think a remand is necessary, because, as I have pointed out, even assuming that fact in favour of Mr. Joshi, in our opinion the result can only be in favour of the assessee. Therefore, it is unnecessary to have this fact determined by the Tribunal.

1951

MESSRS. KIRLOSKAR BROS. v. COMMISSIONER OF INCOME-TAX

Chagla C. J.

We, therefore, answer the question submitted to us in the negative.

The Commissioner to pay the costs, including the costs of the remand.

Attorney for applicant: *Y. P. Pandit.*

Attorney for respondent: *N. K. Petigara.*

Answer accordingly.

A. J. P.

APPELLTAE CRIMINAL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas

STATE *v.* JAYANTILAL GOVINDDAS AND ANOTHER (ORIGINAL ACCUSED NOS. 1 AND 2).*

1953 *March* 11

Bombay Prevention of Gambling Act (IV of 1887), ss. 12 (a), 7—Find of marked money in possession of accused, whether in itself incriminating circumstance—Panch accompanying bogus punter—Credibility of Panch witness—Presumption under s. 7 of the Act.

Although the mere find of marked money in the possession of an accused is not by itself an incriminating circumstance, when there is positive evidence that the money was given to the accused for laying a bet, a conviction under s. 12 (*a*) of the Bombay Prevention of Gambling Act, 1887, is not illegal.

Mere fact that the Panch witness accompanied the bogus punter to lay a bet is not sufficient justification for discarding or discrediting his evidence.

In order that a presumption may arise under s. 7 of the Bombay Prevention of Gambling Act, 1887, it is not necessary that the things seized must be proved to be instruments of gaming. It would be sufficient if there are reasonable grounds, in the particular circumstances of each case, for suspecting that the things seized were instruments of gaming.

Emperor v. *Harilal Gordhan*,[1] distinguished.

*Criminal Appeal No. 116 of 1952

[1] (1937) 39 Bom. L. R. 613.

1952

STATE
v.
JAYANTILAL GOVINDDAS

Vyas J.

State v. *Shivaji Vaganji*[1] and *Emperor* v. *Hormazdyar Ardeshir Irani*,[2] followed.

CRIMINAL APPEAL by State against the order of acquittal passed by B. C. Vakil, Sessions Judge, Ahmedabad, setting aside the order of conviction and sentence passed by S. C. Vasa, Sixth Additional City Magistrate, Ahmedabad.

Jayantilal (accused No. 1) and Chimanlal (accused No. 2) were prosecuted in the Court of the 6th Additional City Magistrate, Ahmedabad, for an offence punishable under s. 12 (*a*) of the Bombay Prevention of Gambling Act, 1887. The trial Magistrate found both the accused guilty of the offence with which they were charged and sentenced each of them to suffer rigorous imprisonment for a month and to pay a fine of Rs. 200. The accused appealed and the Sessions Judge, Ahmedabad, set aside the order of conviction and sentence passed by the trial Magistrate.

The State of Bombay appealed to the High Court against the order of acquittal.

K. S. Daundkar, Assistant Government Pleader, for the State.

Purshottam Tricumdas with *Arun H. Mehta,* for the accused.

VYAS J.—This is an appeal by the State of Bombay against an order of acquittal passed by the learned Sessions Judge, Ahmedabad, in favour of the original accused persons, Jayantilal Govinddas and Chimanlal Vrijlal who were prosecuted for an offence under s. 12, cl. (*a*), of the Bombay Prevention of Gambling Act, 1887 (Bom. IV of 1887), and convicted and sentenced by the learned Fifth Additional City Magistrate, Ahmedabad.

Shortly stated, the facts of the case which gave rise to this prosecution were as follows: On November 15, 1950, Police Sub-Inspector Mishrikhan Pathan attached to the Astodia Police Chowkey received information that accused No. 1 Jayantilal Govinddas was receiving bets on American futures near Adarsh Hindu Hotel situated not far from the entrance

[1] (1950) Crim. Ref. No. 93 of 1950, decided by Bavdekar and Dixit JJ., on November 23, 1950 (Unrep).

[2] (1947) 50 Bom. L. R. 163.

