28/74

SUPREME COURT OF VICTORIA

MURTAGH v PALTOS; MURTAGH v PARTOUGLU

Gowans J

12, 13 June 1974 — [1974] VicRp 91; [1974] VR 768

GAMING AND BETTING – ACCUSED OBSERVED TO BE USING PREMISES FOR THE PURPOSE OF BETTING – PREMISES A HOUSE OWNED BY ANOTHER PERSON – CHARGES LAID – SUBMISSION MADE TO MAGISTRATE THAT THERE WAS NO EVIDENCE THAT THE PREMISES HAD BEEN USED IN A LAWFUL WAY – SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *LOTTERIES GAMING AND BETTING ACT* 1955, S18(1)(a).

HELD: Order nisi absolute. Dismissal order set aside. Remitted for further hearing.

1. On the evidence, findings were open in each case that the defendants were in exclusive occupation of the house in circumstances designed to make the premises safe from intrusion and they were exercising the right to permit entry into the house; and further that they had been there some time before the commencement of the betting activities which were relied on by the prosecution; and, in addition, that they were making use of certain facilities in the house, consisting of the television receiver, the gas stove, the telephone service for inward calls, the concealed socket for plugging in the telephone, and perhaps also the garden. There was a finding open that each knew the owner, but there was insufficient to show that there was authority or permission from the owner for them to use the premises or the facilities.

2. In those circumstances, the question was whether on those findings it could have been held that the defendants were persons using the house within the meaning of that term where it was first used in s18(1)(a) of the *Lotteries Gaming and Betting Act* 1966.

3. The evidence indicated a degree of exercise of control in relation to the premises beyond the mere betting activities which were observed to be taking place.

4. There was ample evidence on which there could at least be found that that part of the foundation of a betting business, which consisted of inquiries as to the prices that would be given for different horses and of offers to make bets, was being carried on.

5. In the result there was evidence on both aspects of the matter on which the magistrate could have convicted. Accordingly, the Magistrate was wrong in holding that he had no alternative but to dismiss the information without calling upon the respondent to answer the allegations of the informant because no use of the subject premises by him had been proved other than the unlawful use for betting.

GOWANS J: These are two orders nisi obtained by Patrick William Murtagh, Senior Constable of Police, to review the dismissal of two informations brought by him against the two respondents, Peter Paltos and Peter Partouglu in the Magistrates' Court of Brighton. In each case the information related to an offence against s18(1)(a) of the *Lotteries Gaming and Betting Act* 1966. The charge was that the defendant on 5 May 1973, at Brighton, being a person using a certain house or place, to wit premises known as 6 Violet Crescent, East Brighton, did unlawfully use the same for the purpose of betting.

The two charges arose out of the same incident. On the day mentioned, Saturday, 5 May, about 1.25 p.m., three members of the police force, Inspector Sylvester, Senior Sergeant Joseph James Murphy and the informant went to a private dwelling-house at the address referred to, Murphy going to the front and the other two to the rear. What the latter two, through the kitchen window at the rear, saw the defendants doing, and what was said and done inside after entry (according to the informant's evidence) and what was said afterwards in the garden outside by each of the defendants to Inspector Sylvester (according to the evidence of Murphy) constitutes the basis of the informant's case against each defendant.

The evidence was given in a joint hearing of the informations. At the close of the case for the prosecution a submission was made by counsel for the two defendants that there was no case to answer, on the basis that there was no evidence of any "using" of the premises in a lawful way independently of the use of betting; that was said to be required on the authority of *O'Donnell v Gardener* [1902] VicLawRp 116; (1902) 27 VLR 718; 8 ALR 81, and other cases referred to in Bourke's *Police and Summary Offences*, 2nd ed., p297. The magistrate held that a use other than the unlawful use for betting had to be proved, and he dismissed the informations without calling upon the defendants for an answer.

In each case an order to review the order was obtained on the ground "that the stipendiary magistrate was wrong in holding that he had no alternative but to dismiss the information without calling on the respondent to answer the allegations of the informant, because no use of the subject premises by him had been proved other than the unlawful use for betting".

