

State by the Public Prosecutor, Madras Vs. Muthu and Others

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Court : Chennai

Decided On : Feb-09-1993

Reported in : 1993(2)ALT(Cri)649; 1993CriLJ2420

Judge : N. Arumugham, J.

Appeal No. : Criminal Appeals Nos. 749 and 750 of 1987

Appellant : State by the Public Prosecutor, Madras

Respondent : Muthu and Others

Advocate for Def. : V.K. Muthusamy, Adv.

Advocate for Pet/Ap. : G. Kumaravel, Govt. Advocate

Judgement :

1. Both the appeals are directed against the judgment of acquittal rendered by the Judicial Second Class Magistrate, Tiruchengode, made in C.C. Nos. 143 and 144 of 1986 dated 30-7-1987, whereby acquitting all the accused in both the cases for the alleged offence committed by them under Sections 8 and 9 of the Tamil Nadu Gaming Act, 1930.

2. To appreciate the points involved in both the appeals, the case of the prosecution in brief is stated as follows :-

On the instructions given by the Superintendent of Police, Salem, in connection with a petition sent by Ananda Babu, pertaining to a gaming house being conducted, Sub-Inspector, Pallipalayam Police-Station, in compliance with the instructions given by the superior officer with the help of his convoy raided the house bearing Door No. 50, situated in Pallipalayam Bridge Road at about 2.00 a.m. on 15-7-1986, where he found the accused 1 and 2 along with 18 others engaged in playing cards numbering 52 with a total cash of Rs. 12,000/- and the gold ring to the weighment of 1 1/2 sovereign and actually playing 'Vettu Attam' and also found the accused 3 and 4 along with 14 others playing game involving 52 cards and a total cash of Rs. 2570/- and four wrist watches which were duly recovered by him under the cover of Mahazar without attestation by any independent witness for the reason particularly known to the Sub-Inspector. He has laid the charge-sheet against the accused as stated above, by registering the case in his Police Station Crime Nos. 395 to 397 of 1986.

3. The plea of the accused for all the charges was one of total denial and their complicity and the guilt were denied totally. There witnesses were examined on behalf of the accused among whom D.Ws. 1 and 2 are draftsmen of the topography prepared by them showing the details of the house involved in this cases. D.W. 3 is a member of the so-called Club functioning in the said premises. Ex. P-1 to P-5 were marked on behalf of the prosecution against which four documents were relied on on behalf of the accused, the first of which relates to certificate given by the Registrar of Co-operative Society and the second pertains to the map and so on. 12 Material Objects were marked and relied on by the prosecution. On considering the recorded oral and documentary evidence let in by the prosecution, learned trial Magistrate has found all the accused were not guilty and whereupon he acquitted them of all the charges.

4. Mr. Kumaravel, learned Government Advocate while canvassing the grounds urged in the Appeals, drew my attention to Sections 8 and 9 of the Tamil Nadu Gaming Act, 1930 which reads as follows :-

'8. Penalty for opening etc., a common gaming house :- Whoever opens, keeps or uses or permits to be used any common gaming house, or conducts or assists in

conducting the business of any common gaming house or advances or furnishes money for gaming therein, shall be liable on conviction to fine not exceeding five hundred rupees, or to imprisonment not exceeding three months, or to both.

S. 9. Penalty for being found gaming in a common gaming-house :- Whoever is found gaming or present for the purpose of gaming in a common gaming-house shall, on conviction, be liable to fine not exceeding two hundred rupees or to imprisonment not exceeding one month; and any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming.'

5. By adverting the above sections of law, learned Government Advocate contended that during the raid conducted by P.W. 1 Sub-Inspector, it was found the bettings on the table in the shape of money and currency and the gold jewellery. But however, playing cards were found numbering in 52 and several persons were found engaged during that odd hours in Door No. 50 and that therefore, the time and occurrence which was detected during the raid ex-facie presumes that the place was used as common gaming house in which all the accused were found engaged and accordingly, the prosecution has established the case against them and in this regard the trial Court has not appreciated the adduced evidence in its proper perspective.

6. Per contra, Mr. V. K. Muthusamy learned counsel justifiably contended before me that to sustain any conviction under sections 8 and 9 of the Tamil Nadu Gaming Act, the basic ingredients which are necessarily required to be proved and established before a Court of law as provided in the Section itself has not been adhered to by the prosecution on the one part; and that evidence adduced by the prosecution through P.Ws. 1 and 2 remains solitary one with no truth at all; and that thirdly the alleged raid conducted by P.W. 1 is manifestly an illegal one without any legality, sanctity and that therefore, the trial Court has rightly observed and concluded so justifiably and whereby acquitted all the accused.

7. Before proceeding to appreciate the rival contention in these cases I may advert to the basic ingredients, which are useful, as adumbrated in the above two sections of law. A casual reading of these two sections would mean that the act of

gaming itself is not per se an offence. But to rope in the said act of gaming into an offence it must be necessarily proved that the act is being carried on in a common gaming house. It therefore, follows that to sustain a conviction of a person for the violation of the above sections it is imperative on the part of the prosecution to prove that the said person was playing the game and above all what is necessarily and basically required to be proved is that the gaming in a common gaming house. Unless and until this basic element of a common gaming house is established it is rather difficult to accept the proposition taken by the learned Government Advocate that a conviction can be based on the basis of mere conjectures.

8. Section 3 of the Tamil Nadu Gaming Act defines what is meant by 'common gaming house'. According to the said section 'common gaming-house' means :

'any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, vehicle, vessel or place whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle, vessel or place or otherwise howsoever; and includes any house, room tent, enclosure, vehicle, vessel or place opened, kept or used for the purpose of gaming;

Gaming does not include a lottery but includes wagering or betting, except wagering or betting on a horse-race when such wagering or betting takes place.'

