

down by the Privy Council in the recent case of *Malkarjun v. Narhari* (1), where it was said that "strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do." Here I think the purchaser, who was a stranger to the suit, was justified in believing that the Court had authority to attach and sell this property.

For these reasons I think that the order of the lower appellate Court was wrong and that it must be reversed and the decree of the Subordinate Judge restored with costs throughout.

Decree reversed.

(1) (1900) 25 Bom. 337 at p. 347.

CRIMINAL APPELLATE.

*Before Mr. Justice Chandavarkar and Mr. Justice Jacob; on reference,
before Mr. Justice Aston.*

EMPEROR v. ALLOOMIYA HUSAN.*

Gambling—Bombay Prevention of Gambling Act (Bombay Act IV of 1887), sections 4, 5, 6, 7—Keeping a common gaming house—Applicability of presumption under section 7 to cases under section 4—Warrant under section 6—Delay in executing the warrant—Previous conviction—Criminal Procedure Code (Act V of 1898), section 343—Evidence Act (Act I of 1872), sections 11, 54.

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On the 19th May, 1903, a warrant was issued by the Commissioner of Police at Bombay, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), for the arrest of accused 1. In execution of this warrant, when, on the 7th June, 1903, the police entered the room of accused 1, no actual play was seen by the raiding party, but there were found playing cards on the ground, and ten persons, including accused 1, were found sitting in a circle. Upon these facts the Magistrate convicted the accused of keeping a common gaming house, an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), by applying to him the presumption created by section 7 of the Act; and taking into consideration the previous convictions of the accused under the Act, he sentenced him to pay a fine of Rs. 500, the maximum amount of fine allowed by the section. On appeal to the High Court,

Held, by Chandavarkar and Aston, JJ. (Jacob, J., dissenting), affirming the conviction, (1) that the presumption created by section 7 of the Bombay

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Prevention of Gambling Act (Bombay Act IV of 1887) could be applied to cases falling under section 5 as well as to those falling within the purview of section 4 of the Act.

(2) That the applicability of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) was affected by the fact that a considerable interval had elapsed between the issue of a warrant under section 6 of the Act and the execution thereof.

(3) That the evidence that the accused had been previously convicted of the same offence was admissible to show guilty knowledge or intention.

Held, by Jacob, J., dissenting, (1) that the presumption created by section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) is sufficient for the purposes of section 5 of the Act. It is also sufficient for the purposes of section 4 (a) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of showing that the house was so kept or used by any specified person.

(2) That in a trial for an offence under section 4 (a) of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), the evidence that the accused was previously convicted of a similar offence cannot be admitted either under sections 14, 15 or 54 of the Evidence Act (I of 1872).

(3) That the question whether the delay, between the issue of a warrant under section 6 of the Act and its execution, has been reasonable or otherwise is one which must be decided with reference to the circumstances of each case.

APPEAL from the conviction and sentence recorded by Karsandas Chhabildas, Third Presidency Magistrate of Bombay.

On the 19th May, 1903, the Commissioner of Police at Bombay issued, under section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), a warrant for the arrest of Alloomiya Husan, accused 1.

In execution of this warrant, the police entered the room of accused 1 on the 7th June, 1903, where a pack of cards was found and ten persons, including accused 1, were found seated in a circle.

The accused 1 was thereupon charged under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) with keeping a common gaming house, and accused 2—10 under section 5 of the Act with being found gaming therein with cards and money.

The Magistrate convicted them and sentenced them to pay fines varying in amount. The following is a material portion of his judgment.

Three witnesses have been examined by prosecution, *viz.*, Inspector Peter Sullivan, Sub-Inspector Roberts and Sub-Inspector Finch. After going through their evidence I am fully convinced that the statements of all the accused except No. 9 are unworthy of any belief whatever and that all the accused, except No. 9, were actually gaming with cards and money when they entered No. 1's room armed with a warrant from the Commissioner of Police on the 7th instant at 3 P.M. It is proved to my satisfaction that when they entered the room, all the accused except No. 9 were actually playing with cards and money as they were seated in a circle; that on seeing Inspector Sullivan entering there was a general confusion and rush for windows and doors; that accused No. 10 threw out of the window a cap which was lying on the ground; that No. 8 jumped on a chair and began to read the Kurán, while No. 7 quietly sat near him and that No. 9 began to work in a bath room. The evidence of Inspector Sullivan is fully borne out by the evidence of Sub-Inspectors Roberts and Finch, from whose evidence it is also proved that the packs of cards, Exhibits B and C, were found in No. 1's room—Exhibit B on the floor scattered about and Exhibit C underneath a mat—and that Rs. 1-3-0 were found lying on the ground. It is also proved that Sub-Inspector Finch and Roberts had to go to the door on the other side in order to prevent the accused escaping. One witness has been examined on behalf of the accused by name Abdul Rehman Abdul Rasool, a relation of accused No. 1. He was not present at the time accused were arrested, but he tries to support the statements of accused Nos. 1—4 and 5 and 8 showing that No. 8 is a preacher of Kurán, that No. 1 was never seen gambling, and that some money was due to Nos. 4 and 5. In view of the evidence for the prosecution which is quite clear and trustworthy, and which I do not see any reason to disbelieve, I am not prepared to hold on the evidence of this witness alone, who is related to No. 1 closely, that Nos. 4 and 5 and 8 were in No. 1's room for the innocent purposes they suggest and that the three witnesses for the prosecution have perjured themselves. I do not believe his evidence at all and on the evidence for the prosecution find that accused No. 1, being the occupier of the room, used it for the purpose of a common gaming house, and that Nos. 2, 3, 4, 5, 6, 7, 8 and 10 were found gaming with cards and money in that room. I accordingly convict accused No. 1 under section 4 of Act IV of 1887 and accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10 under section 5 of the said Act. With regard to accused No. 9, I am inclined to believe that he was a mere looker on temporarily. For the evidence shows that his tools were with him and that he began to work after the Police came. It is doubtful whether he was in No. 1's room purely for the purpose of gaming. I therefore give him the benefit of the doubt and order him to be acquitted. Now with regard to the suggestion made by Mr. Kazi Kabirudin that the warrant issued by the Commissioner of Police is bad, I must hold that the warrant is perfectly legal. It has been executed by an officer to whom it was addressed and has been issued by the Commissioner of Police who is authorized, under section 6 of the Gambling Act, to issue it. I fail to see any

