

CROWN CASES
DECIDED IN THE
ORIGINAL AND APPELLATE JURISDICTIONS
OF THE
HIGH COURT OF BOMBAY.

REG. v. NA'NA' MOROJI.

1871.
Jan. 16.

In re Mádhav Morár et al.

Gaming—Found Gaming—Warrant—Certiorari—Act XIII. of 1856, Secs. 57, 58, and 111—Act XLVIII. of 1860, Sec. 15.

A warrant issued under Sec. 58 of Act XIII. of 1856 should be addressed to some one or more Inspectors, and not generally to "all Constables and Peace Officers." Where a warrant in the latter form was executed under the direction of an Inspector, it was held that the error in the form of the warrant was merely an error of procedure, and did not affect the validity of the conviction, under Sec. 57, of persons apprehended in pursuance of the warrant so executed.

Held, on the evidence, that there was sufficient to show that the house in which the prisoners were arrested was a common gaming-house.

A person is "found gaming," within the meaning of Sec. 57 of Act XIII. of 1856, who, having been *seen* gaming by an Inspector of Police, is shortly afterwards, in a place adjoining the room in which he was seen gaming, apprehended by Police Constables acting under the direction of such Inspector.

ON the 13th of January 1871, *M'Culloch*, before GREEN, J., moved for and obtained a rule *nisi* for the issue of a writ of *certiorari* directed to Náná Moroji, Esquire, Officiating Third Magistrate of Police, for the removal of the proceedings taken before him on the 11th of January 1871, in the matter of a complaint made against the prisoners, Mádhav Morár and twelve others, and the convictions of the said prisoners, and the order on two of the said prisoners, C. P. Muhammad and Tár Sulémán, to pay a fine of Rs. 100 each.

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The rule was granted upon an affidavit of Mr. Khandarav Moroji, stating that the prisoners were tried before Náná Moroji, Esquire, on the 27th of December 1870 and the 5th and 11th of January 1871, on a charge of "being found in a common gaming-house gaming with dice and money on the 27th day of December 1870, under Sec. 57 of Act XIII. of 1856," and were, on the 11th of January 1871, convicted of the said offence, and sentenced (with the exception of C. P. Muhammad and Tár Sulemán) to one month's imprisonment in the County Jail with hard labour, and that C. P. Muhammad and Tár Sulemán were sentenced to pay a fine of Rs. 100 each, or in default to suffer one month's imprisonment with hard labour, and were unable to pay the fine.

The affidavit then verified the evidence given before the Magistrate and the warrants put in at the trial.

William Price, an Inspector of Police, had, at the trial, produced four warrants, bearing different dates, but all in a similar form, and deposed that he arrested the prisoners under the one bearing date August 1870. It was in the following form:—

"To all Constables and Peace Officers for the Town and Island of Bombay.

"Town and Island of Bombay. Whereas complaint has this day been made upon solemn affirmation before me, Frank H. Souter, Esquire, Commissioner of Police for the Town and Island of Bombay, by Háji Hassan against Háji A'dam, Háji Gháchi, and Pitámbar Umarsi, for keeping a common gaming-house :

"These are, therefore, in Her Majesty's name to charge and command you to enter, with such assistance as may be found necessary, by night and by day, and by force if necessary, the said common gaming-house, situate at Bhendi Bazár, kept by the said Háji A'dam, Háji Gháchi, and Pitámbar Umarsi, and to take them into custody, and all persons whom you may find therein, and to seize all instruments of gaming and all moneys and securities for money found therein, and to search all parts of the house, room, or place which you shall have so entered where you have reason to believe that any instruments of gaming are concealed, and to search the persons of those you may so take into custody, and to seize and take possession of all cards, dice, counters, and other instruments of gaming which you shall find upon such search.

"And you are hereby further charged and commanded to bring before one of the Magistrates of Police for the said Town and Island all such

persons so apprehended, that they may answer the premises and be further dealt with according to law. Herein fail not, and for your so doing this shall be your warrant.

“ Given under hand and seal this day of August 1870.

(Signed) “ F. H. SOUTER,

“ Commissioner of Police.”

William Price had further deposed that, in pursuance of the above warrant, “ he went to a house in Bhenđi Bazár, with about fifteen other police officers, between twelve and one on the morning of the 27th of December 1870, and saw the prisoners and other persons in a room on the fifth story. He looked through a barred window from an adjoining room. He knocked the bars out with a hammer. By the time he got in, all the persons that had been in the room had got on the neighbouring roofs. Other police officers had got in before him from other directions. Most of the prisoners were arrested on the tiles. When he first looked through, the prisoners were playing with dice, cards, and money. The prisoners were searched, and moneys were found on their persons. The house belonged to Háji Gháchi. It had to his knowledge been used for a long time for gambling purposes. Warrants had been repeatedly issued for seizing gamblers in that house. He had seen all the prisoners before the above occasion so as to be able to recognise them. He looked through the window for about thirty seconds. No one was arrested in the room. He could not say to whom the warrant was in particular given by the Commissioner. At the time of the arrest it was in the possession of Mr. Hallums, a Superintendent of Police.”

