

16/91

SUPREME COURT OF VICTORIA

COOKE v DELUISE

Gobbo J

26 January 1990

PROCEDURE – PARTICULARS – GAMING/RESTRICTED MACHINES SEIZED – INFORMATIONS LAID – PARTICULARS SOUGHT AND GIVEN – PURPOSE OF PARTICULARS – FURTHER PARTICULARS SOUGHT – WHETHER SUCH PARTICULARS MORE AKIN TO EVIDENCE: LOTTERIES, GAMING AND BETTING ACT 1966, S68.

Six informations were laid under s68 of the *Lotteries, Gaming and Betting Act 1966* ('Act') in respect of 3 machines seized from D.'s premises. Prior to the hearing, D. sought further and better particulars as to the "basis upon which it was alleged that" the machines were gaming or restricted machines. The prosecutor stated that the machines were within the definitions in the Act and the magistrate at the hearing was satisfied that sufficient particulars had been supplied. Upon order nisi to review—

HELD: Order nisi dismissed.

The need to provide particulars is governed by the advancement of justice and the securing of a fair trial. In the present case, there was no confusion as to or lack of identification of the subjects of the information as they had been taken from the defendant's possession. The reference by the prosecutor to the relevant provisions of the Act meant that any further matters were more in the nature of evidence rather than in the province of particulars. Accordingly, the learned magistrate was not in error in being satisfied that the defendant had been supplied with sufficient particulars to enable him to meet the charge and to satisfy the requirements of justice.

Whitehead v Koulouklidis, MC 13/1974, referred to.

GOBBO J: [1] This is the return of an order nisi in relation to six informations which came on for hearing before the Magistrates' Court at Melbourne on 15 September, 1989. These six informations related to three machines that were taken from premises at 52 Lygon Street, Brunswick. The defendant who gives 52 Lygon Street, Brunswick as his address, is aggrieved by the refusal of the magistrate to order particulars in respect of the informations in question.

It is first necessary to turn to the informations. There are two in respect of each machine. The first set of informations is expressed to be laid under s68(4) of the *Lotteries, Gaming and Betting Act 1966* and charged as follows:

The defendant at Brunswick in the State of Victoria on the 11th day of January 1989, being the occupier of premises situated at 52 Lygon Street, not being a private dwelling, did permit a restricted machine to remain in a place on the premises accessible to a person other than the owner, occupier or employee.

The second set of three informations were under s68(2) of the *Lotteries, Gaming and Betting Act 1966* and charged that:

The defendant at Brunswick in the said State on the 11th day of January 1989 did possess a machine for gaming.

Section 68 provides, so far as presently relevant, as follows:

(1) In this section "Machine includes any device, whether wholly or partly mechanically or electronically operated.

"Restricted machine" means a machine which depicts a game—

[2] (a) in which the format, or format sequence, is not absolutely identical each time the game is played; or

(b) which involves random selection, or purported random selection, on the part of the machine; or

(c) in which it is possible for a player—

- (i) to both accumulate and lose any unit of measure used to determine the player's progress or position in the game; or
- (ii) to alter the number of his or her units during the game without having to exercise a substantial degree of skill; or
- (d) in which the magnitude of the outcome of a winning game can be varied by a player by increasing his or her outlay before or during the game.

(2) Any person who constructs, uses, hires, leases, lends, gives, sells, offers for sale or possesses any machine for gaming or betting is guilty of an offence.

(3) Without limiting the generality of sub-section (2), the following machines are deemed to be machines for gaming:

- (a) Any machine known as a poker, draw poker or video poker machine or any machine which is similar in nature or object to such a machine;
- (b) Any multiple coin machine;
- (c) Any machine declared to be a machine for gaming under sub-section (6).

(4) 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.

Sub-s6 provides as follows:

The Governor-in-Council may, by Order published in the *Government Gazette* declare a machine or type of machine to be a machine for gaming.

The evidence on affidavit is that the informant was requested to provide particulars of each information. The text of that request is not before me, and the material is limited to the failure of the informant [3] to provide particulars as follows:

Of the basis upon which it was alleged that the object possessed were machines for gaming, contrary to s68(2) and "Restricted Machines" contrary to s68(4).

