

33/86

COUNTY COURT OF VICTORIA

EVANGELOU v THOMSON

Chief Judge Waldron

18 December 1985

CRIMINAL LAW – CONTRIVANCES FOR GAMING – BLACK JACK MACHINE – METHOD OF OPERATION – WHETHER FOR PURPOSE OF GAMBLING – NATURE/OBJECT OF POKER MACHINE – WHETHER BLACK JACK MACHINE OF SIMILAR NATURE: LOTTERIES GAMING AND BETTING ACT 1966, S68.

1. In deciding whether a machine is a contrivance for gaming within the provisions of S68(2) of the *Lotteries Gaming and Betting Act 1966* ('Act'), the Court should look at the basic nature or object of the machine. If its essential quality is to depict a gambling game and to allow its player to indulge in gambling activities, it is open to hold it to be a contrivance of gaming within the Act.

2. Accordingly, where a machine depicted the game of black jack and had options of increasing the winning score, doubling the winning score by playing a 'High/Low' procedure and choosing "cards", it was open to hold that the machine had a similar object to a video poker machine and was thereby within the provisions of the Act.

CHIEF JUDGE WALDRON: [1] This is an appeal brought by one Evangelos Evangelou against the summary conviction of Louciano Deluise at the Brunswick Magistrates' Court on 22nd July 1985 of having at Brunswick on 24th January 1985 kept contrivances for gaming, to wit three machines similar to video poker machines. On 28th October 1985 I granted leave to the Appellant to appeal out of time pursuant to section 75(1)(f) of the *Magistrates' Courts Act*. However, when that leave was given I indicated that the question of the competence of the Appellant to prosecute the appeal would have to be decided by the Judge who heard the appeal. As chance would have it, on the 4th November 1985 I heard the Appeal. On that date the appeal proceeded on the assumption that the Appellant is a person who imported the machines in question. However, after reserving my decision I came to the view that evidence was required of the Appellant's interest in the subject machines. That evidence was given by the Appellant on the 13th November 1985 and was to the effect that he was the owner of the machines and that the question of the legality of the use of the machines was pertinent to the commercial value of them.

The preliminary question to be decided therefore is whether the Appellant is competent to prosecute this appeal pursuant to section 73 of the *Magistrates' Courts Act*. Section 73(1)(a) provides:

"Where a person feels himself aggrieved by the summary conviction of a Magistrates' Court he may appeal from the conviction to the County Court".

Is therefore, the Appellant "a person who feels himself aggrieved" by the conviction of Deluise? On my understanding of the authorities a person may feel himself aggrieved by a conviction only if he had the right to be heard on the prosecution which gave rise to the conviction (*Dentry v Scott* (1947) VLR 462). It is to be noted that although the Respondent seized the three subject machines no order for their forfeiture was made. The learned Magistrate simply proceeded to a conviction. It is clear [2] that the owner of an object which is the subject of an application for forfeiture has the right to be heard in the Magistrates' Court (*De La Rue v MacNamara* [1940] VicLawRp 24; (1940) VLR 128 at p136-7) and therefore would be a person aggrieved by the making of such an order. Further I do not doubt that if the conviction of Deluise was affirmed and the Appellant sought the return of the three machines which have been seized, a forfeiture order would be sought and obtained. Therefore, I am satisfied that the Appellant is competent to prosecute this appeal. As I have observed earlier, the information against Deluise was in the following terms, namely that he "did keep contrivances for gaming to wit three machines similar to video poker machines". During the hearing of the appeal, however, the question which was

argued was whether or not the subject machines were, in the terms of section 68(2) of the *Lotteries Gaming and Betting Act* (as amended), machines "of a similar nature or having a similar object" to video poker machines. As both parties desired that the effect of the full terms of section 68(2) be decided on the appeal, by consent on 20th November 1985 I gave leave to the Respondent to amend the information by deleting the words "similar" and substituting therefor "of a similar nature or having a similar object".

Each of the subject machines, by electronic means, depicts the game of black jack. Thus the person playing the machines plays against a "banker". The player and the "banker" both have a "hand". The player is able to decide whether to be content with two "cards" or receive additional "cards". If at any time the total value of his "cards" exceeds twenty one, he loses the "game". If they do not, and when he chooses to receive no further "cards" the machine then proceeds to play out the "banker's" hand. If the "banker's" hand exceeds 21, the player wins. If the "banker's" hand is less than 21 and is of the same value as that of the player, the "banker" wins. If the value of the player's hand exceeds that of the "banker", the player wins.