Ratanji Jivanji had deposed that he had been in the house in question gambling from 10 P.M. of the 26th of December to 1 A.M. of the 27th, and that all the prisoners were there at the same time gambling. He sent and gave information to William Price. The house belonged to Háji Gháchi.

James Cumming, an Inspector of Police, had deposed to arresting one of the prisoners on the staircase of the house in question, and two others as they were getting out of a window in the gaming-room. He had to break open a door to

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get upstairs. He found, in the room in which the prisoners had been gambling, cards and dice and money scattered about the floor; also several pairs of shoes and several *pagdis*, which were subsequently claimed by the prisoners.

Mir Abdul Ali, an Inspector of Police, had stated "that he had known the house for four or five years, and that he knew the house had been used for gambling purposes, that the proprietor's name was Haji Gháchi, and that the upper story of the house had been used for gaming; people were living in the other parts." In cross-examination he had said that from inquiries made he stated that the house was used for gaming purposes. The rest of the prisoners were arrested, some on the tiles of the house in dispute and neighbouring houses, and some concealed in neighbouring rooms.

M'Culloch contended (I.) that the warrant under which the prisoners had been apprehended was illegal, the provisions of Act XIII. of 1856, Sec. 58, not having been complied with, as that section requires the warrant to be issued to some Inspector or superior officer of police, who should be specified, and does not authorise a warrant addressed to "all Constables" (see Sec. 25); that, the warrant being illegal, the arrest and conviction founded upon it were also illegal. (II.) That Sec. 57 of Act XIII. of 1856 contemplates that the "finding" of persons gaming must be a "finding" of them by an Inspector duly authorised to find, under Sec. 58 of that Act; that a finding by one of the public, or by an inferior officer of police, was not contemplated by the Act; that (Bombay) Act III. of 1866 showed that the meaning of Sec. 57 contended for was its true meaning; and that, Price not having been duly authorised to act under the provisions of Sec. 58, the prisoners had not been found gaming within the meaning of Sec. 57. (III.) That as a matter of fact the prisoners were not "found gaming." "Found gaming" is by no means equivalent to "proved to have been gaming," nor to "seen gaming." The Act evidently contemplated that the gamblers should be taken "red-handed." If that were not so, there would be no limit to the vexation and annoyance that persons might be sub-

jected to. If the Legislature intended that Sec. 57 should embrace a case like the present, they would have used words such as are used in Sec. 86: "A Police officer may arrest without a warrant any person committing *in his view*," &c. (IV.) That there was no evidence of this being a gaming-house. A gaming-house must be limited to mean a house open to the public for gaming purposes. Sec. 15 of Act XLVIII. of 1860 will, no doubt, be relied on, but there is no evidence of information on oath having been given to the Commissioner of Police, and the warrant of itself is no proof of the truth of the facts recited in it.

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Ferguson, on the 14th of January, showed cause against the rule. He objected that no ground for a *certiorari* was suggested on the affidavit: Paley on Convictions, p. 412 (5th ed.); *Reg. v. Eaton (a)*. [GREEN, J.:—Surely grounds of law need not appear on affidavit. Here the affidavit verifies the evidence, and the grounds on which the rule was granted were purely legal grounds arising out of that evidence.]* A conviction can only be quashed on the merits, and not for error of form or procedure: Act XIII. of 1856, Sec. 111. The objections raised to the conviction are formal objections, and do not go to the merits. No warrant was, in fact, necessary: Sec. 86. If, however, it be said that the police who made the arrests were not the police in whose view the offence was committed, then I say the warrants are in substantial compliance with Sec. 58, but in any view the arrest forms no portion of the conviction. The prisoners were "found gaming." The construction of these words contended for on the other side would completely defeat the object of the Act. If under Sec. 15 of Act XLVIII. of 1860 the warrant does not show that this was a common gaming-house, there is quite sufficient evidence of that fact upon the depositions.

Cur. adv. vult.

(a) 2 Term Rep. 89.

* Mr. Ferguson also objected that six days' notice of the application should have been given to the prosecution, under 13 Geo. II., c. 18, s. 5, in analogy with the English practice, but waived his right to insist upon it.