It was deposed that the police prosecutor had informed counsel for the defendant that the machines were Restricted Machines for the purposes of the charges, under s68(4) by way of everything found within the definition of Restricted Machines in s68(1) and that the machines were machines for gaming, for the purposes of the charges under s68(2) by way of the deeming provisions of s68(3A) and 68(3C).

It was further deposed that the police prosecutor had stated at the outset of the proceedings that the prosecution would say that the machine was all of the things set out in the definition of s68(1) and the proceedings were not an abuse of process. It was also deposed that the informant had informed the instructing solicitor for the defendant that it would be alleged that the machines in question were loan calculators, and played a game similar to five card poker.

As had already been indicated, it has been submitted that these particulars as provided – whether orally before the hearing, or at the hearing, did not suffice and it had been submitted that the learned magistrate should direct that further particulars of the kind requested be delivered. The learned magistrate [4] declined to do so and was of the view that he was not satisfied that the particulars supplied were so lacking as to cause real prejudice. He also found there was no abuse of process.

It was argued on behalf of the defendant, for whom Mr Holdenson appeared – that as to the charges under s68(2), which might be described as the Restricted Machine charges, that the defendant did not have notice of whether the machine was wholly or partly mechanically or electronically operated. There were further complaints made in relation to the particulars supplied in relation to Restricted Machines. I will come to those in a moment.

Before going further with the complaint as to particulars, it needs to be noted that this was not a case of a defendant who was contending that he did not know which machine was referred to. The machines referred to were taken from the premises apparently occupied by the defendant, and it is not suggested for one moment that there might have been some uncertainty or confusion as to which machines were referred to. This is therefore not a case of whether the defendant might fairly expect to know whether a machine was a lathe, for example, or some other

kind of machine, as was the case in the unreported decision frequently referred to in this context, *Whitehead v Koulouklidis*, a decision of Murphy J delivered on 19th June 1974. In that case the charge was one of using premises for the purposes of unlawful gaming and the information was [5] laid under s12(a) of the *Lotteries, Gaming and Betting Act*. Unlawful gaming as defined, included a wide variety of activities. Some limited particulars had been supplied, which referred to the operation of machines on premises occupied by the defendant. The defendant had complained that the particulars were insufficient and ambiguous because he did not know which machine was being referred to. His Honour held that the defendants should be called upon to specify or identify the machines in question or their type. More particularly at page 7A of the judgment, His Honour said:

"Is it, for example, alleged that the machines or either of them – for they could be different – were still ball machines or poker machines or totalisators or washing machines, or as Mr Liddell put it, lathes or something else?"

It is axiomatic that the need to provide particulars is governed by the overriding requirements of the advancement of justice and the securing of a fair trial. The particulars to be provided will therefore depend on the needs of justice in the particular case and that will depend on what information has already been unequivocally provided, and what is unarguably known or available already to the defendant. It follows that if an object is clearly identified because it is in effect common ground and it was handed over by the defendant or taken from the defendant, and there is no suggestion of there being any other object that could answer the description in the information, it would ordinarily not be necessary for the advancement of justice, to describe the article [6] which was taken from the defendant.

The defendant in this case does not contend that this is a case of confusion or absence of identification of the machine referred to. What is submitted however is that the defendant is entitled to particulars of each of the matters appearing under the definition of Restricted Machine in s68(1). Thus, for example, it is contended that the defendant should have received notice of what the format sequence was that was applicable, what constituted the random selection referred to under paragraph (b) in the case of this machine, what were the matters which made it possible for the player to accumulate and lose units of measure, and what constituted the unit measure and what constituted the progress or position in the game, and finally, in relation to subparagraph (d), how it was that the magnitude of the outcome of a winning game was varied by a player by an increase in outlay.

In my view, this argument proceeds upon a misconception of what is the role of particulars. In the first place, it is in any event clear that the particulars requested sufficiently satisfied the actual request by setting out the basis upon which this was to be treated as being a Restricted Machine. That was identified by the prosecutor before the hearing, and it was put upon the basis that the prosecution would contend that each of the sub-paragraphs appearing under the definition of Restricted Machine were applicable.

