Chua Seong Soi v Public Prosecutor
[2000] SGHC 195

Case Number : MA 123/2000

Decision Date : 26 September 2000

Tribunal/Court : High Court

Coram : Yong Pung How CJ

Counsel Name(s) : Jimmy Yim SC and Suresh Divyanathan (Drew & Napier) for the appellant; Han Ming Kuang (Deputy Public Prosecutor) for the respondent

Parties : Chua Seong Soi — Public Prosecutor

Criminal Law – Offences – Gambling – Common gaming houses – Playing pai kow – Gaming in place used for two businesses – Whether such premises a "common gaming house" – Whether frequency constituted "habitual gaming"

Criminal Procedure and Sentencing – Charge – Insufficiency of particularity – Accused unsure which limb Prosecution proceeding on

: On 13 November 1999, at about 8.20pm, officers from the Gambling Suppression Branch of the Criminal Investigation Department conducted a raid on a factory located at 31 Sungei Kadut Street 4 (`the premises`). The raiding party found the main gate to the factory compound unlocked. They proceeded to enter and made their way to an office on the ground floor of the factory. Inside, they found a group of eight people gathered around a table, engaged in a game of pai kow. The raiding party identified themselves by shouting `police`, and proceeded to arrest all eight persons in the office. Apparently, there was one other person who managed to escape arrest by slipping out through the rear entrance of the office. The police found several items lying on the table, including cash amounting to $440, domino tiles, a few dice and a pair of chopsticks. A further search of the drawers in the office revealed other items such as English playing cards, sih seh cards, coloured chips, a box of domino tiles and some mahjong tiles. However, the mahjong tiles did not constitute a complete set.

Of the eight people arrested, seven were charged with gaming in a common gaming house under s 7 of the Common Gaming Houses Act (Cap 49) (`the Act`). All seven pleaded guilty and were fined $1000. The eighth person arrested, the appellant in the present case, was the tenant of the premises. He was charged under s 4(1)(b) of the Act which reads:

> *Any person who permits a place of which he is the owner or occupier or of which he has the use temporarily or otherwise to be kept or used by another person as a common gaming house shall be guilty of an offence and shall be liable on conviction to a fine of not less than $5,000 and not more than $50,000 and shall also be punished with imprisonment for a term not exceeding three years.*

The charge read as follows:

> *You ... are charged that you on or about 13 November 1999 at or about 8.20pm, at No 31 Sungei Kadut Street 4, office at the ground floor, Singapore, being the temporary owner of the said premises, did permit the said premises to be used as a common gaming house and you have thereby committed an offence under s 4(1)(b) of the Common Gaming Houses Act (Cap 49) and punishable under s 4(1) of the same Act.*

The trial judge held that by virtue of the gaming paraphernalia seized from the premises, the presumption in s 17 of the Act came into play. Section 17 reads:

> *Where in any proceedings under this Act any instruments or appliances for gaming are found in any place entered under this Act or upon any person found in such place, it shall be presumed, until the contrary is proved, that the place is a common gaming house and that it is so kept, used or permitted to be used by the owner or occupier thereof and that any other person found in such place or escaping from it is gaming therein.*

At the end of the trial, the judge was of the view that the appellant had failed to satisfactorily rebut the presumption. The appellant was accordingly convicted and sentenced to a fine of $20,000 and a term of imprisonment of two months. The appellant appealed.

The appeal

The term `common gaming house` is defined in s 2(1) of the Act as follows:

> *The term `common gaming house` includes any place kept or used for gaming to which the public or any class of the public has or may have access, and any place kept for habitual gaming, whether the public or any class of the public has or may have access thereto or not ...*

The definition thus incorporates two alternative limbs:

(a) there is freedom of access to the place, available to the public or any class of the public, or

(b) the place is kept for habitual gaming.

A place will be a `common gaming house` if it falls into either of the two limbs. The trial judge below evaluated the facts and formed the view that the premises fell into the second limb, ie that they were kept for `habitual gaming`.

