04/90

SUPREME COURT OF VICTORIA

BAYLY and ANOR v SCARICA and ANOR

McGarvie J

16, 29 August 1989 — [1990] VicRp 63; [1990] VR 731

GAMING AND BETTING – VIDEO POKER MACHINE – SHOP EMPLOYEE IN CHARGE OF PREMISES AT RELEVANT TIME – WORKED IN SHOP 3 DAYS PER WEEK FOR 2 MONTHS – WHETHER APPEARED TO HAVE CARE OR MANAGEMENT OF SHOP – WHETHER DEEMED TO BE AN OCCUPIER – "POSSESSION" – WHETHER EMPLOYEE IN POSSESSION OF MACHINE – WHETHER EMPLOYEE LIABLE AS ACCESSORY: *LOTTERIES GAMING AND BETTING ACT* 1966, SS66B, 68(2), (4), 69; *MAGISTRATES' COURTS ACT* 1971, S60.

On two consecutive days, a police officer went to shop premises where S. was behind the serving counter. The officer gave S. money who then pressed some buttons on a keyboard thereby enabling the officer to operate a video poker machine. When later questioned, S. said she had worked in the premises 2 or 3 days per week for the previous 2 months, was in charge of the premises and was working there by herself at the time. Subsequently, charges under s68(2) and (4) of the *Lotteries Gaming and Betting Act* 1966 ('Act') were laid against S. alleging she was an occupier who permitted the machine to remain on the premises, that she was in possession of the machine or alternatively that she was liable as an accessory. The magistrate upheld a submission of 'no case' and dismissed all charges. Upon order nisi to review—

HELD: With respect to the charge alleging S. was an occupier, order absolute. With respect to the other charges, order discharged.
1. Criminal liability under s69 of the Act applies to a person who appears, acts or behaves as the person having the care or charge or control of the premises which would be exercised by an occupier or keeper. In the present case, notwithstanding that S. was an employee, she appeared, acted or behaved as the person in charge of the premises and accordingly, was deemed to be the occupier of the premises.
***Deeley v Stirrey* [1932] VicLawRp 24; [1932] VLR 159; 38 ALR 106, discussed.**

2. As distinct from the reference in s66B of the Act, "possession" in s68(2) of the Act has its ordinary legal meaning. An employee does not have possession of the employer's goods but custody only. Accordingly, as S. was an employee it could not be said she was in possession of the video poker machine.

3. To sustain a conviction as an accessory to a principal offender who commits an offence of strict liability, it is essential to prove that the accessory knew all the essential facts which made what the principal offender did a crime. In the present case, the evidence did not disclose that S. knew of the essential facts which made the video poker machine in breach of the Act.
***Georgianni v R* [1985] HCA 29; (1985) 156 CLR 473; 58 ALR 641; (1985) 16 A Crim R 163; (1985) 59 ALJR 461; (1985) 2 MVR 97; 4 IPR 97, applied.**

McGARVIE J: [1] There are before me two orders to review the decisions of a Magistrate at South Melbourne Magistrates' Court on 23 August 1988, but initially I will deal only with the charges against the defendant Scarica. The outcome of the review proceedings against the defendant Nounez depends on their outcome.

Ivana Scarica was charged under the *Lotteries Gaming and Betting Act* 1966 with four offences. She was charged with two offences relating to 1 June 1988 and two offences of the same nature relating to events the following day. In respect of each day she was charged:

> (a) under s68(4) that being the occupier of premises at 146 Lygon Street, Carlton not being a private dwelling house she permitted a restricted machine to remain in a place on the premises accessible to a person other than the owner, occupier or a person employed to work on the premises, and
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> (b) under s68(2) that she possessed a machine for gaming, a Phonex video computer, at those premises.

The four charges were heard together and each was put against her on the basis that

she had committed the offence as a principal offender or alternatively that she was liable to be convicted as an accessory under s60 of the *Magistrates' Courts Act* 1971. On a submission of no case to answer made at the close of the prosecution case, the learned Magistrate dismissed all the charges. The issues which arise on the grounds of the order nisi are three:

[2] 1. Whether Defendant Deemed to be Occupier

The first depends on the operation of ss68(4) and 69 of the *Lotteries Gaming and Betting Act*. Section 68(4) provides:

> "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."