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illegality in it. With regard to the point that there is no evidence to show that accused No. 1 used this room as a common gaming house, as there is nothing to show that the room was used for the profit of the person occupying or using such room, I think section 7 of the Gaming Act is quite clear. Section 7 says when cards, dice, counters or other instruments of gaming used in playing any game, &c., are found in a house or room entered under warrant issued under section 6, it shall be evidence, until the contrary is shown, that such house or room is used as a common gaming house and that the persons found therein were present for the purpose of gaming, although no play was seen by the Police officer. In this case it is proved that a legal warrant was issued under section 6 by the Commissioner of Police. It is also proved that cards and money were found in a room which is proved to be in No. 1's occupation and which was entered under the authority of that warrant. These two circumstances are, in my opinion, evidence under section 7 of that room being used as a common gaming house and that the persons present therein were there for the purpose of gaming until the contrary is made to appear. As it has not been made to appear to my satisfaction that the accused were in that room for the innocent purposes mentioned by them and as cards and money were found in that room, I must convict accused No. 1 under section 4 and accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10 under section 5 of the Gaming Act. With regard to the punishment to be inflicted on the accused, I think No. 1 deserves to be dealt with severely as he is admittedly a confirmed gambler. He has been convicted twice under section 4 on a charge of keeping a common gaming house and thrice under section 5 on a charge of gaming. In his case a deterrent sentence is necessary. I sentence accused No. 1 to pay a fine of rupees five hundred, in default three weeks' rigorous imprisonment. With regard to accused Nos. 2, 3, 4, 5, 6, 7, 8 and 10, I sentence each of them to pay a fine of rupees seventy-five each, in default one week's rigorous imprisonment.

The accused 1 appealed to the High Court.

The following are the sections of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), referred to in the case :—

4. Whoever:

(a) being the owner or occupier or having the use of any house, room, or place, opens, keeps or uses the same for the purpose of a common gaming house;

(b) being the owner or occupier of any such house, room or place, knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purpose aforesaid;

(c) has the care or management of, or in any manner assists in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid

(7) advances or furnishes money for the purpose of gaming with persons frequenting any such house, room, or place, shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to three months.

5. Whoever is found in any common gaming house, playing or gaming with cards, dice, counters or other instruments of gaming, or is found there present for the purpose of gaming, whether by playing for any money, wager, stake or otherwise shall be punished with fine which may extend to two hundred rupees, or with imprisonment which may extend to one month.

Any person found in any common gaming house during any gaming or playing therein, shall be presumed, until the contrary be made to appear, to have been there for the purpose of gaming.

6. It shall be lawful for the Commissioner of Police in the City of Bombay, and elsewhere for any Magistrate of the First Class or any District Superintendent of Police or for any Assistant Superintendent empowered by Government in this behalf, upon any complaint made before him on oath that there is reason to suspect any house, room, or place to be used as a common gaming house, and upon satisfying himself after such enquiry as he may think necessary that there are good grounds for such suspicion to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any Inspector, or other superior officer of Police of not less rank than a Chief Constable—

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any such house, room, or place; and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not; and

(c) to seize all instruments of gaming, and all moneys and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein; and

(d) to search all parts of the house, room or place, which he shall have so entered, when he shall have reason to believe, that any instruments of gaming are concealed therein, and also the persons of those whom he shall so find therein or take into custody, and to seize and take possession of all instruments of gaming found upon such search.

7. When any cards, dice, gaming table, counters, cloth, board or other instruments of gaming used in playing any game, not being a game of mere skill, are found in any house, room, or place entered under warrant issued under the provisions of the last preceding section or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room, or place is used as

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a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police officer, or by any person acting under the authority of either of them.

S. B. Dady Burjor for the accused 1.

Scott (Advocate General), with the Public Prosecutor, for the Crown.

CHANDAVARKAR, J.:—The appellant, Alloomiya Husan, has been convicted by the Third Presidency Magistrate, Bombay, of the offence of keeping a common gaming house under section 4 of Bombay Act IV of 1887. Three grounds have been urged before us in support of this appeal against the conviction. The first is that the presumption of guilt created by section 7 of the Act has been wrongly applied to the offence of keeping a common gaming house under section 4. It is contended that that presumption applies and was intended by the Legislature to apply only in the case of the offence of gaming in a common gaming house, which is dealt with in section 5 of the Act. There is nothing in the language of section 7 which lends support to the narrow construction which we are asked to put upon it. On the other hand, the language is wide enough to cover the case of an offence of keeping or using a common gaming house.