[7] In those circumstances, it seems to me that the question has been answered in any event, but the defendant submits that it is entitled to further particulars, and in particular that it should have the matters that I have just referred to. It seems to me that this request goes well beyond the bounds of understanding what is in the charge that is being made, and being able to provide the defendant with sufficient material that would enable the defendant to meet the charge and generally to enable the court to be satisfied that the requirements of justice in this matter have been met.

The matter might perhaps be best illustrated, or the nature of the extravagance of the request might best be seen by indicating that in the course of argument, it was asked of counsel for the defendant, what, in the case of an ordinary machine such as a pinball machine, would be able to be provided to answer the requirement to identify what amounted to random selection. The view put forward was that it would have been adequate particulars, had there been a response along these lines – namely that "coloured numbers depicted on the screen which change from time to time as the machine operates".

That response illustrates the inappropriateness of the request in the first place. For a start,

coloured numbers by their very nature, do not deal with random selection, and the very answer to that, which is provided does not in fact answer what constitutes random selection. It seems to be that all that it says is that numbers change on a screen from time to time. It might fairly [8] have been argued – if it was necessary to prove that constituted random selection as opposed to some other form of selection – that that answer was not a satisfactory answer. The mere fact that that type of response is made to an enquiry from the Court seems to me to indicate that there is a great deal of artificiality and unreality about the nature of the argument that seeks to know what it is that constitutes the inner workings of a machine, or alternatively, that seeks to elicit much more superficial matters – namely what it is that was observed by a player of the machine during its operation.

The matter seems to me more in the nature of the evidence of a person who will be called to describe the operation of the machine, and that it does not really go to take the matter any further than the sub-characteristics that are set out under the definition of Restricted Machine. As to the second set of requests for particulars, namely that the machine for gaming was not the subject of adequate particulars, it seems to me again that that argument must fail. It fails at the outset because the basis that was asked for was, in fact, identified – namely it was said that it was a machine that followed in the deeming provisions of sub-paragraph 3 of sub-s3 of s68 in the manner that I have already adverted to in the recital of the [9] material on affidavit. The fact that more than one deeming provision might be relied upon, is not the point. There is no restriction on the use of deeming provisions in these circumstances.

It was also argued that where sub-s(3)(a) refers to any machine "known as a poker machine" it was necessary for the prosecution to give particulars of what constituted the knowing in that situation, by whom it was known and where it was known, and generally to provide details of those matters. Again one assumes that the proof of the facts necessary to give rise to the deeming provisions will be matters that will require, if not expert evidence, at any rate evidence that is acceptable to the court, as demonstrating a sufficient knowledge, perhaps a familiarity with the operation of machines of this nature so as to be able then to say that that is a description that could fairly be applied to this particular machine. It does not, in my view, mean that if a constable proposes to provide that matter by reference to his experience, that the prosecution has to set out in particulars what that experience is and in what places this machine is known as a poker machine, or what it is that makes a machine have that description in a particular circle of people.

It follows that I am satisfied that the request for particulars was sufficiently met in this [10] case, and that the magistrate was not in error in declining to order further particulars and in declining to prevent the matter proceeding until further particulars had been supplied. There was a further argument put, based upon abuse of process, but it was not suggested that if the first argument failed, then the abuse of process argument could succeed. In my view, once it is found that sufficient particulars had been given, then ordinarily abuse of process would not arise.

Of course it is another matter if a quite separate argument was being put, that the nature of the offences and the way in which the case was proposed to be proved was such that it involved sufficient oppression to bring it within the principles described in cases such as the recent decision of the High Court in *Jago v The District Court of New South Wales & Ors* [1989] HCA 46; (1989) 16 CLR 23; (1987) ALR 577. But I am satisfied that that is not the position in this case, and I do not find those grounds made out in the present material. For all of those reasons the order nisi will be dismissed and the matter remitted to the Court to enable the hearing to proceed.

APPEARANCES: For the respondent Cooke: Mr G Maguire, counsel. Victorian Government Solicitor. For the applicant Deluise: Mr OP Holdenson, counsel. McGinnes & Associates, solicitors.