

Abdul Latif Vs. Emperor

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Court : Kolkata

Decided On : Sep-02-1937

Reported in : AIR1938Cal237

Appellant : Abdul Latif

Respondent : Emperor

Judgement :

B.K. Mukherjea, J.

1. The appellant in this case is one Abdul Latif who has been convicted by the Chief Presidency Magistrate, Calcutta, under Section 44, Calcutta Police Act, (Act 4 of 1866), and sentenced to pay a fine of Rs. 250 only. In default he has to suffer rigorous imprisonment for a period of one month. There is not much dispute about the facts of this case which lie within a short compass. On 5th September 1936 Sub-Inspector Jennings of the Calcutta police, who is the first witness for the prosecution, searched a shop-room in premises no. 7 Ripon's Lane, Calcutta, which is admittedly in occupation of the accused and the search was made under a warrant issued under Section 46, Calcutta Police Act, signed by the Deputy Commissioner of Police, Southern Division. The Sub-Inspector found the accused and several other persons at the shop-room and on search of the premises certain race-books, race handicap sheets, and other papers were seized by the police. The learned Magistrate found most of the papers to be innocuous, but he held that

certain slips of papers forming Exs. 3 and 6, were betting slips, which did come within the definition of 'instruments of gaming' in the Calcutta Police Act. The Chief Presidency Magistrate was of opinion that as the search was made in conformity with the provision of Section 46, Calcutta Police Act, and the instruments of gaming were found in the shop-room, a presumption would arise under Section 47 of the Act, that the room or place was used as a common gaming house, which the accused would have to rebut. As there was no reliable evidence on the side of the accused to rebut this presumption he was convicted under Section 44, Calcutta Police Act.

2. Mr. Mookerjee, who appears in support of this appeal, has assailed the propriety of the decision of the Chief Presidency Magistrate substantially on three grounds. He has argued in the first place, that the learned Magistrate misappreciated the law on the point and erred in law in holding that there was any presumption in favour of the prosecution under Section 47, Calcutta Police Act, from the fact of the search being conducted in accordance with the provisions of Section 46, which would shift the burden on to the accused to establish his innocence. He maintains that the presence of the instruments of gaming might at best be taken to be a piece of evidence to show that the place was kept or used as a common gaming house, but that would not exonerate the prosecution from showing that the other elements necessary to constitute a common gaming house, as defined in Section 3 of the Act, were present in this case. The second argument is that the slips of paper, which have been pronounced to be betting slips by the trying Magistrate are not instruments of gaming within the meaning of the Act. Lastly it is contended, that even if these papers be regarded as instruments of gaming a conviction on the strength of these papers alone is not proper, particularly when there is no evidence to show that any profit was made or expected by the accused by reason of his owning, occupying or keeping the place.

3. Now so far as the first point is concerned, it cannot be disputed that to sustain the conviction of the appellant under Section 44, Police Act, it must be proved that he has opened, kept or used a room or house, which he owns or occupies, as a common gaming house. To constitute a common gaming house as defined in Section 3, not only there must be instruments of gaming used or kept in the place,

but such instruments must be kept or used for the purpose of gain or profit of the person, owning, occupying or using such room. If the slips found in the room be held to be betting slips, the first requirement is certainly complied with, but as regards the second, the prosecution has not adduced any evidence, but has relied on solely what the trying Magistrate calls the presumption under Section 47, Police Act. It is necessary to consider therefore, as to how far Section 47, Calcutta Police Act, absolves the prosecution from proving the elements necessary to constitute a common gaming house, as defined in Section 3 of the Act, where on a proper search being made in conformity with the provision of Section 46, certain instruments of gaming are found in the place or house in question. The precise point came up for Decision before a Division Bench of this Court consisting of Henderson and Mitter JJ. in *Banga Lal v. Emperor* : AIR1936 Cal788 . Mitter J. expressed his opinion that Section 47, only raised a presumption of fact. The finding of the materials mentioned in the section would be evidence that the place was a common gaming house, though the effect of that evidence could be nullified by other evidence on the record. Henderson J. used a more guarded language. According to him Section 47, created a special rule of evidence making something evidence, which otherwise would not be evidence in law. It did not strictly speaking create a 'presumption' in the sense in which the expression is used in the Evidence Act, and that the Magistrate is not bound to convict a person upon this evidence alone, even if the accused does not adduce any evidence to the contrary.