(i) Frequency of the gaming sessions

It appeared that the chief factor relied upon by the trial judge was the frequency of the gaming sessions. At the trial, the defence called as witnesses three of the persons who were arrested on the premises. They were DW2, DW3 and DW4. Another one of the persons arrested on the premises was called as a witness for the prosecution, PW2. The defence also called DW5, who claimed to be the person who slipped away just as the raiding party was entering the premises. Each of these witnesses gave evidence as to how many times they had ever gambled on the premises. The evidence of these witnesses is tabulated as follows:

Witness	Number of times that witness ever gambled on the premises
PW2	Five to six
DW2	Two to three

DW3	Five
DW4	Two to three
DW5	Four to five

The trial judge further made reference to the following exchange that took place during the appellant`s cross-examination:

> *Q: In a week, how many times do you meet your business associates and gamble with them?*
>
> *A: Many times a week.*
>
> *Q: How long has this taken place?*
>
> *A: Many times.*

In the light of all the evidence, the trial judge held:

> *The varying number of sessions as testified by the various witnesses together with what the accused said during cross-examination indicate that the sessions were frequent, to the extent of many times a week.*

It appeared that the trial judge erred, in that he took too literal an approach to the term `habitual gaming`. It is not uncommon for a person to invite his friends over for a game of, say, poker. This may happen more than once a week, and may even take place every week. There may even be monetary stakes involved. In such an example, it would not put too much of a strain on the English language to say that the host`s premises become a place where `habitual gaming` occurs. However, it is absurd to say that the host by doing this opens himself up to criminal liability under the Common Gaming Houses Act. Not surprisingly, the courts take a purposive approach towards the interpretation of the second limb of the definition of `common gaming house`. In **R v Fong Chong Cheng** [1930] SSLR 139 , Stevens J explained that the second limb of the `common gaming house` definition refers to (at p 145):

> *... a place which, though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming. I say `primarily` because I think it is clear that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble. Nor in my opinion do the premises of an ordinary social club become a common gaming house merely because the club provides facilities for its members to gamble, and some of them habitually use the premises for that purpose ...*

It is therefore not enough merely for the gambling sessions to be frequent. The premises must be kept primarily for gambling. This was prima facie not the case here. The appellant was the director and

major shareholder of two timber companies: Tat Hin Timber Co Ptd Ltd (incorporated in 1978) and also Kar Hin Timber Company Pte Ltd (incorporated in 1980). It was the appellant`s case that both companies had been carrying on business at the premises since 1981, which was when he first rented the premises from the Jurong Town Corporation. This claim was also supported by the General Manager of Kar Hin Timber Company Pte Ltd, one Teo Biow Hin (DW6), who testified that Kar Hin Timber Company Pte Ltd had been carrying on business at the premises for about 20 years. That both companies were live and substantial companies was evidenced by the statements of account, sales invoices and delivery orders tendered by the appellant in the court below.

There will of course be instances when premises are ostensibly used for some legitimate purpose, eg as a residential home or as a club, but where the legitimate purpose is in effect only a facade to hide the fact that the primary purpose of the premises is in fact gaming. This possibility was canvassed by me in **PP v Yap Ah Yoon** [1993] 3 SLR 763 , where I made the following observation (at p 766):

> *A common feature of these cases ... is that the premises in question were all social or recreation clubs, or at least purported to be so. In such cases,* ***the real question was whether the club premises were devoted exclusively to gaming*** *or to general social purposes among which games of chance were included. The distinction is between a bona fide social or recreation club, and one which is used ostensibly as such but which is in reality kept and used for gaming purposes ...*
>
> *The approach is similar when it is a private residence which is alleged to be a common gaming house ...* ***The question must be whether it is in reality used as a private residence or it is in fact, behind the facade of a personal dwelling, primarily kept for gaming****. [Emphasis added.]*

If the presumption in s 17 of the Act is applicable, the onus will be on the accused to show that it is not just a facade. Thus, when the accused in ***Yap Ah Yoon*** tried to argue that the premises were used primarily as a private residence and not for gaming, the burden was held to be on him to show that the premises were in fact not primarily used for gaming. On the facts of that case, all that the accused could show was that there were people living on the premises. As this fact was still equally consistent with the premises being used primarily for gaming, I found that the presumption was not rebutted.