On a combined reading of the definition given in Section 3 and Sections 8 and 9 of the Tamil Nadu Gaming Act and on applying the same to the facts involved in this case more particularly, on the evidence of P.Ws. 1 and 2, I feel at the outset that the learned trial Magistrate did the right thing by observing that the prosecution has miserably failed to bring home the guilt of the accused as provided by the law. He has acquitted all the accused so rightly and I do not come across any error of law or misappreciation of the facts and evidence adduced before him. There was absolutely no iota of evidence much less convincing rather cogent let in before the trial Court to show that the house bearing Door No. 50 situated in Pallipalayam Bridge Road were used as a common-gaming-house being run by the first accused in which the other accused were participating and playing cards of what is

allegedly called 'Vettu Attam' involving considerable cash and jewellery. Having regard to the evidence given by P.Ws. 1 and 2 and having regard to the legal ratio and basic ingredients referred to above I am fully constrained to hold that the prosecution is not even anywhere neared the basic ingredients built in the above sections of law and that therefore, no conviction can be sustained against the accused for the offence charged and tried.

9. Mr. V. K. Muthusamy, learned counsel also drew my attention to an important aspect which the prosecution has deliberately omitted to do so. It is stated that though the Superintendent of Police, Salem has instructed P.W. 1 to conduct a raid in the place involved in this case by handing over a petition addressed to him, the mandatory direction given by the Act itself is not followed. The Police Officer who came to conduct the raid upon the dwelling house, namely, P.W. 1, has not obtained any search warrant from the Court of law nor from his superior officer as contemplated by the Act to conduct the raid and that without doing so, conducting a raid and the Court acting on such basis, has not been recognised by the relevant Act. A feint explanation was given by the learned Government Advocate for this attack that because the raid was conducted at odd hours of 2.00 a.m. on the relevant date and in view of the urgency, search warrant for the search has not been obtained and that therefore, it has not impaired the prosecution case. But in view of the procedural mandate clearly laid down and repeatedly insisted by the various judicial pronouncements of our land I am totally unable to persuade myself to accept the explanation given by the learned Government Advocate and accordingly, I am inclined to hold that there is every force in the argument advanced by Mr. V. K. Muthusamy, learned counsel for the respondents.

10. Catena of case laws were referred to during the course of argument in favour of the contentions advanced on behalf of the respondents. The relevant among them are the following :-

In *Santhanam Iyengar v. State*, 1959 MWN (Cri) 43 learned Judge of this Court has held as follows :-

'Gambling by itself is not an offence and it becomes only an offence when the gaming takes place in a common gaming house or in a public place. A common

gaming house means a place of public resort where a number of persons are invited to congregate for the purpose of gambling. In order to constitute a common gaming house it must be shown that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming. With a view to convict a person for keeping a common gaming house it is necessary for the prosecution to prove that he owned the house or was the occupier of it and that the instruments of gaming were kept or used for the profit or gain of that person.

The game that is played must be a game of chance, the word 'mere' used in the phrase 'games of mere skill' stands for 'pure'. In each case it has to be determined whether the main element is one of skill or of chance. If the preponderating element is of chance then it would come under the Act, otherwise not.'

11. Then, to book a person in the context of allegedly running a gaming house and punishing for conducting gaming as contemplated under sections 45 and 46 of the City Police Act there were judicial pronouncements emerged already by this Court. It was held in *Sundaravadivelu Chatty v. State*, 1955 MWN (Cri) 14 that in the absence of any evidence on record to make out the element of profit or gain to the person owning, occupying or keeping the premises, the offence of running a common gaming house under sections 45 and 46 City Police Act is not made out. In the light of the above legal ratio I am inclined to hold that the law does not prohibit the playing certain games including cards and games relating thereto, even with stakes, but only prohibits anyone from running a common gaming house which, in effect, means commercialising the acts of gaming or indulging in gambling in public places. To put it in other words, the law only aims at controlling or containing the evils of gambling, and not its total eradication. This would be clearly manifest if the definition of 'common gaming house' and prescriptions contained in the above sections of law are taken note of.

12. Unfortunately, Police are not taking note of the said legal implications. To illustrate, the Superintendent of Police, Salem, while giving direction and instructions to P.W. 1 did not appear to have apprised him of the above legal implications. For the part of P.W. 1 also, he has not taken note of nor understood the legal philosophy. The definition provided in Section 3 of the Tamil Nadu

Gaming Act clearly indicates that the derivation of profit or making a gain by the person owning, occupying, using or keeping the gaming house which is an indispensable requisite comes within the ambit of the legal term common gaming house.

13. In the absence of any evidence to show that the place where cards were played was used for the profit or gain of the person owning, occupying, using or keeping the place, it would not become a common gaming house and that would not be a positive and only one conclusion legally to be arrived at by any Court of law. Keeping the above legal norms accepted and being followed by various Courts of our country, in the context of the evidence adduced by the prosecution in this case, I feel to remark that the prosecution drew the blank in all and there is nothing more to say rendering the whole case to be rejected.

14. Lastly, I may state that the legal norm pointed out by the apex Court and various other High Courts to be followed in disposing the appeals filed against the order of acquittal have not at all been made available in this case and for the said reason also I am not inclined to allow these appeals. Having considered every aspect of the legal points and factual materials placed before the trial Court in this case, I am totally convinced and satisfied with the elaborate evidence discussed by the learned trial Magistrate and accordingly, I hold that he has rightly acquitted all the accused for all the charges framed and tried against them and so justifiably. In the result, both the appeals deserve no merit.

15. In the result, both the appeals preferred by the State fail and accordingly they are dismissed.

16. Appeals dismissed.