10/71

SUPREME COURT OF VICTORIA

DRIVER v LOTTI

Gillard J

29 March 1971

LOTTERIES GAMING AND BETTING – PERSON CHARGED WITH BEING THE OCCUPIER OF PREMISES DID KEEP A CONTRIVANCE OF GAMING – QUESTION WHETHER DEFENDANT WAS THE OCCUPIER OF THE PREMISES – FINDING BY MAGISTRATE THAT THERE WAS NO EVIDENCE TO MAKE SUCH A FINDING – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *LOTTERIES GAMING AND BETTING ACT* 1966, SS68, 69.

HELD: Order nisi discharged.
Having regard to the manner of the police evidence, there was a gap in proof of the relationship of the defendant to the house or place where the contrivances were found. The evidence as it stood was quite consistent with some other person or persons upon the premises and the fact that he was behind the counter and had turned off the machines on at least two or three occasions on each day, and that he had made payment of money, did not indicate that he had the care government or management of the house or place. It indicated merely that he had the care government or management of the machines.

GILLARD J: In this case Michael Lotti was charged at the Magistrates' Court at Northcote on 20 October 1970 on two informations, first, that on 19 June 1970 at Northcote he being the occupier of premises situated at and known as 221 High Street, Northcote, did keep a contrivance for gaming at 221 High Street, Northcote, to wit a baseball machine, and secondly that on 20 June 1970 at Northcote being the occupier of premises situated at and known as 221 High Street, Northcote, did keep a contrivance for gaming at 221 High street, Northcote, to wit a baseball machine.

Evidence was given by two policeman of their experience at the premises on the dates mentioned. They interviewed the defendant who purported to make certain admissions. One of the police witnesses was then cross-examined and he, in effect, said that he had written out the questions to be asked of the defendant prior to interviewing the defendant. He was then asked to produce those written questions but was unable to do so. He was then asked did he remember the questions that he put to the defendant; he said that he did, and thereupon in narrative form stated the questions he asked. Unfortunately, he omitted the salient questions relating to the occupation by the defendant. The informant, who was the corroborating witness, and who had been absent from Court during the cross-examination of the first police witness, was then called to the box and after a short examination corroborating the evidence of the first witness he also was cross-examined and in the course of cross-examination he made several statements which were contrary to the first witness. But above all, at the conclusion of his evidence he was asked questions by the Magistrate as to what the first witness said to the defendant. I read from para. 11 of Mr Knott's affidavit of what happened:

> "The Magistrate then asked the witness Driver whether Seddon used the word 'occupier' in any of the questions to the defendant and whether the defendant appeared to understand the meaning of the word 'occupier'. The witness Driver said that there are persons of foreign extraction who do not understand what is meant by the word 'occupier', and in those circumstances what is done is that some other word is used so that the person interviewed can understand what is being sought. He gave an example of the word 'boss' being used instead of the word 'occupier'. In this case he said the defendant may have been asked 'Are you the occupier?' Or he may have been asked 'Are you the boss?' or he may have been asked something else to ascertain whether he was the occupier".

After this incident, Mr Buckner of counsel for the defendant, submitted to the Magistrate that there was no case to answer on the ground there was no evidence to show that the defendant was the occupier of the premises. The prosecuting officer then drew attention to certain statements made from the police brief concerning occupation which he submitted had been stated in evidence.

The Magistrate interrupted him to say: "But that ignores the cross-examination."

The Magistrate then gave his decision in this form:

> "I have been told the questions asked are virtually a *pro forma*. It has been admitted that the defendant may not have been asked whether he was the occupier at all, but a question such as, 'are you the boss?' and getting an answer to that they believed to be an answer to the same question. I am not satisfied to make the inference that when the defendant answered a question that does not use the word 'occupier' he is answering that he is the occupier. He could well be the manager, well own the premises; he is not necessarily the occupier. I cannot see any evidence upon which I can safely say that the defendant is the occupier. Therefore on this ground I uphold the submission and the information will be dismissed."

The Informant then obtained an order nisi on 2 December 1970 to review that decision on four grounds.

> "First, the Stipendiary Magistrate misdirected himself in holding that he was required to be satisfied beyond reasonable doubt that the defendant was the occupier of the premises known as and situate at 221 High Street, Northcote before he could rule that the defendant has a case to answer.
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> Secondly, that on the evidence the Stipendiary Magistrate was wrong in ruling that the defendant had no case to answer.
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> Thirdly, that on the evidence the Stipendiary Magistrate should have found that the defendant was the occupier of the said premises.
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> Fourthly, that on the evidence the Stipendiary Magistrate should have found that the defendant should be deemed pursuant to s69 of the *Lotteries Gaming and Betting Act* 1966 to have been the occupier of the said premises."

Before me, it has been earnestly urged that at the conclusion of the police case the Magistrate should have examined the evidence to see whether there was a *prima facie* case made out by the prosecution. With that I agree, but it must be remembered that in this case the defendant had not appeared at all, and although Mr Buckner said there was no case to answer, he in effect was indicating to the Court that the prosecution had failed to prove its case. Even in the absence of an explanation from the defendant any gaps in the prosecution case cannot be filled by the failure of the defendant to give evidence. In effect, the Magistrate was obviously impressed by the cross-examination of the policemen, and was disinclined to accept any evidence of admissions that the defendant was an occupier.