In the present case, however, the testimony of the general manager, DW6, that business associates came to the premises on normal working days to discuss about buying and selling timber, remained unshaken throughout. The photographs of the premises also revealed that timber was in fact stored on the premises. This, coupled with the documentary evidence adduced, tended to show that the businesses of the two companies were genuine and not just a facade. On the totality of the facts, it appeared that the appellant had successfully demonstrated that the premises were not primarily used for gaming.

The frequency of the gaming sessions may nevertheless be a very relevant consideration under certain circumstances. One may well conceive of a situation where the frequency of gaming sessions occurring in a place is so high that an inference may be raised that the place is in fact used primarily for gaming. That may well have formed the basis for the decision in **R v Singapore British Malay Football Club** [1934] MLJ 3 [1933] SSLR 431 , where it was held that the club in question was used primarily for gaming, and that its other activities were only ancillary.

In the present case, however, there was no evidence that the gaming sessions were frequent. The persons caught gaming on the premises had been acquainted with the appellant for a very long time, for periods ranging from ten to 30 years. The premises had been tenanted to the appellant for about 20 years. Yet PW2, who gave the highest figure (regarding how many times he had ever gambled on the premises), could only say that he gambled on the premises for five or six times. PW2 said that he had known the appellant `for over twenty years`. Six times in 20 years cannot, by any stretch of the imagination, be categorised as `frequent` for present purposes.

The evidence of PW1, who was one of the police officers in the raiding party, was as follows:

> *Prior to 13.11.99 [ie the night of the raid], observations were conducted at the premises. More than two observations were conducted. Thereafter, there was instruction to conduct the raid.*

That was it. The prosecution below did not even bother to explain what was seen on those two occasions when observations were conducted. No other evidence was proffered by the prosecution as to the frequency of the gaming sessions on the premises. On the totality of the facts, there is nothing to show that gaming on the premises was ever conducted `many times a week`.

I was therefore far from satisfied that the frequency of the gaming sessions on the premises was such as to bring the premises into the second limb of the definition of `common gaming house`.

(ii) The stakes involved

Another factor relied upon by the trial judge was the stakes involved. The trial judge held (at GD [para] 28):

> *The accused and his witnesses gave varying range of stakes involved during the sessions. PW2 said that the stakes were from $200 to $300, although he further testified that on 13 November 1999, the stakes were only $10 to $50. The accused said that the stakes were from $10 to $100. The remaining defence witnesses said that the stakes were from $10-$50. The evidence of the accused and PW2 as regards the stakes are inconsistent with the evidence of the rest of witnesses. Taking into account that the accused had the burden to rebut the presumptions against him, this reluctance to disclose precisely both the amount of stakes and earlier, the number of sessions are clearly factors not in his favour.*

First and foremost, nowhere in the record of appeal did it show that the appellant was cross-examined as to the issue regarding stakes. In his examination-in-chief, the appellant stated quite categorically that each individual`s stake would usually range from $10 to $100. That being the case, one could not help but wonder how the trial judge came up with the observation that the appellant displayed `reluctance to disclose precisely the amount of stakes`.

The trial judge also appeared to be influenced by the apparent inconsistency in the evidence regarding the stakes. With respect, there was no inconsistency here. The appellant said that the stakes ranged from $10 to $100. The other defence witnesses said that the stakes ranged from $10 to $50. PW2 also said that on the night of the raid the stakes ranged from $10 to $50. These figures were corroborated by the fact that, on the night of the raid, there were eight people (including the appellant) playing pai kow, and the total amount of money seized from the table amounted to $440;

an inference may therefore be drawn that the stake per person on that night was about $55 per person. The ranges given were thus roughly similar and it would serve no useful purpose to nitpick over what were evidently minor and inconsequential differences in the detail.

The trial judge thus erred in holding that the evidence pertaining to the stakes were `clearly not in [the appellant`s] favour`.

(iii) The fact that DW5 fled from the scene

DW5 was one of the players on the premises at the time of the raid but he managed to slip away through the rear entrance just when the police stormed in. At the trial below, DW5 was called by the defence and he explained why he had fled. According to him, he thought that the raiding officers were robbers. Being afraid, he ran. This explanation was clearly a lie. It was PW1`s testimony that the raiding party had shouted `police` when they stormed into the factory office. Furthermore, DW5 was unable to explain why he did not stop to ask for help when he saw (and he admitted that he did see) the police cars outside the premises.