The second ground of appeal urged before us is that the learned Presidency Magistrate admitted the evidence of certain previous convictions against the appellant in proof of the offence of which he has been convicted. That evidence is to the effect that the appellant was previously convicted twice under section 4 of Bombay Act IV of 1887 and thrice under section 5 of the Act. The learned Magistrate has drawn from this evidence the inference that the appellant is a "confirmed gambler" and that he, therefore, "deserves to be dealt with severely." If the object of proving the previous convictions was merely for the purposes of the punishment to be awarded after conviction, the Magistrate ought not to have allowed that evidence to go in before convicting the appellant; but even in that case there is no law which provides that proof of previous convictions can be given to justify enhanced punishment under Bombay Act IV of 1887. Section 75 of the Indian Penal Code, which deals with the punishment of

persons convicted after a previous conviction, is confined to offences punishable under Chapter XII or XVII of that Code. Nor could the proof of previous convictions be given against the appellant to show that he bore a bad character. Section 54 of the Evidence Act prohibits the admission of such evidence unless evidence has been given that the accused person has a good character, and the only exception allowed to that is where the bad character of the person is itself a fact in issue or relevant. The learned Advocate General has sought to bring the admission of the evidence in question within that exception by contending that, as the question at issue in this case was whether the appellant kept a common gaming house, the evidence was admissible under either section 14 or 15 of the Evidence Act. Now, however the law stood before the amendment of the Evidence Act in 1891, such evidence is made clearly admissible by the amendment of the Act. See Explanation 2 to section 14 of the Evidence Act. According to it, previous convictions become relevant within the meaning of that section when the existence of any state of mind, or body, or bodily feeling, is in issue or relevant. For instance, where a person was charged with the offence of belonging to a gang of persons associated for the purpose of *habitually* committing dacoity, it was held by the Calcutta High Court that proof of previous conviction was admissible under section 14 of the Evidence Act, having regard to the character of the offence attributed to the accused: *Empress v. Naba Kumar Patnaik*.⁽¹⁾ In the present case, the offence charged against the appellant was one of keeping a common gaming house. Both in the charge-sheet and in the Magistrate's judgment it is stated generally that he was accused of the offence of keeping a common gaming house under section 4 of the Act. That section divides the offence into four classes, and all are described in the marginal note as "keeping a common gaming house." The first class has reference to the owner or occupier of a house, room, or place, who uses or keeps it as a common gaming house. Now, the user of a place or the keeping of it for a particular purpose necessarily connotes the existence of a state of mind. They imply a purpose showing intention and knowledge, intention to use the place for that

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(1) (1897) 1 C. W. N. 146.

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purpose and knowledge that it is so used. To keep a common gaming house is to hold the house and manage it with the intention of using it as such *habitually*. In the words of Lord Hobhouse in *Powell v. Kempton Park Race-course Company*,⁽¹⁾ "the phrase *use for a purpose* necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand." "Kept" and "used," he says, are expressions necessarily or very strongly importing an habitual or repeated use of the thing for the purpose. So also in the second class of the offence. According to it, a person commits the offence of keeping a common gaming house, if, being the owner or occupier of it, he *knowingly or wilfully* permits the same to be opened, occupied, kept, or used by any other person as aforesaid; or, in the third class, if he advances or furnishes money *for the purpose* of gaming with persons frequenting any such house. These are ingredients of the offence which render it necessary to give proof of his *knowledge* or intention and habitual course of dealing with the house, room, or place so far as they are relevant to the proof of the offence. I think, therefore, that, having regard to the character of the offence charged against the appellant *in respect to this particular room*, the evidence was rightly admitted under section 14 of the Evidence Act.

The appellant was convicted by the Magistrate generally under section 4, and the evidence in the case shows that there was gambling going on when the Police entered, and the appellant who was the occupier of the room was one of the gamblers. This evidence, with the evidence of previous convictions, consisting in his own admissions, shows that he used and kept it as a common gaming house both under the first and the second class of the offences in section 4, *i. e.* (a) and (b).

The third and last ground of appeal is that the execution of the warrant which was issued by the Commissioner of Police under section 6 of Bombay Act IV of 1887, and under which the Police entered the appellant's house and conducted a search, was illegal, because, it is contended, the warrant was executed not immediately after it had been issued, but several days after. The date of the warrant is 19th May, 1903, and it was executed on the

(1) (1899) A. C. 143 at p. 172.