In order to establish that the defendant was the occupier of the premises the prosecution relied on s69 which 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 purposes of this Act or any other Act or law relating thereto be deemed to be the occupier thereof or the keeper thereof (as the case requires) whether he is or is not the real owner occupier or keeper thereof."

In relation to the charges of being an occupier of the premises and permitting a restricted machine to remain in a place on the premises available to a person other than the owner, occupier or an employee, the informant relies on two grounds of review. First that no reasonable Magistrate could have reached a conclusion on the evidence other than that the defendant was deemed to be the occupier of the premises. Secondly that the learned Magistrate must have misconstrued s69 to conclude that the defendant was not deemed to be the occupier. The prosecution case consisted of the evidence of two police witnesses. Constable Mizza said that on **[3]** 1 June 1988 he went to shop premises known as the Cafe Tramonto in Lygon Street which had the facilities of a cafe, a serving counter where refreshments were sold, billiard tables and amusement games. He approached the defendant behind the counter, gave her $5 and asked to play one of two machines which were computers. The defendant turned to a computer screen and keyboard behind the serving counter and pressed some buttons on the keyboard. The constable then went to the computer he had said he wanted to play and played it. It was common ground before the Magistrate and before me that the machine he played and the other one which he played the following day were video poker machines and within the meaning of the Act were restricted machines and machines for gaming. Constable Mizza returned to the premises the following day, again gave the defendant money and played the other computer.

Later Constable Mizza returned to the premises with Senior Constable Bayly and other police officers. In an interview the defendant told the police that she worked in the cafe and was in charge of the premises working there by herself at the moment. She said she had worked there for two or three days a week for the last two months. She declined to say who was the owner of the premises. She said she did not know the name of the machines, whether they were played like the card game of poker, whether they were registered or who owned them. Asked did she know how the machines were played she replied that she turned them on at the control.

[4] The submission by counsel for the defendant which resulted in the dismissal of the charges was based on the decision of the Full Court in *Deeley v Stirrey* [1932] VicLawRp 24; [1932] VLR 159; 38 ALR 106. Mrs Stirrey was charged that she, being the occupier of premises, used them for the purpose of betting with persons. The evidence before the Court of Petty Sessions was that at noon one day a constable entered the shop where she was serving behind the counter. He handed a slip of paper on which was written "5s Pembroke" and some silver coins to a man, who thereupon handed the paper and the money to the defendant. She put the slip of paper and the coins on a shelf behind the counter. Races were advertised to be held at Moonee Valley that afternoon. Within the next month another six visits were made to the shop by constables, and on each of them the defendant was serving behind the counter and a transaction similar to the first one took place. She gave evidence that she lived with her husband in living quarters behind his hairdresser's and tobacconist's shop and billiard saloon. Her husband was tenant of the premises. He spent most of his time in the shop, where she relieved him for meals, though she had no set times for being there.

The prosecution relied on s156 of the *Police Offences Act* 1928, a section in the same terms as s69, to establish that the defendant was the occupier of the premises. By a majority the Court of Petty Sessions dismissed the charge. **[5]** On order to review proceedings which were referred to the Full Court, the issue was whether it was open on the evidence for a member of the Court of Petty Sessions not to be satisfied that Mrs Stirrey was the occupier of the premises. For the informant it was argued that any person who appears to have any kind of care of the premises whatever its nature and however brief, has the care of the premises within the meaning of the section which is now s69 and is therefore deemed to be the occupier. It was contended that any person who is looking after the place is deemed to be the occupier. The Court rejected the informant's argument. Cussen ACJ did not state his opinion in view of the clear conclusions the other members had reached. Macfarlan J said:

> "In my opinion the collocation of the words 'the person having the care government or management of any house' points to the word 'care,' or, rather, the words the care,' having a more restricted meaning than is suggested by the argument of counsel for the informant. The meaning of that word 'care' is explained or coloured to some extent by the words 'government or management,' which accompany it. For instance, in my opinion it would not cover the care exercised by a mere messenger left temporarily to watch or guard a shop while his master went for his lunch, or the care exercised by a night-watchman." (Page 163).