to Sankdi Sheri. On receiving that information, the Sub-Inspector called the punter and the panchas and in the presence of the panch searched the person of the punter and gave a marked two rupee note bearing No. 17-37 925751 to him. The punter was thereafter instructed by the Sub-Inspector to go to accused No. 1 and lay a bet of Rs. 2 on Bombay 7. Accordingly the punter accompanied by the panch witness Ramchandra Chhotuji went in advance. They were followed by the Sub-Inspector and the other panch Mohamed Sharif Musaji. The punter went up to accused No. 1 and offered a bet of Rs. 2 on Bombay 7. Accused No. 1 accepted the bet and received the two rupee note from the punter. The recording of this bet was done by accused No. 2 who was present near accused No. 1 on that occasion. After the bet was thus offered and accepted and recorded, a signal was given and the raid was effected by the police in the presence of the panchas. As the result of the raid, the marked two rupee note was found with accused No. 1 whereas the slip exh. 1-C on which the bet which was offered by the punter was recorded by accused No. 2 was found with accused No. 2. On these facts both the accused were prosecuted for an offence under s. 12, cl. (*a*), of the Bombay Prevention of Gambling Act, in the Court of the Fifth Additional City Magistrate, Ahmedabad. The learned Magistrate, on a careful consideration of the evidence of the punter and the panch and also of the slip exh. 1-C, came to the conclusion that the evidence adduced by the prosecution was "quite natural and probable and believable" and that the offence with which the accused were charged was brought home to them. Accordingly he convicted both the accused and sentenced each one of them to suffer one month's rigorous imprisonment and pay a fine of Rs. 200 or in default to suffer one month's further rigorous imprisonment.

On appeal the learned Sessions Judge relying on a decision of this Court in *Emperor* v. *Harilal*[1] came to the conclusion that the evidence adduced against the accused in this case was not sufficient for the purpose of proving a charge of gaming in public against them and accordingly acquitted the accused. In the view of the learned Sessions Judge, who followed *Emperor* v. *Harilal*,[1] the punter was a police agent and the position was not improved by making a panch witness accompany the punter. In his view the find of a marked

[1] (1937) 39 Bom. L. R. 613.

1952

STATE v. JAYANTILAL GOVINDDAS

Vyas J.

two rupee note from the possession of accused No. 1 was also not an incriminating circumstance by itself. In respect of the slip exh. 1-C, this is how the learned Judge dealt with it.

"No one has tried to explain what is betting in American futures and what Bombay 7 is. The slip does not bear the name of the accused. The figures 2 and 7 are in themselves harmless. They are accompanied by a X which is not explainable. No one has stepped into the witness box to show from his long experience of gambling at Ahmedabad that the slip is a Satta Slip."

For these reasons, he came to the conclusion that the conviction of the accused could not be sustained. In other words, relying upon the case of *Emperor* v. *Harilal* he reversed the order of conviction and sentence passed upon the appellants before him by the learned Magistrate and ordered them to be acquitted and discharged.

Now, Mr. Daundkar appearing for the State of Bombay in this appeal has drawn our attention to a decision of the division bench of this Court in *State* v. *Shivaji Vaganji*[1] in which Mr. Justice Dixit made the following observations:

"Sir John Beaumont in *Emperor* v. *Harilal*[2] took the view that the punter's evidence cannot be corroborated merely by the finding of a marked coin upon the person of the accused. That principle has been modified in a subsequent decision of this Court in *Emperor* v. *Hormazdyar Irani*.[3] Now, in cases relating to gambling no hard and fast rule can be laid down as regards the nature of the corroboration required in order to accept the story of the punter; each case must depend upon its own facts."

Now, it is to be noted that *Emperor* v. *Harilal*,[2] was a case of conviction under s. 5 of the Bombay Prevention of Gambling Act, and therein a question arose whether a presumption arising under s. 7 of the Act could or could not be drawn. It was in that connection that the learned Chief Justice made these observations (p. 615):

"...But at the same time a charge of gambling like any other criminal charge must be proved by the prosecution by proper evidence, and one cannot fail to note that a false charge of gambling is one very easy to frame. I have said in a great many of these cases that these police agents are not only accomplices, but are also unreliable witnesses, because they are generally paid by results. It is always in

[1] (1950) Criminal Reference No. 93 of 1950, decided by Bavdekar and Dixit JJ. on November 23, 1950 (unrep.)

[2] (1937) 39 Bom. L. R. 613.

[3] (1947) 50 Bom. L. R. 163.

their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a police agent in these cases must always be corroborated before it can be acted upon. I do not think that the case is improved by providing the police agent with a companion and calling him a panch, as was done in this case. The finding of the marked currency note is not by itself sufficient to justify the convictions."

And dealing with the slips upon which the prosecution was relying as betting slips, the learned Chief Justice went on to say (p. 615):

"...These slips have now been translated, and they are by themselves quite unintelligible. They certainly do not purport to be records of gambling transactions. It appears, however, that the Police Sub-Inspector went into the witness-box and stated that in his view, based on experience in other cases, these slips were instruments of gaming. He suggested apparently that slip B should be construed in such a way that the first entry, which is Rs. 20 of Kaku, amounts to the record of a bet of Rs. 2 on mandi by a man named Kaku; though there is nothing whatever in the slip itself to suggest that that is its meaning."