7th June, 1903. Section 6 of the Act does not say that the warrant should be executed immediately after its issue, nor does it prescribe any period during which it must be taken to be in force. But the argument advanced by the appellant's pleader is that it could not have been the intention of the Legislature to keep a warrant of this kind in force for an indefinite period and authorise those to whom it is issued to let it lie in their pockets as long as they like and execute it after the lapse of considerable time: But when the Legislature has not prescribed any period limiting the time during which it is to be in force, the presumption is that it retains its validity until it is executed. In *Dickenson v. Brown and others*⁽¹⁾ Lord Kenyon said that the warrant of a Magistrate was not returnable at any particular time, but continued in force until it was fully executed and obeyed, though it were seven years. In *Mayhew v. Parker*⁽²⁾ the same learned Judge held that a warrant to arrest a person that he might be bound to appear at the next Session of *Oyer and Terminer* might be executed at any time. Some discretion must be given to the officer executing a warrant, and whether that discretion is exercised properly and within a reasonable time or not is a question which must depend on the circumstances of each case. But the warrant itself does not become illegal merely because it is executed not immediately after its issue but some days after that. There may be, under certain circumstances, illegality attending the execution of the warrant and rendering the officer executing it liable on account of such illegal execution; and yet the warrant itself may be in force, no period of time being expressly prescribed for its execution. It was said that the language of section 6 of the Act showed that the warrant must be executed immediately after its issue, and the case was put before us in this way in support of that. The persons who occupied the place when the warrant was issued might leave and others might come and live there, and it cannot have been the intention of the Legislature that the warrant should be executed when there has been a change of that kind. But it appears to me that the language of section 6 supports the view that the Legislature did not intend to restrict the authority executing the warrant to any limit of time. The warrant has to

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(1) (1794) 1 Peck, N. P. 307.

(2) (1793) 8 T. R. 110.

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be issued when a complaint is made on oath that there is reason to suspect that "any house, room, or place" is used as a common gaming house. The attack aimed at primarily is against a *particular locality* as distinguished from the persons who live in or frequent it. It is because a house, room, or place is suspected to be a rendezvous of gamblers that the Legislature has authorized the issue of a warrant, the object being to prevent any house becoming the resort of gamblers. The gamblers are reached through the house, room, or place, and it is the house, room, or place which is to be entered and searched. The complaint in fact on the basis of which the warrant goes is against the house, room, or place, and its inmates and its contents come in as parts of it. That being the nature of the complaint and the house, room, or place standing where it did, it may be the Legislature has not prescribed any limit of time for the execution of the warrant, but left it to the discretion of the officer issuing it. Persons who live in such a place may change from day to day or from hour to hour, as those who gamble there may change. But the house, room, or place being in itself *prima facie* proved to the satisfaction of the authority issuing the warrant under section 6 of the Act to be a *common gaming house*, it continues to be so for the purposes of the Act and may be searched within a reasonable period so long as the warrant, not being executed, is in force. Again, the object being to apprehend the gamblers and seize the gaming instruments, it may be necessary sometimes that the executing officer should bide his time to make the search. Having regard to all these circumstances I think that the Legislature has deliberately omitted to provide for any period of time for the execution of the warrant.

The only flaw in the warrant urged before us was that because the search under it was made some days after its issue, we must decline to draw under section 7 the presumption against the appellant that the place was used as a common gaming house. For the reasons I have given neither the warrant nor the search under it is vitiated by the fact that the search was made several days after it had issued. But assuming that the flaw pointed out is of such a character as to vitiate the search and make the presumption created by section 7 inapplicable to the case, what

follows? This only that the prosecution must prove that the place searched by the Police was used as a common gaming house. It only makes a difference as to on whom the *onus* of proof in the first instance lies. Here the evidence of witnesses for the prosecution proves that gambling was going on when the Police entered and that packs of card and money were found in the room. The appellant and the other persons who were accused with him were caught almost red-handed. That evidence with the evidence of previous convictions against the appellant is sufficient, in my opinion, as it was sufficient in the opinion of the Magistrate who saw and heard the witnesses and examined the accused, to prove that the appellant's course of dealing with the room in which he has lived for the last 18 or 19 years has been to treat it as a house kept for gaming. The discrepancies pointed out in the evidence by the appellant's pleader are too trivial to affect the weight of it. I would, therefore, confirm the conviction and sentence under section 4 and reject this appeal.

JACOB, J.—I have had the advantage of perusing my learned colleague's judgment in this appeal, and it is with much regret that I feel myself unable to concur in some of the conclusions at which he has arrived, materially affecting the decision of the case.

The first objection taken for the appellant was that the *presumption* (I use this word for want of a better concise term, in accordance with common practice, though I am doubtful whether the term accurately connotes the conclusions of the section) created by section 7 of Bombay Act IV of 1887 was applicable only in connection with an offence alleged to fall under section 5, and not in connection with one under section 4 of the Act. It is, I think, obvious that broadly stated as this contention was, it is untenable. I am not sure, however, that the learned pleader, who appeared for the appellant, was quite successful in explaining clearly the point of his objection.

Now it is clear that section 7 does provide for a "presumption" under certain circumstances that the house, room or place in question is used as a common gaming house. That is sufficient for the purposes of section 5. It is also sufficient for the purposes of section 4 (a) so far as regards the fact that the house, &c., is so used, but it is not alone sufficient for the purpose of

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showing that the house was so kept or used by any specified person, and in certain cases this would be certainly an important distinction in favour of a person charged with an offence under section 4 (a).

