

03/90

SUPREME COURT OF VICTORIA

DELMASTRO v SERGI

Nathan J

21 October 1986

GAMING AND BETTING – GAMING MACHINE – POKER VIDEO MACHINE – WHETHER COURT CAN TAKE JUDICIAL NOTICE OF – EVIDENCE – WHETHER MAGISTRATE CAN ACT ON EVIDENCE GIVEN IN OTHER CASES: LOTTERIES GAMING AND BETTING ACT 1968, S68.

1. A Court can take judicial notice of the game of poker and its key elements and the concept of a video machine.

2. A magistrate was in error in dismissing a charge where, in giving his reasons for decision, rather than have recourse to general knowledge or matters of common repute, he referred to and incorporated evidence given in previous cases conducted before him.

McArthur v McRae [1974] VicRp 43; [1974] VR 353, applied.

NATHAN J: [1] Section 68, sub-s(1)(c) of the *Lotteries Gaming and Betting Act* provides that any occupier of a house or place where a machine or device or contrivance is kept for the purposes of gaming shall be guilty of an offence. Sub-section (2) proceeds to define the types of machines involved and they are characterized as follows:

"Without affecting the generality of the provisions of sub-s(1) the following machines devices or contrivances shall be deemed to be machines devices or contrivances for gaming,"

and there [2] follows a long list which includes video machines and any other machines of a similar nature or having a similar object. It will be immediately perceived that sub-s(2) is expansively phrased by the introductory words of, "Without affecting the generality." The expansion of the class of the machines involved is further entrenched by the penultimate phrase which recites that, "Any other machines of a similar nature or having a similar object."

In this case the Magistrate dismissed an information laid pursuant to that section which recited that Mr Sergi had on his premises contrivances for gaming, namely, three machines similar to video poker machines. The applicant, Miss Delmastro, has appealed from that decision on the ground which can be usefully encapsulated as follows:- that the Magistrate improperly took into account material which was not evidence before him, he making reference to decisions made by him in previous cases. Secondly, that a video poker machine involves a game of such wide repute that on any view of the evidence, the Magistrate should have found that the machines involved contravened the Act.

It is necessary to have recourse to the affidavit material which I do, adopting the interpretations most favourable to the respondent and I certainly exclude from my consideration that evidence which was advanced by the applicant and contested by the respondent. In substance it too falls into two classes, that is, the evidence as to what the nature of the machine was, and secondly, the remarks passed by the Magistrate. I will deal first with the factual situation.

The applicant has sworn that she entered the premises of Mr Sergi and there observed three video [3] target machines. She said that these machines depicted five symbols across the screen and that the symbols had numbers from 2 to 13 on them, or an A. My immediate observation is that there were 13 symbols bearing a value from A to 13. The only reasonable inference being that A stood in place of the letter 1, and accordingly, there were displayed numerals having exactly the same value as those in a deck of cards being from 1 to 13. I return to her evidence. She then said, "I played one of the machines and found that I could play a game of poker." I interpolate, that evidence was not contested, that the applicant knew what she was doing when playing the

machine is therein apparent. She had no difficulty. She was playing a game of poker. I return to her evidence which says this, "It depicted that A represented A's. The figures 2 to 10 represented numeral cards and the figures 11, 12 and 13 represented Jack, Queen and King respectively. That latter observation as to the court cards so-called was challenged by the respondent and in my view correctly so.

[4] However, it does not detract from the inference properly found that the entire range of numerals represented values from 1 to 13. She then said, "The symbols were of four different colours. Upon playing the machine I obtained a hand of three aces for which I was paid 15 free games. Also upon achieving a winning combination of cards, I had the opportunity to double up or take the score." She then makes the observation that all of those entitlements are exactly the same as those of a video poker machine.

The evidence of Mr Thomson was as follows, and this comes from the affidavit of the respondent, Mr Sergi: "To play the game a 20 cent coin was inserted in the machine, and instead of five targets displayed on the screen, five numbers were displayed from 2 to 13 or a letter 'A'. The player could depress a hold button and hold any one or more of these five numbers. The player then presses a button to receive the new numbers in place of the ones not held. A winning combination resulted in a score which was added to the player's score which was ultimately played out and eventually the player would have to insert another 20 cent coin. He also said that he was able to operate the machine by using a key to increase the games available by rotating it backwards and forwards," ("he" referring to Mr Thomson.) "He said that on playing a game on the machine that every time a player achieved a winning combination, that the person playing the machine had an option to either double up the score at that game, risking the loss of points won on that game, or alternatively to decide not to double up and just take the score."