DW5`s conduct appeared to have carried great weight in the mind of the trial judge, who held:

> *If the accused and his business acquaintances were only having a `friendly` session amongst close friends as claimed, why was there a need for DW5 to flee? This goes to show that DW5 knew that they were habitually gambling in a common gaming house and when the police raided the place, he simply fled.*

With respect, the trial judge may have attributed to DW5`s conduct a greater significance than it deserved. DW5 may have fled for a variety of reasons. He may personally have had something to hide from the police that was unconnected to the rest of the other gamblers. Or he may have run because he thought that in gaming on the premises, he was doing something illegal. However, whether the gaming that took place that night was in fact illegal depended not on whether DW5, in his panic-stricken state of mind, believed it to be illegal, but on whether it was illegal from the objective viewpoint of the law. And from the objective viewpoint of the law, whether the gaming in the present case was illegal or not depended on the question of whether the premises were used primarily for gaming. If the answer to that question was `no`, then the premises did not constitute a common gaming house; the fact that DW5 may have thought that gaming on the premises was wrong could not convert an otherwise legitimate gathering into an illegal gaming session.

(iv) The plea of guilt from the other arrested persons

All the other gamblers arrested on the premises pleaded guilty to a charge of gaming in a common gaming house. However, in the court below, DW2, DW3, DW4 and even PW2 said that they pleaded guilty to an offence of `gathering to gamble` and not `gaming in a common gaming house`. They said that they did not even know what a `common gaming house` was.

The trial judge nevertheless held:

> *The charge which they pleaded guilty to ... clearly stated that 31 Sungei Kadut Street 4 was used as a common gaming house and the seven of them were charged under s 7 of the Act which carried a lesser penalty than the accused`s charge. The statement of facts also stated that they had committed an offence of `[d]id (sic) game in a Common Gaming House ...*

> *... in so far as the gamblers` evidence that they merely pleaded guilty to a charge of gambling and not gambling in a common gaming house, it was my finding that they pleaded guilty to a charge under s 7 for gambling in a common gaming house.*

The trial judge then concluded:

> *It was therefore my finding that the fellow gamblers` plea of guilt and subsequent conviction under s 7 for gambling in a common gaming house is a relevant consideration in determining whether 31 Sungei Kadut Street 4 was indeed used as a common gaming house ... I would however add that it was not my sole criteria of coming to the conclusion that the premises were used as a common gaming house.*

With respect, the plea of guilt by the other arrested persons did not in any way show that the premises were in fact a common gaming house. The very fact that they pleaded guilty showed that the crux of the present case, ie whether the premises fell within the second limb of the definition of common gaming house, was never argued.

Particularity of the charge

There was one further matter that was not raised on appeal but which nonetheless had some importance. The charge alleged that the premises were used as a common gaming house, but did not say which limb of the term `common gaming house` was being relied on. The charge here was thus similar to that in the case of **Abdul Kareem v R** [1957] MLJ 185 , where the charge read:

> *You are charged that you ... did assist in the management of a common betting house and you have thereby committed an offence under s 4(1)(c) of the Betting Ordinance ...*

In quashing the conviction, Shepherd J held (at p 190):

> *The definition of `common betting-house` in the Ordinance clearly presupposes as I have said the existence of two types of common betting-house within the meaning of the Ordinance - the first being what I will call the `open type` where the public have access, and the second being what I will call the `closed type`, where the public have no access but where habitual betting is carried on. The prosecution have not made it clear to which type they have referred in the charge and I consider that this omission may well have prejudiced the defence ...*

There will of course be situations where the lack of particularity causes no prejudice. A good example is seen in the case of ***Loh Ah Kow v PP*** [2000] 4 SLR, which was recently decided by me. In that case, it was clear from the notes of evidence that both the prosecution and the defence proceeded on the basis of the first limb of the definition of `common gaming house`. The accused never bothered to even address or adduce evidence pertaining to the question of whether the premises in question fell within the second limb. All the arguments advanced by the accused were tailored to

defend the case on the first limb, ie to show that the gamblers present were friends of the accused`s workers and not members of the public. When the accused was eventually convicted on the basis that the premises did fall within the first limb, it could not realistically be said that any prejudice was caused by the omission of the charge to indicate from the onset that the prosecution was relying on the first limb and not the second.