It is necessary in order to comply with the provisions of section 6 of the Act that the authority issuing the warrant should be satisfied that there are good grounds for suspecting the house, &c., to be used as a common gaming house, that is (under section 3), that it is kept or used for the profit or gain of the owner or occupant, &c., and before he can be so satisfied, it would seem to be necessary *ex hypothesi* that he should have what he deems to be reliable information as to the enjoyment, or at least as to matters involving reason to suspect the enjoyment, of such profit or gain by some specified individual as such owner or occupant. In the present case the warrant which is on the record indicates that the house was kept by the appellant. I am of opinion that this circumstance alone would not have justified any presumption against the accused, if he had disputed the fact that he was the owner or occupant of the house. The burden of proving this fact, which it is necessary to prove for a conviction under section 4 of the Act, is not removed from the prosecution by the provisions of section 7 and the entry of his name in the warrant would so far be no evidence of this fact against the accused.

In the present case, however, this objection of fact was not taken before the Magistrate. As the record before us stands it is undisputed that the appellant was the occupant of the house, and to him, as such, the "presumption" that the house was used as a common gaming house attaches. I concur therefore in holding that on the facts of this case the first objection is untenable.

The second objection has reference to the admission, not indeed of evidence, but of statements elicited from the appellant as to previous convictions for offences under the same Act. I concur in the opinion (see *Yasin v. King Emperor* ⁽¹⁾) that the examination of an accused person in respect of such previous convictions which it may be necessary or permissible for the

(1) (1901) 28 Cal. 630.

prosecution to prove is without legal warrant or justification, having regard to the provisions of section 342 of the Criminal Procedure Code. For the purposes of the present argument, however, these statements must be regarded as evidence, and the question which arises is whether evidence of such previous convictions was relevant in the present case.

It is not necessary I think to consider in this case whether such evidence would have been admissible after conviction for the purpose of affecting the sentence to be passed. It seems probable on the construction of section 54 of the Evidence Act, especially in view of the circumstance that in the matter of civil suits a somewhat analogous condition of affairs is dealt with in section 55, that such evidence tendered even for such a limited purpose must be excluded. The question however is not free from doubt (see *Queen v. Shiboo Mundle*⁽¹⁾ and *Roshun Doosadh v. Empress*,⁽²⁾) and whether this is likely to have been the real intention of the Legislature in view of the deliberate adoption of the principle expressed in section 54 of the Evidence Act prior to its amendment by Act III of 1891, and the considerations which brought about that amendment (see *Queen-Empress v. Kartick Chander Das*⁽³⁾) may well be questioned.

The provisions of section 221 of the Criminal Procedure Code have reference, it may be noted, to the competence not to the discretion of the Court in awarding punishment. However in this case a decision on this point is not at present called for as the learned Advocate General very readily admitted before us that the previous convictions must have weighed with the Magistrate in determining the question of the accused's guilt. Now as regards the admissibility of the evidence in this connection my learned colleague has applied section 14 of the Evidence Act. He regards for this purpose the case as falling possibly within the purview of section 4, clause (b) or clause (d), of the Act.

This in my opinion is going entirely beyond the record. It is true that so far as any law is quoted, the Magistrate only refers generally to section 4, which of course might include or denote clause (b) or clause (d) as well as clause (a), but the offence is clearly stated to have been that of "keeping a common gaming

(1) (1865) 3 W. R. Cr. 38.

(2) (1890) 5 Cal. 768.

(3) (1887) 14 Cal. 721.

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house," and this no less clearly falls under clause (a) and not under clause (b), much less under clause (d).

I can find nothing in the record and certainly nothing was said at the hearing before us to indicate that the offence was ever regarded as falling under clause (b) or clause (d).

It is indeed true that the general expression "keeping a common gaming house" is attached in the margin to the whole of section 4 of the Act. This seems to me however beside the present question, apart from the fact that marginal notes form no part of the legislative enactment: *Dukhi Mullah v. Halway*⁽¹⁾, *Punardeo Narain Singh v. Ram Sarup Roy*⁽²⁾. Section 242 of the Criminal Procedure Code requires that the particulars of the offence of which a person is accused shall be stated to him, and it is to my mind clear that a general reference to the inclusive terms of a marginal note appended to a section which deals with several offences made up of distinct facts, does not amount to a compliance with this requirement. The expression "keeping a common gaming house" applies in strict parlance only to the terms of clause (a), and looking to the record and to the case as presented to us, it seems to me impossible to conceive that any other offence than one falling under clause (a) was contemplated by the prosecution, or by the Magistrate, or by the accused.

In my opinion there can be no doubt that the two clauses (a) and (b), provide for perfectly distinct offences. The ingredient of the house being kept or used for profit or gain is common indeed to both, but in the case of clause (a) the direct recipient of the gain or profit is the owner or occupant himself, while under clause (b) it is some other person whom the owner or occupant has knowingly or wilfully permitted to use the house for such a purpose.

Clause (d) on the other hand deals with an entirely different state of facts. The advance of money by the appellant for such a purpose has never been alleged. Now even assuming that clause (b) could under any circumstances be applied by us in this appeal, there is no evidence or allegation that any such permission as is stipulated in this clause had been given by the appellant to any other person, or that any other person had used or kept the

(1) (1895) 23 Cal. 55.

(2) (1898) 25 Cal. 358.

house for his profit or gain. The necessary ingredient of fact, therefore, is wanting, and no question of knowledge of wilfulness, or indeed of any other state of mind, can, therefore, arise in connection therewith as affecting the appellant.

As stated above, however, I am clearly convinced that clause (b) is not applicable, and clause (a) read with the definition in section 3, which states the ingredients of the offence, is concerned solely with matter of fact, and not with any such states or conditions as are specified in section 14 of the Evidence Act.