[5] The description of the game being played upon the machine given by Miss Delmastro and Mr Thomson bears no other characterisation other than it was a game of poker. I have come to the view that the game of poker is of sufficiently wide repute and of such general knowledge in the community that I can take judicial notice of it and what its key elements are. They are as follows: that a participant receives initially a selection of five cards or items bearing a value of 1 to 13, those values being identical to the values of cards in a common pack of playing cards. There is a further multiplicant common to a pack of cards as with this game, and that is a division or a characterisation of the total number of fifty-two cards into four suits or classes. In the game of poker, the participant receives an initial selection of five items, and he then has the option of selecting a further number, discarding items or cards in his hand in order to retain a total of five items or cards. He is then paid or receives a reward, depending upon the ultimate value of the cards or items retained by him.

These characteristics of the game, which on short research indicates of being of great antiquity and common to the Incas of Peru, the Mayas of Mexico, and the Western European tradition, illustrate its widespread nature, it would not come as a surprise to an ordinary Australian citizen as being a matter of commonality or repute. Accordingly, the description of the games given by the witnesses bears, as I have said, no other interpretation other than being a game of poker. [6] The definition section prohibits machines or contrivances which play the game of poker. I am also convinced that the concept of a video machine, poker or otherwise, is also one of sufficient commonality and repute that I may take judicial notice of it. A video in the latter twentieth century context is an electronic device which displays from a pre-recorded tape to a screen, figures or numerals. A machine of course is defined in the Act, therefore an electronic device or contrivance which displays on a screen to the participant a set of figures or numerals is plainly a video machine, and a video machine which displays the game of poker is plainly a video poker machine.

There is an inherent conundrum in a prohibitive Act which says that a person is to be prohibited from having on their premises a video poker machine or a similar machine, the conundrum being that the similarity will not be known unless the prohibited object itself is known. But I find that I can surmount that difficulty by the characterisation, as above concluded of the words "video" and "poker". The fact that this was a machine similar to a poker machine is further entrenched by the admission of the respondent when asked by Mr Thomson, "Do you agree that these machines are similar to the video poker machines?" His reply was, "Yeah, but we

don't pay out. They only pay 20 cents a game." That is an admission followed by a qualification; the admission is the word "Yeah," the qualification is meaningless as the evidence was that on receiving a winning combination a reward of being able to play extra games without cost was thereby accumulated. I reiterate that the requirement of this section is to find that the machine is not necessarily a poker machine, but similar thereto. [7] The similarities are overwhelming, and in my view the positive fact of the machine being a poker machine is also overwhelming.

That being so, I am of the view that on the evidence advanced, no magistrate could have come to the view that the machine as exhibited was not similar to or was not in fact a video poker machine. I come to the second ground advanced in the order nisi, and that is that the magistrate took into account matters which he should not have. That evidence is contained in the affidavit of Miss Delmastro as follows: "In summing up the magistrate said:" – and direct speech is here used – "It seems to me this matter differs from other evidence I have received at other courts of what a poker machine is.

[8] There is sufficient dissimilarity between the definition and this machine to show or not to prove it is a poker machine. The onus is on the prosecution to prove its case; I am not satisfied this machine is a poker machine. The charge is dismissed'. The evidence set out in the affidavit for the respondent is: "The magistrate in summing up said: – and direct speech is not used, but a form of narrative prose is employed – "that the evidence was quite different to evidence he had heard on other occasions regarding video poker machines. He said that there was sufficient dissimilarity in the present case to be not of a similar type to other video machines. The onus was on the prosecution to prove their case. The charge was dismissed."

I find that there is no great contextual difference between the two versions, but that the direct speech evidence which is in fact less favourable to the applicant is the one upon which I should rely. I am, however, satisfied that the magistrate was not employing his general knowledge or taking judicial notice of what the game of poker was or what a video machine was, but was using terms which imported into his reasoning conclusions of fact he had reached at previous cases conducted before him. It was not that he had had a recourse to his general knowledge, or matters of common repute, but he did in fact refer to previous cases which apparently had been conducted before him: "It seems to me this matter differs from other evidence I have received at other courts." If he said that, and I find that he did, it is plain that he incorporated evidence of prior cases before him into the resolution of the fact situation before him in this case. That cannot be done; it offends one of [9] the most basic principles of the common law, that a case must be decided solely upon the evidence properly before the magistrate in the instance, and I need no more than refer to *McArthur v McRae* [1974] VicRp 43; [1974] VR 353.

It will be seen therefore that the order nisi should be made absolute on the two bases advanced in the grounds, and I will order that this matter be remitted to the magistrate for further hearing and ultimate despatch in accordance with this judgment.