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SUPREME COURT OF VICTORIA

TARANTO & GLEESON v BEST

Starke J

28 September 1965

GAMING – DEFENDANTS CHARGED WITH BEING OCCUPIERS OF A HOUSE DID KEEP A CONTRIVANCE FOR GAMING – WHETHER DEFENDANTS WERE "OCCUPIERS" – WHETHER MACHINE WAS A CONTRIVANCE FOR GAMING – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *POLICE OFFENCES ACT* 1958, S151.

HELD: Orders nisi in each case made absolute. Dismissals set aside.
1. One could not be satisfied beyond reasonable doubt that the only possible explanation of the evidence was that Gleeson was the occupier or keeper of the premises. True it was that he resided there; true it was apparently he had a conversation with the owner of the machines. But whether he was the person who had control of these premises of this place, or whether he had some other interest in the premises or in the machine, were all alike possible inferences which could be drawn from the evidence. And this being so, it was quite clear that the evidence did not sustain a finding beyond reasonable doubt that the applicant was the occupier of the premises where the machine was found.

2. In relation to Taranto, there were other inferences consistent with evidence not excluded by the Crown and, therefore it could not be said beyond reasonable doubt that this applicant was an occupier in the relevant sense of the premises where the machine was found.

3. The word 'stake' meant a transaction depending upon the result of a future event which was entered into by more than two people and as a result of which and on the determination of the future event, one or other or some of them collected the money or other valuable thing which formed the stake. That being so, this machine was as much without the meaning of the expression 'stake' as it was without the expression 'wager' in the definition section.

4. Accordingly, the conclusion that the machine which was the subject matter of these proceedings, was not a machine device or contrivance for gaming, within the meaning of s151. For that reason the orders nisi was made absolute.

STARKE J: There are two orders nisi to review the decision of the Court of Petty Sessions at Brighton, made on 16 March 1965. By agreement between counsel, these orders nisi were heard together.

The two defendants in the Court of Petty Sessions who are the applicants before me, are Studley Gleeson and Bartolo Taranto. They were both charged but on different dates and different places, under s151 of the *Police Offences Act* that, "Being the occupier of a house or place to wit premises situate at and known as – " and then the premises were described – "Did keep a contrivance for gaming therein,"

Each defendant was convicted on the 16 March 1965 and fined £5 and it was ordered that the instrument of gaming (being the machine which was identical in each case and which I will describe in a moment) should be confiscated and the money found in those machines should be forfeited.

On the 30 April 1965, an order nisi was granted by Smith J calling upon the informant, who is a police officer to show cause why the decision of the Court of Petty Sessions should not be set aside on two grounds. First that there was no evidence on which the magistrate could find that the defendant was the occupier of the premises referred to in the information, and secondly, that on the evidence the machine was not one for gaming, that the game of operating it was not one in which each player had or appeared to have a chance of losing.

The evidence relating to the first ground is contained in the affidavit of Studley Gleeson, sworn on 13 April 1965. Before I turn to this evidence it is necessary to note that under the section, amongst other things it is provided that

> "Every person who is the occupier of any house or place where any such machine or contrivance, or any such totaliser and so on, shall be guilty of an offence."

It is not contended by the Crown that either of the applicants were the owners of the premises, but it is contended that on the evidence, each was the occupier of a house or place where the machine or device was.

The affidavit does not disclose that any affirmative finding of fact on this issue was made by the magistrate, but I think I should assume, as he convicted both of the applicants, that he was satisfied beyond reasonable doubt that each of them was the occupier of the premises where the machine was.

The evidence relating to this matter in Gleeson's case is quite short and is as follows:

"Do you reside in the premises?" – "Yes." "Do you agree that the premises are known as 36 Church Street, Middle Brighton?" – "Yes." "How long had this machine been on the premises?" – "I suppose it would be a couple of months." "Do you own the machine?" – "No, a man just came and put it here." "Have you received a percentage of money in the machine when the owner cleared it?" – "No, I do not think it has ever been cleared." "When the man installed the machine, did you discuss with him the percentage of profit you would receive from the machine?" – "No, we did not talk about the money side of it at all." Then the interrogation goes on to discuss the operation of the machine.

Mr Tadgell for the informant showing cause, conceded that all the answers that I have quoted, would be of an ambiguous character if the admission had not been made that the applicant resided at the premises. "But", Mr Tadgell says, "reading those answers in the light of the admission that he did reside on the premises, there is sufficient evidence to allow the tribunal of fact to find beyond reasonable doubt, that the applicant was the occupier of the house or place where the machine was found, within the meaning of the Act." Mr Tadgell referred to a decision of Sholl J in which His Honour held that occupier in this provision means keeper.