Further, it seems clear that the relevance of such previous convictions would be excluded by the terms of explanation (1) of section 14 of the Evidence Act, read for instance with illustration (p) appended to the section.

Equally I am of opinion that section 15 of the Evidence Act is inapplicable. In connection with an offence under section 4 (a) there is no question, at any rate in the present case, of accident, or knowledge or intention. The words "*for the purpose of a common gaming house*" in this clause do not in my opinion involve any notion of intention, as distinguished from accident, but are used as introductory of the definition in section 3. The *facts* set out in that definition are what must be proved to establish the purpose.

The words of Lord Hobhouse quoted by my learned colleague from the case of *Powell v. Kempton Park Race-course Company*⁽¹⁾ do not appear to me to be in point. The expression was used in the course of a discussion bearing on the question how far the phrase "use for a purpose" is to be limited to the more proximate or direct object of the use. A presumption of deliberate choice or intention attaches more or less to nearly all criminal acts, but it would not therefore be held that intention is a necessary ingredient of such offences. It is also to be borne in mind that section 15 of the Evidence Act invites consideration of the question of intention, only as opposed to accident, and in connection with an offence under section 4 of Bombay Act IV of 1887 it appears to me that no question of accident can arise.

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(1) (1899) A. C. 143 at p. 172.

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It is clear that the evidence cannot be let in under section 54, or under section 11 of the Evidence Act. I have not thought it necessary to refer to sections 310, 511, &c., of the Criminal Procedure Code. The provisions of these sections are directed to matter of procedure, on the assumption that the evidence is admissible.

I am of opinion, therefore, that the conviction, admittedly based in material part on the fact that the accused had been previously convicted, should be set aside, and that the accused should be re-tried. The previous convictions under section 5 would not in any view of the law be admissible. With regard to the discrepancies as to the discovery of the second pack of cards, though standing alone they might not be worthy of serious consideration, the fact that only one pack was endorsed on the warrant and sent up with the charge sheet is significant, and appears to require further explanation. On the third point, *viz.*, delay in execution of the warrant, I am unable to concur entirely in the opinion expressed by Mr. Justice Chandavarkar, but my difference of opinion will not affect the decision of this case.

Section 6 of Bombay Act IV of 1887 empowers any one of certain officials, on the event of certain conditions being fulfilled, to "give authority by special warrant under his hand when in his discretion he shall think fit" to a Police Officer of not less rank than an Inspector to enter, &c. This section read with section 7 imports a departure from the principle ordinarily enforced in criminal proceedings as to the incidence of the burden of proof, and it has been frequently held that the provisions of these sections must in consequence be strictly construed. It appears to me that the justifying reason for the new departure adopted in section 7 is to be found in the fact that the proceedings contemplated by section 6 involve the exercise by an experienced official of a carefully restricted class of a discretion, which, though applied to *ex parte* and it may be interested information, is essentially judicial. Now the *giving of the authority* by the *special warrant* —(the use of such guarded terms cannot be intended to have no significance, compare section 96 of the Criminal Procedure Code) —is in the exercise of that judicial discretion applied to facts as they have been brought to the knowledge of the authorising

official. In the course of time, it may be shorter or longer, according to circumstances, a change in those facts may be brought about; the house or place may be transferred to another occupant, or the same occupant may change his habits, or may cease to take profit or gain, and the result of delay in executing the warrant may thus result in virtual delegation of the carefully guarded discretion from the issuing to the executing official, which cannot have been the intention of the Legislature.

The provisions of section 75 (2) of the Criminal Procedure Code, which embody the principle affirmed in the English cases cited by my learned colleague, are indeed by section 101 of that Code made applicable to search warrants issued under that Code, but they are not in my opinion applicable to a special warrant issued under section 6 of the Bombay Gambling Act. To hold that they are applicable would also involve the application of the provisions of section 104, Criminal Procedure Code, to such special warrants, which would probably tend to defeat their object.

On the other hand, however, it would be absurd to hold that the warrant issued under section 6 of the Gambling Act must be forthwith executed. It appears to me that the question whether the delay has been reasonable or otherwise is one which must be decided with reference to the circumstances of the case. In the present case I am not disposed to hold that the delay of 19 days was unreasonable.

Owing to the above difference of opinion the case was, under section 429 of the Criminal Procedure Code (Act V of 1898), referred to Mr. Justice Aston.

S. B. Dady Burjor for the appellant (accused 1):—We contend that the Magistrate was not right in raising a presumption of guilt on the strength of section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). The Act must be construed strictly: *Queen-Empress v. Narottamdas Motiram* ⁽¹⁾; *Queen-Empress v. Govind* ⁽²⁾; *Queen-Empress v. Kanji Bhimji* ⁽³⁾; and, hence, section 7 must be held to apply to a conviction under section 5 only, and not under section 4 of the Act.

Moreover, the admission of irrelevant evidence as regards previous convictions had weighed with the Magistrate in coming

(1) (1889) 13 Bom. 681.

(2) (1891) 16 Bom. 283.

(3) (1892) 17 Bom. 184.