All of this is consistent with the rules of black jack, although it is achieved by electronic means, the cards merely being depicted on the screen of the machine. The game which is depicted, namely [3] Black jack, is of course, quite different to that of poker. Further, with the video poker machine, there is no banker or dealer. Rather the player is dealt five "cards" which he can either accept or choose to have all or some of them substituted by other "cards". Certain "hands" produce a credit of a certain number of points or games. Likewise with the subject machines, certain hands receive certain credits and if the player beats the "banker" he receives a credit of two.

The evidence of Constable Thomson was that the subject machines bore other similarities to a video poker machine. First, that although the game of black jack is different to that of poker, both are gambling games. Secondly, that with each type of machine the player is able to exercise a degree of control over his "hand" in that he can choose whether or not to add to or substitute "cards" which he receives initially. Thirdly, each machine provides a high-low or double-up procedure which allows for a double pay-out on any winning "hand". Fourthly, each machine enables the player to increase the points which may be scored on a particular "hand". Finally, each machine has a points counter.

Section 68(2) provides as follows:

"... the following machines devices or contrivances shall be deemed to be machines devices or contrivances for gaming, namely machines devices or contrivances known respectively as crane machines, fruit machines, poker machines (including the electronic or partly electronic machines, devices or contrivances known as draw poker machines or video poker machines) golf ball machines race machines flag machines jumbo machines or multiple coin machines and any other machines of a similar nature or having a similar object, and whether such machines are actually used for gaming or not."

On behalf of the Appellant, Mr McGinnes, argued that when deciding whether a particular machine was of a similar nature or had a similar object to a video poker machine, one must look at the game depicted by the electronic workings of the machine. As the subject machines depicted the game of black jack, which is quite a different game to that of poker, he submitted that the subject machines were not of a similar nature or had a similar object to a video poker machine. He further submitted that the parliamentary debate upon the second reading of the amendment to section 68(2), contained in Act No.10134, whereby the words [4] "(including the electronic or partly electronic machines, devices or contrivances known as poker machines or video poker machines)" were inserted into the subsection after the words "poker-machines" indicate that it was only draw poker and video poker machines which were sought to be caught by the amendment and that it was contemplated that further amending legislation might be required, if and when other machines were devised and sold. Mr McGinnes also referred me to the decisions of Gray J in *Drew v Briscoe* and Judge Mullaly in *Zoccoli and Iannello v Thomson* which decisions provoked the above amendment to section 68(2). Prior to the amendment, video poker machines were legal and only became illegal by virtue of the amending legislation. Mr McGinnes submitted that the purpose of the amending legislation was to make draw poker and video poker machines only illegal, remembering that the words "of similar nature or having a similar object" had been in the sub-section since 1939.

By contrast Mr Murphy for the Respondent submitted that it was the type of machine in a more general sense which the legislation was aimed at, rather than the precise game depicted by the machine. Therefore, as the subject machines had the above-mentioned similarities to the video poker machines, particularly the option to increase the winning scores, the ability to choose "cards" and the option to double the winning score by playing the high-low game, the subject machines did have "a similar object" to the video poker machine. Further he submitted that the above decisions were not to the point and were not of assistance, as they related to the narrow question of whether the video poker machine was a multiple coin machine as defined in section 3 of the Act.

As was observed by Gray J in *Drew's case* and by Judge Mullaly in *Zoccoli and Ianello's case*, the question of what is the meaning of an ordinary English phrase or word as used in a statute is a question of fact not of law. Further, the question whether a particular set of facts comes within the description of such a word or phrase is one of fact. In my judgment as a question of fact the subject machines are of a similar nature to that of a video poker machine in that they are of a similar essential quality. Further, I am of the view that they have a basically similar object. The *Shorter Oxford Dictionary* defines "object" as "thing aimed at, end, purpose".

In my judgment the fact that the game of black jack rather than a poker hand is depicted on the [5] machine is irrelevant. The basic nature or object of the subject machines is similar to that of the video poker machines, in that the essential quality of the subject machines, the basic thing aimed at, the end, the purpose of the machines is by means of the depiction of a gambling game and the player's conduct of that game, to allow certain gambling activities to be indulged in, in order to secure not only a favourable points score but an increased points score. In my judgment that was the essential nature or object of the video poker machines which was declared to be illegal by the amendment to section 68(2), not the simple determination of the poker "hand" depicted thereon. Likewise that is the essential nature or object of the black jack machine, which therefore is rendered illegal by the operation of section 68(2) as amended.

In my view there is nothing in the *Hansard* reports of the parliamentary debate which goes against that conclusion. I am therefore of the view that the learned Magistrate was correct in proceeding to a conviction of Deluise. The appeal therefore is dismissed and the conviction and sentence are confirmed.