On looking at the material in the affidavits I am not certain that I would have arrived at the same conclusion, but it is not my task to determine the matter. My task is to decide whether or not there was evidence before the Magistrate which required him to make a finding that the defendant was an occupier. Having regard to the last statement in his reasons, namely, I cannot see any evidence upon which I can safely say the defendant is the occupier", it suggests to my mind that despite the evidence of the policemen he was not prepared to accept proof from them that occupation was admitted. This, however, does not conclude the matter, because the attention of the Magistrate was never given to the provisions of s69 of the *Lotteries Gaming and Betting Act* 1966. That section provides:

> "Every person who appears, acts or behaves as master or mistress or as the person having the care, government or management of any house or place open, kept or used in contravention of this Act, or as a common gaming house shall for the purpose of this Act or any other Act or law relating thereto be deemed to be the occupier thereof, whether he is or is not the real occupier thereof."

Mr Buckner on behalf of the defendant in the Court below has urged to me that this section has no application to the provisions of s68. In the alternative he has urged that there is no evidence at all which would require the Magistrate to find that the defendant at the material time was master or the person having the care government or management of the house or place.

I find it unnecessary to deal with the matter of interpretation that Mr Buckner has put upon the section. I uphold his alternative submission, that having regard to the manner of the police evidence there is a gap in proof of the relationship of the defendant, to the house or place.

The evidence as it stands is quite consistent with some other person or persons upon the premises and the fact that he was behind the counter and had turned off the machines on at least two or three occasions on each day, and that he had made payment of money, does not indicate to me that he had the care government or management of the house or place. It indicates merely that he had the care government or management of the machines.

This equivocation could have been easily overcome by the police paying a little attention to evidence of their observations, rather than relying too strongly upon admissions made.

Nowhere does it appear that the police ever attempted to give any evidence of who were on the premises on the two occasions. It is true they gave evidence that the defendant was there, but they did not exclude the possibilities of other persons being in charge of the house or place where the machines were. I the more readily come to this conclusion as no point of s69 was made by the prosecution in the Court below. If attention had been drawn to it then there could undoubtedly have been a finding of fact by the Magistrate on the matter.

In the absence of such a finding I think that Mr Buckner is quite entitled in this Court to uphold the decision or the Court below by drawing my attention to the gaps in the prosecution's proofs. Looking then at the grounds of the order nisi I say as to the first ground that whilst one can be impressed by a decision such as *Wilson v Buttery* [1926] SASR 150, as to the necessity of keeping one's mind open to the difference between the standard of proof required to show there is a case to answer, as opposed to the standard of proof required in order to prove the case beyond reasonable doubt. Nevertheless, when, as in this case, it appeared that counsel in effect was saying the prosecution has failed to prove its case, then in my view the Stipendiary Magistrate did not misdirect himself in going straight to the ultimate burden of proof. As a matter of fact, of course, he has never stated that he was required to be satisfied beyond reasonable doubt.

The words he used – and I repeat them – "I cannot see any evidence upon which I can safely say that the defendant is the occupier"; I emphasise the use of the adverb 'safely'. In the administration of the penal law it is fundamental that those charged with the responsibility of making decisions should not make them lightly but should do it only upon the basis of persuasive evidence. Clearly in this case, the Magistrate was not persuaded. Ordinarily it might be said that it is perverse for a Magistrate to reject uncontradicted evidence. This is also fundamental to the administration of justice.

Nevertheless in appraising evidence it is the Magistrate's function to determine how persuasive it is. Having regard to the record as disclosed in the affidavit I am not satisfied that the Magistrate misdirected himself in any way. Similar remarks therefore can be made of ground two. As to ground three, this, of course, is the rub of the case; the Magistrate in effect said he was not satisfied with the evidence of occupation and it was within his prerogative to so find, and I cannot find that on the evidence he was at all abusing his position in making the finding he did. On the fourth ground, as I have stated earlier, it seemed to me that s69 of the *Lotteries Gaming and Betting Act* was not adverted to in the Court below. It has now been discussed before me and on the evidence it is quite equivocal, irrespective of the appropriate interpretation of s69, and as to whether or not it would apply to these premises.

Before leaving the case I should point out, as indeed Mr Ryan was good enough to point out, that the form of the information in this case seems to be quite wrong. The offence here is that the person is the occupier of premises upon which machines are kept. It is not the keeping of the machines which creates the offence; it is being in occupation of premises in which machines are kept. Those charged with the administration of these provisions might look to it to see that the informations follow the terms of s68 upon which they appear to be based.

For the reasons I have ventured to give in my view this order nisi should be discharged, with $120 costs.

APPEARANCES: For the applicant Driver: Mr DM Ryan, counsel. John Downey, State Crown Solicitor. For the respondent Lotti: Mr GSH Buckner, counsel. F Owen & Associates, solicitors.