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to a conviction. These previous convictions are not admissible under any provision of law, either under the Criminal Procedure Code (Act V of 1898) or the Evidence Act (I of 1872). Sections 220, 321, 310, 348 and 511 of the Criminal Procedure Code (Act V of 1898) deal with the procedure regarding such evidence and not with its admissibility or otherwise. Such evidence was formerly admissible under section 54, Evidence Act, I of 1872 (*Queen-Empress v. Kartick Chunder Das* ⁽¹⁾); but since its amendment by Act III of 1891, it is inadmissible. It is also inadmissible under section 14 or section 15 of the Evidence Act (I of 1872); for in an offence under section 4 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887), *viz.*, of keeping a common gaming house, there is no question of intention or guilty knowledge. No state of mind is relevant in this case: *Empress v. M. J. Vyapoory Moodeliar* ⁽²⁾; *Hollingham v. Heath* ⁽³⁾. As regards the dictum of Lord Hobhouse in *Powell v. Kempton Park Race-course Company* ⁽⁴⁾, on the phrase "use for the purpose," we rely on the opposite view taken by the Earl of Halsbury, L. C., in the same case at page 162.

We further contend that the warrant being a special warrant, must be executed forthwith, and not having been so executed, it must be taken to have spent itself, or in any event the presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) ought not to be raised against us. The general rules regarding ordinary warrants under the Criminal Procedure Code (Act V of 1898) do not apply to this special warrant. The delay in execution of the warrant in the present case is far from reasonable and has not been accounted for.

Scott (Advocate General), with the Public Prosecutor, for the Crown:—The presumption under section 7 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) applies equally to sections 4 and 5 of the Act. There is nothing in the Act to limit or restrict its operation.

The evidence of previous convictions was rightly admitted either under section 11 or section 14 or section 15 of the Evidence Act (I of 1872). It is necessary to prove the intention of the

(1) (1887) 14 Cal. 721.

(2) (1881) 6 Cal. 655.

(3) (1858) 27 L. J. C. P. 241.

(4) (1899) A. C. 143.

accused and guilty knowledge is an ingredient of the offence. The prosecution had to prove that the present act of the accused formed one of a series of similar acts on his part.

As regards the legality of the warrant, the Court must so construe section 6 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887) as to give some meaning to its provisions. To hold that the warrant should be executed forthwith is to make the section nugatory. Section 75 (2) of the Criminal Procedure Code (Act V of 1898) shows that a warrant shall remain in force until it is cancelled or executed. In any event, the delay in executing the warrant is not shown to be unreasonable.

ASTON, J.—It is, I consider, clearly proved by the evidence in this case that a room, of which the appellant is the occupier, was entered by certain Police Officers on the 7th June last under a warrant legally issued in accordance with the provisions of section 6 of the Gambling Act (Bombay Act IV of 1887) nineteen days previously, and that in the room thus entered under the warrant so issued, there were found playing-cards, and ten persons including the appellant.

The finding of cards under these circumstances constitutes legal evidence, until the contrary is made to appear, that this room is used as a common gaming house and that the persons found therein were present for the purpose of gaming even if no play was actually seen by the raiding party (see section 7 of the Act).

It has been contended by Mr. Dady Burjor who appeared for the appellant that section 7 of the Act has no application when there has been an interval of many days as in this case between the issue of the warrant and its execution. This argument is, I think, unsound, for no foundation for it can be discovered in any express words or necessary implication in the Act. It is, however, open to the appellant to ask the Court to treat what the Legislature declares in section 7 to be incriminating "evidence," as reduced in weight by any unreasonable delay which may take place between the issue of a warrant under section 6 and its execution. In the present case the delay is not shown to have been unreasonable.

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There is further evidence on the record which I think the Presidency Magistrate has rightly believed to be true. This evidence establishes the following additional facts. The ten men in the room when surprised were seated on the floor in a circle. Some of the cards were scattered about and some under a mat after the raiding party entered, but most of the persons in the room had cards in their hands when first seen. Money was found on the floor. When surprised there was at first general confusion and effort to escape and then a pretence of listening to the reading of one of the ten persons.

The offence of "keeping a common gaming house" of which appellant stands convicted under section 4 of the Gambling Act (Bombay Act IV of 1887) may be committed in any of the various ways set out in clauses (a), (b), (c), (d) of that section. It is sufficient at present to confine attention to clause (a) — "being the owner or occupier or having the use of any such house, room or place, opens, keeps, or uses the same for the purpose of a common gaming house" — though it may be observed that under clause (c) it would be useless for the appellant to plead that he was not the owner or occupier if he had "the care or management of, or in any manner assisted in conducting the business of any such house, room or place opened, occupied, kept or used for the purpose aforesaid."

The incriminating evidence on the record may be summarised as follows :—

(1) The appellant is the occupier of the room in question.

(2) When the room was entered under a warrant issued under the provisions of section 6 of the Act cards were found in the room. This has been declared by the Legislature (section 7) to be evidence until the contrary is made to appear that such room is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming.

(3) There were in fact nine persons besides the appellant, some of whom were playing cards in the presence of the appellant, and evidently playing for money.

To rebut the complete case made out by this evidence that this room was opened, kept or used by the appellant as a common gaming house, there is merely the bare assertion of the accused

that the persons present had met fortuitously each for a different purpose wholly unconnected with card-playing and that there was no card-playing at all—an assertion which the Magistrate, for, I think, good reasons, did not believe.