In the present case, the trial judge held:

> *Although the defence sought to use the case of **Abdul Kareem v R** [1957] MLJ 185 for the proposition that the prosecution must make it clear which type of common gaming house they are relying on, I wish to point out that throughout the trial and from the way the defence was conducted, they were aware which limb under the definition of `common gaming house` in s 2(1) of the Act they were defending the case on, that is, the `closed type` for habitual gaming. It was the defences` stand throughout the trial that the gambling was between close friends and there was no access to the public.*

As can be seen from the case of ***Loh Ah Kow*** , if the case is fought on the first limb, the accused will invariably seek to adduce evidence showing how the gamblers on the premises were his friends and therefore could not constitute the `public or any class of the public`. That is precisely what happened in the trial below. The witnesses called by the appellant were mainly the people who were arrested during the raid. They were called to give evidence as to how they had known the appellant for between ten and 30 years. It was evident that the appellant`s case below was very much tailored to establish that the premises did not fall within the first limb of the definition of `common gaming house` This was a reasonable course of action to take; seeing as how the entrance to the premises were unlocked, it was conceivable that the prosecution might mount an argument that the premises were open to the public. The very fact that the trial judge could make the observation that

> *[i]t was the defence`s stand throughout the trial that the gambling was between close friends and there was no access to the public [at GD [para] 45].*

showed that the appellant could well have been defending the case on the first limb. As such, the trial judge may have fallen into error when he declared that the defence

> *were aware which limb under the definition of `common gaming house` in s 2(1) of the Act they were defending the case on, that is, the `closed type` for habitual gaming [ie the second limb]. [At GD [para] 45.]*

For the above reasons, it was conceivable that the appellant was unsure as to which limb the prosecution would be proceeding on at trial, and that he was left to guess which front would have to be defended. This may then justify an inference that the insufficient particularity of the charge prejudiced the appellant. I repeat once again the observation that I made in the case of **PP v Anuar bin Arshad** [1996] 2 SLR 52 (at p 57):

> *As a general rule, it cannot be satisfactory for the prosecution to prefer charges which lack clarity and specificity. The defence should be entitled to know the prosecution`s allegations with a reasonable degree of particularity, and not left to guess what these allegations will be.*

Much less confusion will be created if the charge states clearly from the start whether the prosecution will be relying on the first or second limb, or both.

Conclusion

The law is clear. In order for premises to be `habitually` used for gaming within the meaning of the second limb of the definition of the term `common gaming house`, they must be used primarily for gaming. This limitation must be borne in mind, for to read the word `habitually` literally would turn the Act into a giant dragnet with no clearly defined boundaries. All and sundry would then be caught by the Act, from the hardcore gaming house operator who earns his living by operating an underground casino, to the bored housewife who invites her contemporaries over for a weekly mahjong session. In the present case, it seemed that the trial judge below did not fully appreciate the purport and extent of the limitation. The evidence showed that the premises were primarily used for the businesses of two live and substantial companies. The gaming that occurred on the premises, if it could even be deemed to have been frequent at all, was only incidental (see **R v Li Kim Poat & Anor** [1933] MLJ 164 [1933] SSLR 129) to the business conducted on the premises. The premises could not have been said to be used primarily for gaming.

On a more general level, it is imperative that one does not lose sight of common sense when deciding whether to bring a prosecution. The totality of the facts must be examined. In the present case, DW2 said that he knew the appellant for `close to 30 years`. DW3 said that he knew the appellant for `more than 20 years`. DW4 said that he knew the appellant `since 1979`. DW5 said that he knew the appellant for `ten years over`. PW2 said that he knew the appellant `for over 20 years`. All of them were involved in the timber business and had thus been business associates. Furthermore, the atmosphere that night was nothing like that in a gaming house. The stakes were not very high. In fact, the raiding officer PW1 herself testified that the excess money from the gaming stakes was used to buy food and drinks. Common sense would thus tell a person that the activity on the premises was strongly characteristic of a friendly game between people who had known each other for a long time. It could not have been the intention of the legislature that such activity should fall within the purview of the Act.

The appeal was therefore allowed and the conviction set aside. The fine paid by the appellant was also ordered to be refunded.

Outcome:

Appeal allowed.