4. Though the words 'until the contrary is made to appear' are rather appropriate to a presumption in the technical sense of the word, it seems to me that the absence of any word like 'may presume' or 'shall presume' in the section is very much significant, and I agree with Henderson J. in holding that the discovery of the instruments of gaming in the place on a proper search which is contemplated by the Act, would be an evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming house, but it would be an evidence on the other point also, as regards the making of profit or gain by the owner or occupier, etc, of the place; although according to the ordinary law, it cannot be treated as an evidence of the other fact. When the prosecution relies upon Section 47, the accused can certainly explain away the whole circumstances

and 'show the contrary' as the section lays down. If the explanation is sufficient, the evidence practically loses its force; if on the other hand, no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court, to weigh and appraise the evidence in the best manner possible, and he may, if he thinks proper, convict the accused on this evidence, though he is not bound to do so. Taking this to be the proper view of the law, I think the learned Magistrate was not quite correct in convicting the appellant simply on the ground, that there was in law a presumption under Section 47, which the accused was not able to rebut. It was his duty to consider whether the evidence itself was sufficient to justify the conviction on the facts and circumstances of the case. As however, I am hearing an appeal, it is open to me to decide the question, on a consideration of the entire evidence on the record, and I propose to deal with the matter in connexion with the third point raised by the appellant.

5. The second point raised by the appellant relates to the question as to whether the slips found on search could be said to be instruments of gaming within the definition of that expression in the Police Act, 'Instruments of gaming' according to Section 3 of the Act 'include any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming'. As gaming includes wagering or betting, the slips, if they are used for the express purpose of facilitating betting operations, would certainly come within the mischief of the definition. The slips, which have been held to be betting slips by the learned Magistrate, contain the names or numbers of horses, and certain small amounts, against each name or number. It is said that these amounts represent what were betted on the several horses, and the slips were given as these fractional sums could not be wagered at the authorized totes in the Race Course. This seems to be probable, and without) any explanation coming from the accused, it must be said that these were rightly held to be instruments of gaming by the trying Magistrate. The learned advocate for the appellant has pointed out two things in this connexion, first, that the slips do not show any profit or gain to the appellant, otherwise than as a result, of betting by him and second, that all the slips bear the date 29th August 1936, whereas the search was in connexion with bets that the accused was supposed to have received on horses to be run on 5th September 1936. The first point does not impress me much. An instrument of gaming, be it a pack of cards, or a gaming

table, or dice may not show on the face of it that the person using or keeping such a place where the instrument was found, was deriving any profit out of it. It is the special rule of evidence that is laid down in Section 47, Police Act, which makes this fact an evidence to prove that the person, unless he shows the contrary, was getting benefit out of the same. The other point, that the slips were all of an earlier date, would make them not the less instruments of gaming, though this fact has an important bearing on question of the weight to be attached to these pieces of evidence.

6. I now come to the third point, which is really the material point in this case, and the question is as to whether on the evidence as it stands the trying Magistrate was right in convicting the appellant. The entire evidence has been placed before me, and I agree with Mr. Bhattacharyya, that the evidence of the defence witnesses is not very convincing. Mr. Muknerji also has not laid much stress upon it. The prosecution builds its case upon the betting slips, which were found on search, and which would be evidence under Section 47, to prove that the appellant used the place as a common gaming house. If as Mr. Mukerji suggests, these slips were quite innocuous, and the appellant had really taken these small sums from the other persons, as their agent for the purpose of laying bets on their behalf at the Races, and he had no advantage or profits to derive for himself, there is nothing which prevented him from giving this explanation at the time of the trial. On the other hand, he denied all knowledge of these papers, and said that he did not know where these papers came from. When there is no explanation, or evidence to the contrary, the slips would certainly go in as evidence to prove that the appellant used the place as a common gaming house, and the question narrows down to this whether on these slips alone, the Magistrate should have convicted him.

7. The only thing suggested by the appellant in his explanation, was that these slips did not belong to him, and must have been brought from outside. Mr. Mukerji lays great stress here on the fact that all these slips were of an earlier date, and consequently valueless. If these slips were really planted from outside, or manufactured to incriminate the appellant and his associates, they would not certainly bear the date 29th August 1936. The date rather shows that the papers

are genuine and can be relied upon. In the absence of any other circumstances which might induce me to discredit these papers, I am unable to hold that the Magistrate was wrong in convicting the appellant, upon these betting slips only. I therefore uphold the conviction of the appellant under Section 44, Police Act. As in spite of the discovery of these instruments of gaming, the appellant and his Co-accused were all acquitted of the charge under Section 45, Police Act, I think that the ends of justice will be sufficiently met by reducing the fine imposed upon him to Rs. 100 only. Subject to this variation in the sentence, the appeal is dismissed.

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