Although there was a joint hearing of the two informations, the case against each defendant had to be considered separately. The same position also applies in the case of these two orders to review. The question at the end of the case for the prosecution was as to whether there was a *prima facie* case in the sense of there being evidence on which the particular defendant could be convicted of the charge, and it was not a question as to whether there was proof beyond reasonable doubt of his guilt of the offence: *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, at p658; [1955] ALR 671, at p674.

It is therefore necessary to consider the state of the evidence in each case. In the case of Paltos the evidence was that both the front and the back doors of the house were locked, and when the informant looked in the kitchen window he saw the two defendants answering two telephones and leaning over a bench writing with a pencil on a sheet of paper. He heard Paltos speak into the telephone the names of two horses which were running in a race that day at Sandown Racecourse, and saying words which could be taken to state the betting odds in relation to those horses in those races.

On Sylvester demanding entry, the defendant was seen to run about in the kitchen and place some paper on the gas stove and set it alight, and then take a phone and put it in a kitchen cupboard. On Sylvester smashing the window to gain entrance, Paltos opened the rear door and the two police who were at the rear of the house then entered. The informant saw the burned paper and the gas stove still alight. Concealed inside a kitchen cupboard there was a socket into which Partouglu plugged the telephone taken from the kitchen cupboard where it had been seen to be put. Then some 26 inward telephone calls were received, a number of which constituted inquiries as to the prices of various horses running in races that day either at Sandown, Melbourne, or at Randwick, Sydney, and some the placing of bets. After a number of these calls the defendant Paltos left the kitchen and went into the garden and in answer to questions by Sylvester he gave the name of the owner of the premises as Mrs Ursula Demire and the time of his arrival at the premises as 11.30 a.m., saying that he had had dinner there. He admitted that he knew where the plug for the phone was in its concealed place under the kitchen sink, and that he had pulled the phone plug from its socket. He said he had been watching TV and denied that he had been answering the telephone. He had no explanation to give for the receipt of the telephone calls. He said that the races that day were at "Sandown, Sydney and everywhere".

Sergeant Murphy agreed in cross-examination that the television set had been operating, but he said that he had seen nothing unusual about the gas stove and it was not alight. He, it is to be remembered, had entered the house from the front.

In the case of Partouglu the evidence was the same, except that instead of evidence as to answers made by Paltos to Sylvester there was evidence of answers made by Partouglu to Sylvester. Partouglu said that he had come to the premises to see the owner, Mrs Demire, and had arrived at 1 p.m. He agreed that he and Paltos were locked alone in the house and that the two of them had been seen in the kitchen with two telephones, but he said that he had not seen one pulled out of its socket upon the arrival of the police. He said he knew nothing about the substance of the telephone calls, although he agreed that a number had been made, and he denied that he knew anything about any betting.

On this evidence, in my view, findings were open in each case that the defendants were in exclusive occupation of the house in circumstances designed to make the premises safe from intrusion and they were exercising the right to permit entry into the house; and further that they had been there some time before the commencement of the betting activities which were relied on by the prosecution; and, in addition, that they were making use of certain facilities in the house, consisting of the television receiver, the gas stove, the telephone service for inward calls, the concealed socket for plugging in the telephone, and perhaps also the garden. There was a finding open that each knew the owner, but there was insufficient to show that there was authority or permission from the owner for them to use the premises or the facilities.

The question is whether on these findings it could be held that the defendants were persons using the house within the meaning of that term where it is first used in s18(1)(a).

It is necessary to point out that the circumstances are not concerned with the use of an open place, or the use of premises or a part of premises open to or resorted to by the public, and cases dealing with those particular circumstances may be put aside. Equally there may be put aside cases where the use depends upon the repetition of conduct. This is a case indicating that the occupation of a defined enclosed set of premises was being exclusively engaged in by the defendants for some time during the particular day, with resort being had by them to facilities on the premises and in particular to the facility of the telephone system connected to the premises.

In any ordinary sense, in my opinion, this would indicate that the defendants were "using" the place, and it would indicate that they were doing so even in the sense of Lord Halsbury's phrase in *Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143, at p160; (1897) 2 QB 242, "having the dominion and control over the place, and conducting the business of a betting establishment with the persons resorting thereto", so long as the first phrase does not imply a legal right or permission on the part of the owner and the last phrase is understood as referring to resorting by the use of the telephone system. But they would in any case be using the place as the *dictum* of Lord Halsbury was explained in *Milne v Commissioner of Police for City of London* [1940] AC 1; [1939] 3 All ER 399, i.e. without requiring that there is a "right of legal control or of exclusive control" or "a permissive user" to use the words of Lord Maugham at (AC) p17.