Now I think it is important to bear in mind that this prosecution is, of course, a criminal prosecution in the truest sense of the word and there can be no question of the criminal onus of proof being higher where the crime charged is a heinous one and lower where it is of a minor nature. The criminal onus of proof, applies in full force to all crimes, be they great or small. Therefore, in order to sustain the finding of the magistrate that the applicant was an occupier of these premises within the meaning of the Act, the informant must establish beyond reasonable doubt that no inference can be drawn from the passage of the evidence which I have quoted, other than the one which imputes guilt to the applicant.

I am quite unable to say on this evidence, one could be satisfied beyond reasonable doubt that the only possible explanation of the evidence was, that Gleeson was the occupier or keeper of these premises. True it is he resided there; true it is apparently he had a conversation with the owner of the machines. But whether he was the person who had control of these premises of this place, or whether he had some other interest in the premises or in the machine, are all alike possible inferences which could be drawn from the evidence. And this being so, it is in my judgment, quite clear that the evidence does not sustain a finding beyond reasonable doubt that the applicant was the occupier of the premises where the machine was found.

Similarly in the case of Taranto, the evidence of occupancy by that applicant, was contained in the evidence of the informants and contained in a few questions and answers in an interrogation as to which he testified. Again he asked the applicant's name and address and then he went on; "How long have you had the machine on the premises?" – "Maybe two and a half or three months." – "Do you own the machine?" – "No." "Have you got any money from the machine yet?" – "No, it has not been emptied." "When the man put the machine in, did he tell you how much money you would get from it?" – 'No, but we get 25 percent from the music box." This music box was

situated beside the machine. "How does the machine work?" – "I am not sure." Then he goes on with the operation of it.

Except for one question I think it could not be argued that any of these answers established a case of occupancy against this applicant at all. But the first question, "How long have you had the machine on the premises?" might, if taken in one way, suggest that the applicant had some control over it. However, Mr Tadgell very fairly in argument, conceded that that question was ambiguous and might well be taken to mean 'how long has the machine in fact, been on the premises.' And again Mr Tadgell conceded that the facts in this case were weaker than the facts of Gleeson's case.

There are other inferences consistent with evidence not excluded by the Crown and, therefore it cannot be said beyond reasonable doubt, that this applicant was an occupier in the relevant sense, of the premises where the machine was found.

These findings are sufficient to dispose of both orders nisi and the result will of course be that both would be made absolute.

At the end of Mr Tadgell's argument for the respondent before me, I indicated that I was against him on this ground, and suggested that that being so it might be well that I should not go on and determine the question of whether the offences alleged in the information had been otherwise proved. Counsel requested and were granted a short adjournment to discuss the implications of this suggestion, and then requested me for reasons which I find very easy to understand, to deal with the other matter of substance raised in the orders nisi. And consequently I propose to proceed to deal with the second ground raised in the orders nisi.

It is perhaps convenient, although perhaps not altogether necessary for me to describe the machines which are the subject matter of this information. I assume and counsel will please contradict me if I am wrong, that the machines were identical in all relevant respects. One of these machines has been brought into Court so that I might understand its working and very briefly it may be described thus; at the top of a vertical disk is a slot wherein a penny can be inserted. It then drops on to a metal bar which is attached to the face of the vertical disk. Having lodged on top of that vertical bar, it is held in that position at the back by the face of the disk and at the front by a glass window. The penny may then be transferred down the face of the disk from one metal bar to another by use of a knob, until it either drops away from the face of the disk altogether, or finishes in a hole in the centre of the disk. If the player is able to manoeuvre the disk by lack or skill by the use of a knob, so that the penny lodged in the hole in the centre of the disk, it is returned to him in a vent at the bottom of the machine.

Now, a clear understanding of all the matters relating to the operation of the machine are unnecessary for the decision of these orders. The basic thing to understand is this; that the machine contributes nothing, nor can the player get more than his penny back. The optimum result from the point of view of the player, is that he loses nothing at the end of the operations. If he is unsuccessful in manoeuvring the penny into the hole in the centre, well then the penny is lost to him forever and the machine gains by one penny. As I understand the evidence the machine is only played with pennies, and consequently, irrelevant though it may be, one can imagine no-one but small and rather silly little boys playing a game at which the best result is that they can get their money back. However that is beside the point.

The question is whether or not this machine is a machine device or contrivance, for gaming or betting. And I think in the long run, the matter was argued on the basis of whether it was or was not within the meaning of the *Police Offences Act*, a machine device or contrivance for gaming.

In order to determine whether it was or not, one must turn to s85 which is the definition section for this part of the *Police Offences Act*. In this section, gaming is defined as including playing games for any wager or stake of money, or any valuable thing and also betting on the sides on the hands of those who play at games. In the long run, very elaborate and very helpful arguments by both counsel, the decision in this case clearly depended on what the true construction was of the words 'stake of money' in the definition section, and I think it is really as short as that.

