7. In a case which in some respects resembles the present, the defendant before the Magistrates' Court was charged with a number of offences, including being an accessory. McGarvie J had this to say at p737:

> "The common view" – that is the common view of counsel before him – "was that a principal offender to whom otherwise the provisions of s68(4) or s68(2) applied in respect of a machine which was in fact a restricted machine or a machine for gaming, would be guilty of the offences even though it was not proved that he or she knew of the essential facts which made it a restricted machine or a machine for gaming."

His Honour went on to say:

> "Assuming that to be so, s68(13) of the *Lotteries Gaming & Betting Act* does not relieve the prosecution of the obligation of proving the things necessary to establish that the defendant was an accessory."

And with respect, I would adopt His Honour's conclusion. The conclusion I have reached is that whatever role s68(13) might play in some other case, it does not relieve the prosecution. in the present case of the **[7]** obligation of proving all of the things necessary to establish that the defendant in this case was guilty of an offence under s68(4).

Accordingly, I have concluded that the appeal should be dismissed. The order of the Court, therefore, is that the appeal be dismissed and I think it is only necessary for me to make an order for costs, if such is sought.

APPEARANCES: For the applicant DPP: Mr SP Gebhardt, counsel. Solicitor for the DPP. For the respondent Scarica: Mr D Ross QC with Mr M Gibson, counsel.