Lord Atkin at p28 said this:

> "I also think that he [speaking of the bookmaker] can be said to be using the premises if he has such a degree of control over them that it can be said that the premises are a place where he is carrying on his betting business. I do not think that he need have any legal right of occupation: or that he need be a partner with the actual occupier."

And Lord Wright said at p42:

> "Permission is, I think, immaterial in cases of this type if in fact the place is used for the prohibited purpose. The offence may be committed by a licensee or by one who is not even a licensee and has no permission from the occupier. I think Lord Halsbury meant no more by these words than such *de facto* dominion and control as enabled the bookmaker to ply his trade in the place."

And then at p50 Lord Porter said (referring to the observations of Lord Halsbury):

> "In so far as these observations may seem to indicate that the section requires a *de jure* user before an offence can be committed, they must, I think, be read in the light of the matters there in issue."

The defendants would also on these findings that I have set out be using the premises in the same sense as was referred to by Griffith CJ, in *Prior v Sherwood* [1906] HCA 29; (1903) 3 CLR 1054, at p1070; 12 ALR 510, that is, they were in their occupation and possession in such circumstances that use could be made by them of such possession for betting purposes.

It is only necessary further to point out that in *Milne's Case* there was no doubt in the minds of the learned law lords that the bookmaker Payne, who in his own office took the bets from the club members by telephone, was using that office in the relevant sense. (In this connexion see the observations of Lord Wright at pp38 and 39 of the AC report.) I should add that more recently in *R v Porter* [1949] 2 KB 128; [1949] 1 All ER 646, the Court of Criminal Appeal applying *Milne's*

Case held that the permission of the owner or occupier for the user was not necessary, and that Court treated *R v Deaville* [1903] 1 KB 468, to the contrary effect, as overruled.

The distinction which was sought to be drawn in the submissions made before the magistrate between lawful and unlawful user, a distinction stemming from the language of a 'Beckett J, in *O'Donnell v Gardener*, *supra*, appears to seize upon a discrimen which is an irrelevant discrimen. The real question, in my view, is whether there was a user of the premises beyond the mere use implicit in the evidence of the unlawful betting. I am not satisfied that the stipendiary magistrate misunderstood this as being the question in the case. But I am satisfied that he failed to appreciate the significance and implications of the evidence that had been given.

In my view, that evidence indicated a degree of exercise of control in relation to the premises beyond the mere betting activities which were observed to be taking place.

It has been submitted, and of course this is open to the defendants, that assuming that there was evidence of use of the premises in the first sense in which it is used in the relevant paragraph of s18(1), there was no evidence on which the magistrate could have found that there was any use for the purpose of betting in the second sense in which the word is used in that paragraph.

It is undesirable for me to say too much on this aspect, but I am satisfied that there was ample evidence on which there could at least be found that that part of the foundation of a betting business, which consists of inquiries as to the prices that would be given for different horses and of offers to make bets, was being carried on. The actual decision in *Downing v O'Donnell* [1959] VicRp 92; [1959] VR 696; [1959] ALR 1212, is distinguishable, but the reasoning in my view supports the conclusion that I have reached.

In the result, in my opinion, there was evidence on both aspects of the matter on which the magistrate could have convicted. For these reasons, I am satisfied that there has been made out the ground relied upon, namely, that the stipendiary magistrate was wrong in holding that he had no alternative but to dismiss the information without calling upon the respondent to answer the allegations of the informant because no use of the subject premises by him had been proved other than the unlawful use for betting.

The order nisi in each case should, therefore, be made absolute, the dismissal order set aside, and the information remitted to the Magistrates' Court to continue the hearing of the information and deal with it consistently with these reasons. The order nisi must be made absolute with costs in each case.

As to the application under s14A of the *Appeal Costs Fund Act* for a certificate, I suppose there is always the consideration that the magistrate was "led down the garden path", if I may put it that way. But the ultimate responsibility, I suppose, is his to determine what is the law, and I will certify under the *Appeals Costs Fund Act*. There will be a certificate in each case. Orders absolute.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendants: T. Kritikides and Co.