Later he stressed again that the kind of care management or control the defendant had was important. He said:

> "It seems to me that cases under these sections cannot be decided by any general rule such as that sought to be applied by the informant. There may be many cases in which it is quite clear that the care or charge or control – the function exercised by the person alleged to be **[6]** an occupier – is 'the care' mentioned by sec156. There may be many other cases in which it is quite clear that the degree and nature of the charge or control is such that it cannot be considered care within the meaning of the section. There may be other cases in which it is very doubtful whether the care was such or not." (Page 164).

Lowe J agreed with what was said by Macfarlan J and stated his views shortly. One view he expressed was:

> "In my view the words 'care government or management' indicate a genus and point to the kind of control the Legislature was dealing with. The word 'care,' therefore, has its meaning affected by its association with the other two words which I have read. And that the word 'care' must not be given an unrestricted meaning is, I think, indicated by its association in s98 with the words 'or in any manner assisting,' etc." (Page 165).

In the latter part of that passage he referred to the provision whose present equivalent is s18(1)(c) of the *Lotteries Gaming and Betting Act* 1966. I consider that their Honours gave the section a meaning consistent with its words, but which is apt to prevent the deeming provision from leading to the unjust results which acceptance of the informant's argument would have produced in that case. It is convenient to set out s69 broken down into its relevant parts:

> Every person
> – who appears acts or behaves as ...
> – the person having the care government or management of
> – any ... place ...
> – used in contravention of this Act ...
> – shall for the purposes of this Act ... **[7]**
> – be deemed to be the occupier thereof or the keeper thereof (as the case requires)
> – whether he is or is not the real owner occupier or keeper thereof.

The Full Court, having rejected the wide operation of the section urged by the informant, appears to have treated what the Act meant by

> "appears acts or behaves ... as the person having the care government or management of any ... place".

as coloured by what was deemed to be established by such appearance, action or behaviour.

What is established is that the person is deemed to be the occupier or the keeper of the place as the case requires.

I consider that it follows from the Full Court judgment that the care, government or management to which the section refers is that of the kind or nature which would be expected of an occupier or keeper in charge of the premises. In the examples given by Macfarlan J the mere messenger left temporarily to watch or guard a shop while his master went for his lunch, and the night watchman are exercising a kind of "care or charge or control" of the premises (to use the expression of Macfarlan J on p164). It is not however the care or charge or control that would be exercised by the occupier of the keeper of the shop if in charge. It is significant that the messenger referred to is one who only watches or guards the shop during the master's absence, not someone who conducts the business **[8]** of the shop in the master's absence.

The conclusion of the Full Court that it was open on the evidence for a member of the court below not to be satisfied that Mrs Stirrey was the occupier of the premises, follows inevitably from the construction which the Full Court placed upon the section. The evidence was open to the interpretation that Mrs Stirrey was not in charge of the shop at all but was assisting her husband who was present and in charge.

It seems both a practical and just interpretation of this rather draconian provision that it should only be a person who appears, acts or behaves as the person having the care or charge or control of the premises which would be exercised by an occupier or keeper who is deemed, and made criminally liable, as occupier or keeper although not proved actually to be one. Usually an employee permanently or temporarily in charge of the conduct of a business in a shop will appear, act and behave as the person having the care, government or management of the shop which a shopkeeper would have. As most businesses are conducted by companies it is not common today for a shopkeeper or other keeper to be the person in charge of a shop or other business premises. Typically an employee is in charge.

In the present case, on the evidence of the two occasions the constable worked the machines, the defendant appeared, acted and behaved as the person in charge of the shop which was open for business. She therefore appeared, acted and behaved as the person **[9]** having the care, charge or control of the shop which would be exercised by a shopkeeper. That apparent position is not affected by the fact that the evidence of the later interview shows her not to have been the shopkeeper but the employee in charge of the shop. The defendant therefore was to be deemed the occupier of the premises.

I consider that the dismissal of the charges must have been due to a misinterpretation by the learned Magistrate of the principle established by *Deeley v Stirrey*. The dismissal of the charges under s68(4) should be set aside and they should be referred back to the Magistrate for further hearing or re-hearing.