But it is contended for the appellant the conviction is vitiated because the Magistrate elicited from the appellant before he was convicted that he had been previously convicted of keeping a common gaming house and Mr. Dady Burjor argued first that the Magistrate treated this admission as part of the evidence on which he based the conviction appealed against: secondly, that this fact of a previous conviction was not legally admissible evidence to prove the offence of keeping a common gaming house for which the appellant was being tried.

The case was tried not by a jury but by a Magistrate who was judge of the law and the facts. He was presumably aware already from the papers before him that previous convictions were alleged against the appellant and he knew that a previous conviction if proved would afford legal ground for awarding more severe punishment in the event of the appellant being convicted by him. The Magistrate in setting out the evidence upon which he has held the charge against appellant proved has not included the admission of a previous conviction and the record does not afford indication that he took this admission into consideration except for the purpose of assessing punishment. If it is to be assumed (which I think unnecessary) that the admission of a previous conviction was treated by the Magistrate as part of the evidence upon which he based the conviction, the question arises was it admissible evidence under the provisions of the Evidence Act (I of 1872).

Section 54 of the Evidence Act (I of 1872) is as follows:—

“In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

“*Explanation 1.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

“*Explanation 2.*—A previous conviction is relevant as evidence of bad character.”

It is sufficiently clear from this section that in criminal proceedings the fact that the accused person has a bad character is

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not relevant for the purpose of raising a general inference *from such bad character* that the accused person is likely to have committed the crime charged.

The second explanation says "a previous conviction is relevant as evidence of bad character." It does not say that a previous conviction is never relevant unless evidence of bad character is relevant or is itself a fact in issue, and even if it did go so far as to say this, it has to be remembered that the Evidence Act nowhere says that evidence may be given *only* of relevant facts.

Under section 5 "evidence" may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others. The illustration (a) to that section is as follows :—

"A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue :—

A's beating B with club ;

A's causing B's death by such beating ;

A's intention to cause B's death."

The words "*for the purpose* of a common gaming house" occur in each clause of section 4 of the Gambling Act (Bombay Act IV of 1887) and guilty knowledge or intention becomes thus an essential ingredient of the offence defined in that section so that guilty knowledge or intention becomes a fact in issue when a person is tried for the offence of keeping a common gaming house.

Again section 14 of the Evidence Act enacts that facts showing the existence of any state of mind, such as intention, knowledge are relevant when the existence of any such state of mind is in issue or relevant, and (explanation 2) "where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact."

Under section 11 of the same Act, facts not otherwise relevant are relevant if by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

If the prosecution had been in a position to prove that the appellant had habitually on many occasions used this very room or another room in his occupation as a common gaming house by the direct evidence of persons who had gambled there, such a fact would make the existence of the guilty intention or knowledge imputed in the present charge highly probable, and under the sections 5, 11 and 14 quoted from the Evidence Act (with which section 54 must be read) such fact would be admissible in evidence. Previous conviction might be a mode of proving such a use on some of the previous occasions, but it can hardly be contended that such previous convictions are inadmissible if the use for such criminal purpose could be allowed to be proved by other evidence.

I therefore concur in the opinion of Mr. Justice Chandavarkar that in a trial for an offence of keeping a common gaming house under section 4 of the Gambling Act (Bombay Act IV of 1887) evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.

I have assumed in dealing with this part of the argument for the appellant, that the Presidency Magistrate did take into consideration for the purposes of conviction, the previous conviction admitted by the appellant, but I have said that in my opinion it is not necessary to make this assumption. It is, I think, under the circumstances already set out more probable that the Presidency Magistrate's object in putting the question as to previous conviction was to ascertain whether in the event of conviction formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with.

Section 342 of the Code of Criminal Procedure (Act V of 1898) enacts that "for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

It is under this section that the appellant appears to have been examined by the Magistrate.

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If the question was put by the Magistrate under the belief that a previous conviction of appellant under section 4 of the Gambling Act (Bombay Act IV of 1887) could be taken into consideration for the purpose of conviction, then the question was not authorised by section 342 of the Criminal Procedure Code, its object not being to enable the accused to explain any circumstances appearing in the evidence against him.

If, on the other hand, the object of the question was to ascertain whether, in the event of conviction, formal evidence as to alleged previous convictions and as to identity of the accused could be dispensed with, the question was equally unauthorised at that stage by the provisions of section 342, Criminal Procedure Code, so that it may well be contended that inquiry of any sort into the fact of previous convictions for the latter object should have been postponed until after actual conviction of the appellant in this case.

On the view which I take of the evidence, independent of the appellant's admission of previous conviction, it is unnecessary to pursue this matter, as on that view it becomes equally immaterial in the present appeal whether the Presidency Magistrate in fact treated that admission as part of the evidence establishing the offence charged, or whether it was improper so to treat it.

Independently of the evidence objected to there was, as already shewn above, sufficient evidence to justify the conviction.

Section 167 of the Evidence Act (I of 1872) enacts that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." The conviction appealed against is therefore confirmed.

The case does not appear to be one in which, even taking into consideration previous convictions, the maximum fine allowed for the offence is required. Having had the advantage of consulting Mr. Justice Chandavarkar and Mr. Justice Jacob before whom this appeal has been also argued, I reduce the fine to Rs. 250 or in default three weeks' imprisonment. The balance of fine, if paid, to be restored.

Conviction confirmed. Sentence reduced.