Now firstly it seems clear to me and indeed I think was conceded by Mr Tadgell, that the playing of this game could not be regarded as a wager. And I think it is easy to understand why Mr Tadgell made this concession. I think that one has to do no more than look at the classic definition of wager, which is contained in the judgment of Hawkins J as then was in *Carlill v Carbolic Smoke Ball Co* [1892] EWCA Civ 1; [1893] 1 QB 256; [1890-94] All ER 127; (1892) 41 WR 210; (1892) 9 TLR 124; (1892) 67 LT 837; (1892) 62 LJQB 257; (1892) 57 JP 325. At QB p490, His Lordship says this:

> "It is not easy to define with precision what amounts to a wagering contrast; nor the narrow line or demarcation separates a wager from an ordinary contract. But according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the same issue of a future uncertain event mutually agree that dependent upon the determination of that event, one shall win from the other and the other shall pay or hand over to him, a sum of money or other stake neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

Having in mind this definition it is quite obvious that on the facts of this case, the playing of this machine is not a wager. So I turn to the proper construction of the words, 'or stake of money'.

Now Mr Tadgell in this connection relied on the *Oxford Dictionary* definition of stake. He submitted that to stake meant to put at hazard, to put at risk. And he contended that in this case, though the stake was provided by only one party, that that is exactly what the player did; he put at hazard or risk the penny which is used in the playing of the game. He submitted that as the words, 'or stake of money' followed the word 'wager', something different basically from a wager, was intended by the Legislature in using those words.

I cannot think that in a penal statute dealing with betting transactions of all sorts, and I use a neutral term advisedly, should be given the construction which Mr Tadgell contends for. And indeed it seems to me that there are good reasons to interpret the definition section in another way.

In the third edition of *Halsbury*, vol 18. p170, para 340 there appears these passages:

> "It would appear that there cannot be more than two parties or sides to a wager, since the essence of such a contract is that one party must win and the other must lose. Thus a multi-partied agreement to contribute to a sweepstake is not a wager. If however the sweepstake is on the result of a game played by the contributors, it will be void as a gaming contract."

Now it seems to me reasonable to suppose that the phrase under consideration was introduced into the definition, lest the word 'wager' should be construed as indicated in *Halsbury* namely as only a transaction between two people. I must say that I agree with the submission of Mr Buckner that the qualifying words 'of money or any valuable thing', attach both to the words 'wager' and to the phrase 'stake of money'. It seems to me that it this were not so it would be a curious result that a wager for money was struck at, and a wager for a valuable thing was not struck at, under the definition section. And therefore I am of the opinion that the word 'stake' is included to catch multiple gaming transactions which would otherwise not be within the meaning of the section.

There is an alternative view that I think might also be taken of the words 'stake', and it is this: that it is clear on the authorities that the words 'wager' and 'gaming' are not interchangeable. And I think it is clear enough that the word 'gaming' is wider than the word 'wager'. And it may well be that the expression 'stake' is included in the definition section, is a wider catchphrase than the word 'wager' to catch and sweep up any devices which might escape from the narrower word 'wager'. Therefore in my view, that the word 'stake' here really means a transaction depending upon the result of a future event which is entered into by more than two people and as a result of which and on the determination of the future event, one or other or some of them collect the money or other valuable thing which forms the stake. That being so, it seems to me that this machine is as much without the meaning of the expression 'stake' as it is without the expression 'wager' in the definition section. And I therefore come to the conclusion that the machine which

is the subject matter of these proceedings, is not a machine device or contrivance for gaming, within the meaning of s151. And for that reason also, I consider that the orders nisi should be made absolute. I should add that I come to this conclusion without very great regret. Whether technically or not this machine happened to be within the provision of the *Police Offences Act*, I cannot imagine the use of it doing any harm to any member of the community, young or old.

I think I should add, as to the first ground, that it was not argued before me (indeed Mr Tadgell conceded) that he was not assisted by the provisions of s152 of the *Police Offences Act* which is the deeming section. The result is that in each case the orders nisi will be made absolute and in each case the informations will be dismissed.

I do not think I did formally pronounce the order of the Court of Petty Sessions at Brighton in each case is set aside, and in lieu thereof order that the informations be dismissed. The effect of that order is that the order of forfeiture is set aside and I assume then that if whoever holds these things after forfeiture, continues to hold them, that other remedies are available. The respondent must pay the applicant's taxed costs in each case.

APPEARANCES: For the appellant Taranto: Mr GSH Buckner, counsel. Frederick Owen & Associates, Melbourne, solicitors. For the respondent Best: Mr RC Tadgell, counsel. Thomas F Mornane, State Crown Solicitor.
