BHIMRAO TRIMBAKRAO INGLE

v.

STATE OF MAHARASHTRA

AUGUST 19, 1986

[M.P. THAKKAR AND B.C. RAY, JJ.]

Bombay Prevention of Gambling Act, 1887—Ss. 3(ii), 5 and 7—'Common gaming house'—What is—Conviction for offence under s. 5—When arises.

The appellants were convicted under s. 5 of the Bombay Prevention of Gambling Act 1887. Appellant no. 6 was also convicted under s. 4 of the Act. In the appeal, the Sessions Court on an appreciation of evidence came to the conclusion that the prosecution had failed to establish that appellant no. 6 was deriving any profit or gain by way of charges for the use of the room of the office in which gaming was taking place and that accordingly it was not a 'common gaming house' within the meaning of s. 3(ii), and therefore the offence committed by appellant no. 6 would not fall under s. 4. It, however, recorded a finding of guilt against all the appellants for an offence under s. 5 seeking support from s. 7, which provides for presumptive proof of keeping or gaming in a common gaming house. This view was affirmed by the High Court.

Allowing the appeal to this Court,

HELD: 1. An offence under s. 5 can be committed only provided the persons concerned were gaming or were present for the purpose of gaming in a 'common gaming house'. [615F]

2. What was held to be '*not*' a 'Common Gaming House', having regard to the fact that evidence adduced by the prosecution was considered unacceptable could not have been held to be a common gaming house by recourse to the presumption under section 7. What is not a 'common gaming house' in fact in the light of evidence cannot become a common gaming house by reason of a presumption. [615C-D]

3. The Sessions Court was in error in convicting the appellants for an offence under Section 5 which can be committed only provided

the persons concerned were gaming or were present for the purpose of gaming in a 'common gaming house'. The High Court was in error in failing to appreciate the import of the said finding recorded by the Court on the basis of the appreciation of evidence. [615F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 28 of 1977

From the Judgment and Order dated 16.12.1976 of the Bombay High Court in Criminal Rev. Appln. No. 79 of 1976.

A.K. Sanghi for the Appellants.

A.M. Khanwilkar and A.S. Bhasme for the Respondent.

The Judgment of the Court was delivered by

THAKKAR, J. Whether or not it was a 'common gaming house'[1] is the question. Not is the answer.

The appellants were convicted for an offence under Section 5 of the Bombay Prevention of Gambling Act, 1887 (hereinafter called 'the Act') as it stood in 1972 for being found in a 'common gaming house' where they had assembled for the purpose of gaming. Appellant no. 6 was also convicted for an offence under Section 4 of the Act, for using a room as a common gaming house. The Sessions Court exercising appellate jurisdiction came to the conclusion that the gaming was taking place in an office of the (Agricultural) Soil Conservation Department and that the room in which the gaming was taking place was not a 'common gaming house' within the meaning of Section 3(ii)[2] of the Act. On reaching the conclusion that it was not a 'common gaming house', the Sessions Court came to the conclusion that the offence committed by Appellant No. 6 would not fall under Section 4 of the Act.

The Sessions Court, however, recorded a finding of guilt against

1. As defined by section 3(ii) of the Act.

2. Section 3 (ii): "In this Act, 'common gaming house' means: In the case of any other form of gaming, any house, room or place whatsoever in which any instruments of gaming are kept or used for the profit or gain of the persons owning, occupying, using or keeping such house, room or place by way of charge for the use of such house, room or place or instruments or otherwise howsoever."

the appellants including Appellant No. 6 for an offence under Section 5 of the Act seeking support from Section 7[1] of the Act which provides for presumptive proof of keeping or gaming in a common gaming house.

Even though on an appreciation of evidence adduced by the prosecution the Sessions Court came to the conclusion that the prosecution had failed to establish that Appellant No. 6 was deriving any profit or gain by way of charges for the use of the room in question and that accordingly it was not a 'common gaming house', the Court strangely enough held that it was a common gaming house within the meaning of Section 3(ii) of the Act by reason of the presumption under Section 7 of the Act. What was held to be '*not*' a 'Common Gaming House', having regard to the fact that evidence adduced by the prosecution was considered unacceptable could not have been held to be a common gaming house by recourse to the presumption under section 7. The presumption is a rebuttable presumption which was not required to be rebutted by the defence inasmuch as the proseuction evidence was discredited and rejected and the presumption stood rebutted on that account. What is not a 'common gaming house' in fact in the light of evidence cannot become a common gaming house by reason of a presumption under section 7. The reason is neither far to seek nor obsecure. What the prosecution is required to establish by recourse to the presumption is that the room is a 'common gaming house' as defined in the dictionary of Section 3(ii) that is to say that the occupier is collecting charges for the use of the room. When evidence is adduced and the prosecution fails to establish that such charges are in fact collected, how can the Court hold in the face of its own finding that such charges are collected, that even so it is a 'common gaming house' because of the presumption? The Sessions Court was in error in convicting the appellants for an offence under Section 5 which can be committed only provided the persons concerned were gaming or were present for the purpose of gaming in a 'common gaming house'. The High Court was in error in failing to appreciate the import of the said

1. Section 7: When any instruments of gaming has been seized in any house, room or place entered under section 6 or about the person of any one found therein, and in the case of any other thing so seized if the court is satisfied that the Police Officer who entered such house, room or place had reasonable grounds for suspecting that the things so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming-house and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the Magistrate or the Police Officer or by any person acting under the authority of either of them.

A finding recorded by the Court on the basis of the appreciation of evidence that in fact it was not a 'common gaming house' as found by the Sessions Court, and confirmed by the High Court. None of the appellants could therefore be convicted for an offence under Section 5[1]

B The appeal is, therefore, allowed. The order of conviction and sentence is set aside.

A.P.J. Appeal allowed.

1. Section 5: "Whoever is found in any common gaming house gaming or present for the purpose of gaming shall, on conviction, be punishable with imprisonment which may extend to six months and with fine...."