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16th January. GREEN, J.:—In this matter an application has been made to this court to remove by *certiorari*, for the purpose of quashing, from the court of Náná Moroji, Esquire, Third Magistrate of Police in Bombay, certain proceedings against one Mádhav Morár and twelve others. These persons were, on the 27th of December 1870, charged before that Magistrate, and on the 11th of January convicted by him, of an offence under Sec. 58 of the Police Act (XIII. of 1856), namely, being found in a common gaming-house, gaming with dice and money, and were by him sentenced to punishments not exceeding those provided by that section. On the 13th of January an application was made to this court (grounded on an affidavit of Mr. Khandráv Moroji, solicitor), by Mr. M'Culloch on behalf of the prisoners, for a writ of *certiorari* to remove the proceedings, and a rule was granted calling on the Magistrate to show cause why such writ should not issue, which by arrangement was argued the following day, Mr. Ferguson appearing to show cause on behalf of the Magistrate. The right of a defendant to this writ is not *ex debito justitiæ*, but the issue of it is discretionary with the court, and, the matter having been fully discussed on both sides on the rule to show cause, the court is in a position to judge whether there is any probable ground for supposing that injustice has been done before the Magistrate, so as to make the present a proper case for removing the conviction in order to have an opportunity of reviewing it. The objections taken to the validity of the conviction in the present case were as follows:—1st, that the warrant of the Commissioner of Police, under which the police officers acted in entering the house or place in question, and in arresting the accused, was irregular in being addressed to all constables and peace officers, whereas by Sec. 58 of Act XIII. of 1856 the Commissioner of Police can give authority only to an Inspector or superior officer of police; and 2nd, that, supposing the facts deposed to before the Magistrate to be true, as alleged, they do not constitute the offence described in Sec. 57 of the Act in question—of being found in a house, room, or place, kept or used for the purpose of gaming being

carried on therein, playing or gaming with cards, dice, counters, money, or other instruments of gaming—inasmuch as it is not sufficient for a person to be seen gaming in such a house, room, or place, but he must be found there doing so by an Inspector or superior officer of police duly authorised and acting under such authority. With regard to the first objection, I am of opinion that, as a matter of form, a warrant issued under Sec. 58 should be addressed, not as in the present case to all constables and peace officers, but to some one or more Inspectors or superior officers of police, or, at any rate, to Inspectors or superior officers of police generally. But this error, if error there be, is, in my opinion, one of form only, as the warrant appears to have been in fact executed by an Inspector of police with the assistance of other Inspectors and constables acting in conjunction with him. Besides this, any irregularity, if irregularity there was, in the warrant, or execution of the warrant, to enter and arrest, would not, in my opinion, affect the validity of the conviction by the Magistrate for the purpose of this application, having regard to Sec. 111 of the same Act, which provides that no conviction, order, or judgment of a Magistrate shall be quashed for error of form or procedure, but only on the merits. With regard to the second objection, it was contended that there was no evidence that the house or room in question was used as a common gaming-house. I agree that the recitals in the warrant to the effect that complaint had been made on solemn affirmation before the Commissioner of Police against one Háji A'dam, Háji Gháchi, and Pitámbar Umarsi for keeping a common gaming-house, namely, the place in question here, are not in themselves evidence that such complaint had been made, or that the house or place was so used, and that Act XLVIII. of 1860, Sec. 15 (which is an Act to amend Act XIII. of 1856), providing what shall be deemed *primâ facie* evidence of the use of a house, room, or place as a common gaming-house, does not apply to the present case. But I am of opinion that the evidence of Mr. Price, the Inspector of Police, of Ratanji Jivanji, and of Mir Abdul Alí, also an Inspector of Police, being believed by the Magistrate, was amply sufficient to

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warrant the conclusion that the place in question was used as a common gaming-house. Then it is contended that the prisoners were not "found" gaming in a common gaming-house. The evidence is that Inspector Price, looking through a window, saw them in the place in question playing with dice, cards, and money. Only two of them, it appears, were arrested in the room itself, the others being arrested elsewhere, and, with the exception of one of them, not in that house at all, but in closely adjoining places, and none of them were actually arrested by the officer who saw the gaming going on. But, in my opinion, the proper construction to be put on this section does not require that the accused should be actually arrested in the place where the gaming has been going on. It is not necessary to go so far as to say that the section would apply to a case in which some person has seen others gaming in a common gaming-house, and then goes and obtains a warrant and prefers the charge. But in the present case a warrant had been issued on sworn information, and the seeing of the gaming going on by the Inspector, and the arrest of those who were engaged in it, must, I think, be considered to form part of one transaction, and as a connected series of facts constituting the finding; and it would, in my opinion, be an unreasonable construction of the Act to hold that persons are not found gaming when they are seen doing so by an Inspector of Police, and are forthwith arrested by police officers assisting the Inspector who so saw them, though the arrest may not have taken place in the very house or room where the gaming was seen to take place. Being of opinion that the objections taken to this conviction—so far, at any rate, as they concern the merits of the case—ought not to prevail, I must allow the cause shown and discharge the rule.*

Attorney for the prisoners: *Khānderāv Moroji*.

Attorney for the Magistrate: *R. V. Hearn*, Government Solicitor.

* The rule was discharged with costs upon the authority of an unreported case decided by Couch, C. J.