2. Whether Defendant in Possession of Machine

The informant seeks to have the dismissal of the charges that the defendant possessed a machine for gaming at the premises reviewed on the grounds that no reasonable Magistrate could have reached a conclusion other than that the defendant was in possession of it.

In my opinion these charges were not made out on the evidence. No deeming provision applies. The evidence was uncontradicted that the defendant was an employee. The inference from the evidence is that the video poker machines were owned or possessed by the defendant's employer. An employee does not have possession of the employer's goods but has custody of them only. *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at pp268-9; 25 ALR 213. **[10]** "Possession" in s68(2) has its ordinary legal meaning. It is to be contrasted with s66B which extends the meaning of possession to include custody.

3. Whether Defendant Liable as Accessory

Each of the four charges was put against the defendant on the alternative basis that she was the principal offender, or alternatively was liable to be convicted as an accessory under s60 of the *Magistrates' Courts Act* 1971. That section provides:

> "Every person who aids abets counsels or procures the commission of an offence punishable on summary conviction shall be liable to be proceeded against and convicted for the offence either together with the principal offender or before or after his conviction and shall be liable on conviction to the same penalty as the principal offender and may be proceeded against and convicted either

> in the place where the principal offender may be convicted or in that in which the offence of aiding abetting counselling or procuring is committed."

It was procedurally open to the prosecution to proceed in that way. *Georgianni v R* [1985] HCA 29; (1985) 156 CLR 473 at pp490-491; 58 ALR 641; (1985) 16 A Crim R 163; (1985) 59 ALJR 461; (1985) 2 MVR 97; 4 IPR 97. Apparently the way the case was put in the alternative against the defendant was that while she had not herself committed the offence in question, her employer had and she had acted so as to facilitate or assist the employer in the commission of the offence. To establish an offence by the defendant in that way it was necessary for the prosecution to prove that the employer committed the offence, that the defendant intentionally facilitated or assisted the commission of the offence by the employer and that she did so knowing all the essential facts which made what was **[11]** done by the employer a crime.

No offence is committed under s68(4) unless the machine is a restricted machine and no offence under s68(2) unless it is a machine for gaming. As the machines in question here were video poker machines they were restricted machines and also machines for gaming. Both counsel before me advanced the same view of the operation of s68(13) of the *Lotteries Gaming and Betting Act* which provides:

> "In any prosecution for an offence against this section, it is not necessary for the prosecution to—
> (a) prove that the person knew that he or she was committing an offence; or
> (b) exclude the operation of any defence available to the person charged."

The common view was that a principal offender to whom otherwise the provisions of s68(4) or 68(2) applied in respect of a machine which was in fact a restricted machine or a machine for gaming, would be guilty of the offences even though it was not proved that he or she knew of the essential facts which made it a restricted machine or a machine for gaming.

Assuming that to be so, in proceedings against the defendant as an accessory the prosecution is not proceeding in a prosecution for an offence against s68 of the *Lotteries Gaming and Betting Act* 1966. It is established by *Giorgianni v R* [1985] HCA 29; (1985) 156 CLR 473; 58 ALR 641; (1985) 16 A Crim R 163; (1985) 59 ALJR 461; (1985) 2 MVR 97; 4 IPR 97 that to sustain a conviction as an accessory to a principal offender who commits an offence of strict liability it is essential to prove **[12]** that the accessory knew all the essential facts which made what the principal offender did a crime.

It was accepted by both counsel that the evidence before the Magistrate did not make out a case to answer so far as concerns showing that the defendant knew of the essential facts which made the machines in question restricted machines or machines for gaming. On that basis the Magistrate was justified in holding that there was no case to answer on the charges insofar as they were put on the basis that the defendant was an accessory.

I do not need to investigate whether there were any other difficulties in the way of establishing that the defendant was liable as an accessory in this case. **Nankervis v Nounez:** The charges, evidence and grounds in respect of the proceedings against the defendant Nounez are indistinguishable from those I have dealt with and no separate arguments were addressed to me with regard to them. The order nisi in relation to Nounez relates only to s68(2), the charge of possession, so it should be discharged.

APPEARANCES: For the applicants: Mr DB Maguire, counsel. Victorian Government Solicitor. For the respondents: Mr B Kayser, counsel. Kenna, Croxford & Co, solicitors.