In other words, the learned Chief Justice came to the conclusion that on the evidence as it stood, it was not proved that the slips were satta slips. Now, there is no doubt that the above mentioned observations in *Emperor* v. *Harilal*[1] were modified by this Court in its decision in *Emperor* v. *Hormazdyar Irani*[2] in which it was pointed out that for drawing a presumption under s. 7 of the Bombay Prevention of Gambling Act it was not necessary that the things seized must be proved to be instruments of gaming. It was pointed out that it would be sufficient if there were reasonable grounds, in the particular circumstances of each case, for suspecting that the things seized were instruments of gaming. To that extent clearly, therefore, the observations which were made by the learned Chief Justice in *Emperor* v. *Harilal*[1] were modified in the later decision of this Court. It is to be noted, however, that both the above mentioned cases were cases of convictions under s. 5 of the Bombay Prevention of Gambling Act in which a question definitely arose whether a presumption should or should not be drawn under s. 7 of the Act. In other words, in those cases a question arose whether a person's mere presence at a certain place under certain circumstances was to be made penal or not. The case before us, however, is entirely different. This is a case in which two persons are

[1] (1937) 39 Bom. L. R. 613. [2] (1947) 50 Bom. L. R. 163.

1952

STATE v. JAYANTILAL GOVINDDAS

Vyas J.

charged with committing an offence of gaming in a public place, an offence under s. 12, cl. (a), of the Act, and there is before the Court the evidence of the punter Bahadursing and the panch Ramchandra. The punter has given evidence to the effect that he was given a marked two rupee note and was instructed to go to accused No. 1 and lay a bet of Rs. 2 on Bombay 7 and that he accordingly went up to accused No. 1 and offered the said bet on Bombay 7. The evidence of the panch witness is to the effect that he had accompanied the punter, that the punter had gone up to accused No. 1, that accused No. 2 was also present there, that he (punter) had given the marked two rupee note to accused No. 1 and had asked him (accused No. 1) to lay it as a bet on Bombay 7, that the said marked currency note was accepted by accused No. 1 and that thereafter the recording of the bet was done by accused No. 2. Both these witnesses were present before the learned Magistrate and they impressed him well, so much so that the learned Magistrate observed that the evidence adduced by the prosecution "was quite natural, probable and believable" and was sufficient to establish the offence against both the accused. In our view, in this case the evidence of the punter and the panch is satisfactorily corroborated, not only by the find of the marked currency note from the possession of accused No. 1 but also by the slip exh. 1-C. It is certainly true that the mere find of marked moneys from the possession of a person is not an incriminating circumstance by itself, and in this case if there had been no further evidence than merely the evidence to show that the marked currency note was found from the possession of accused No. 1, it could not have been interpreted as an incriminating circumstance against accused No. 1. But there is before us the positive evidence of the panch Ramchandra from which it is clear that this currency note was given to accused No. 1 for laying a bet on Bombay 7. In other words, accused No. 1, according to the evidence, did not come innocently in possession of this marked two rupee note. It was accepted by him as a bet to be put on Bombay 7. Then there is the slip exh. 1-C, and if we turn to this slip, we find that the last entry upon it reads: "2) 7+". It is true that the name of the punter is not to be found in this entry, but then we have to consider the total effect of the evidence on record in regard to this entry. The entry itself is the last one, as we just said, on this particular slip of paper. If we turn to the panch witness Ramchandra, it would

1952

STATE v. JAYANTILAL GOVINDDAS

Vyas J.

appear that the punter was the last person to have gone to accused No. 1 and accused No. 2 for offering a bet. As soon as the bet was offered to accused No. 1 and noted by accused No. 2, a signal was given out and the raid was effected. Therefore, there is no doubt that the punter was the very last person to have gone up to the accused and his was the very last bet which was accepted by the accused. In fact, the panch has clearly told us that the bet which was offered by the punter was noted by accused No. 2. In these circumstances, the writing "2) 7+" must only mean that the bet of Rs. 2 was laid on the figure 7. In the particular circumstances mentioned above, we do not attach any importance to the fact that the name of the punter was not noted in the entry. As the learned Magistrate has observed, the persons who indulge in such activities are generally shrewd and they take care to conceal the true nature of their operations. In *Emperor* v. *Harilal,* to which we have referred already above, there is nothing to show what precisely was the evidence which was given by that particular punter. There is nothing to show whether he was a habitual punter or not, and merely because in the case before us the panch witness accompanied the punter, we do not think that there is sufficient justification in that circumstance to discard or discredit the evidence of the panch witness. In our view, the learned Magistrate was quite right in acting upon the evidence of the punter and the panch, corroborated as it was by the find of the marked currency note of the value of Rs. 2 from the possession of accused No. 1 and by the slip exh. 1-C which, in our opinion, contained a record of the bet which was laid by the punter with accused No. 1.

The result, therefore, is that the appeal must be allowed and the order of acquittal passed by the learned Sessions Judge must be reversed and the order passed by the learned Magistrate must be restored. Both accused Nos. 1 and 2 are convicted of an offence under s. 12, cl. (*a*), of the Bombay Prevention of Gambling Act, and each one of them is sentenced to suffer one month's rigorous imprisonment and pay a fine of Rs. 200 or in default to suffer one month's further rigorous imprisonment.

Appeal allowed.

K. B. S.