

ARTHUR ERNEST WONG

A

v.

REGINAM

[SUPREME COURT, 1978 (Kermode J.) 5th May]

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Appellate Jurisdiction

Gaming—possession of gaming machine—whether regulation prohibiting possession ultra vires the Ordinance—Lotteries Regulations 1975, Regulation 36(1)—Gaming Ordinance 1968, Section 21.

C The appellant was convicted of being in possession of a machine designed for the paying of a prohibited game.

Held: Although the Ordinance gave the Minister power by regulation to prohibit the playing of a game of chance it did not empower him to prohibit the possession of a machine designed for the playing of a prohibited game. Regulation 36(1) was therefore ultra vires the Ordinance and the conviction would be quashed.

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Case referred to:

Attorney-General v. Great Eastern Railway (1880) 5 App. Cas. 473

Appeal to the Supreme Court against conviction in the Magistrate's Court.

KERMODE J.:

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The appellant on the 16th August, 1977 was convicted by the Magistrates Court Suva of the offence of Possession of a Machine for Playing a Game of Chance contrary to Regulations 36(1)(a) and (b) and 43 of the Lotteries Regulations, 1975.

Upon his conviction the appellant was conditionally discharged under section 38 of the Penal Code. He appeals against conviction.

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A number of grounds of appeal were raised by the appellant but it is only necessary to consider the first ground which is as follows;

“That the learned trial Magistrate erred in law in not holding that the Regulation No. 36 made under the Gaming Ordinance 1968 was ultra vires and therefore had no legal effect.”

G The Lotteries Regulations 1975 were made by the Attorney-General in exercise of powers conferred upon him by section 21 of the Gaming Ordinance 1968.

Regulation 36 reads as follows:

“36(1) The possession, purchase or use of any machine which—

(a) is constructed or adapted for playing a game of chance by means of the machine; and

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(b) has a slot or other aperture for the insertion of money or money's worth in the form of cash or tokens, is prohibited.

(2) The game known as crown and anchor or any variety of such a game by whatsoever name called is prohibited.”

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Section 21 so far as it is relevant to the instant case reads as follows:

“21. The Minister may make regulations for giving effect to the provisions of this Ordinance and in particular—

(a) prohibiting absolutely or conditionally the playing of any game.”

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The rest of the section deals with a number of other matters which are not relevant to the offence with which the appellant was charged.

“Game” is not defined in the Ordinance, but in the proviso in section 2 of the Ordinance where “gaming” is defined, “game” shall not include any game or activity therein specified unless otherwise provided by regulations made under the provisions of the Ordinance.

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The power given by regulation to prohibit the playing of “any game” is extremely wide unless a restricted meaning is given to the word “game”. There is apparent power to prohibit absolutely a social game of contract bridge if “any game” can be prohibited by regulation. While I am not called on to define “game”, clearly the intention of the Ordinance “To make better provision for gaming wagering and lotteries” would dictate that a restricted meaning of “game” must be adopted so as to cover a game relating to such activities as gaming wagering and lotteries. It cannot have been the intention of the legislature to give the Minister power by regulation to prohibit any game in which persons can participate such as football. “Game” in its context in section 21 in my view is “a diversion of the nature of a contest,..... decided bygood fortune”. (The Shorter Oxford English Dictionary). The word “game” used as an intransitive verb means “To play at games of chance for a prize stake or wager: to gamble”. (The Shorter Oxford English Dictionary). From this verb stems the noun “gaming” which activity the Ordinance seeks to regulate.

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The issue in this case is whether the Minister was empowered by regulation to prohibit the possession of any machine of the type described in regulation 36. Section 21(a) of the Ordinance gives the Minister power by regulation to prohibit “the playing of any game”. There is no express power in section 21 to prohibit by regulation possession purchase or use of any machine adapted for playing a game of chance.

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Section 21 however, provides general powers by regulation to give effect to the provisions of the Ordinance and such provisions must also be considered to see whether the Ordinance has any provisions which deal with possession purchase or use of any gaming device or article used for gaming.

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There is no definition in the Ordinance of a machine of the type referred to in regulation 36. If such a machine is used for gaming or for a lottery it could be an implement or appliance for gaming as defined in section 2 of the Ordinance.

Nowhere in the Ordinance is possession purchase or use of implements or appliances for gaming made an offence but there are a number of provisions referring to such implements or appliances and how they are to be dealt with if an offence is committed.

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Under section 7 of the Ordinance such implements or appliances may be seized by the police and later declared by the Court to be forfeited to the Crown. Section 13

A has similar provisions. Under section 17 where a common gaming house is provided with contrivances constructed for the purpose of facilitating the carrying on of gaming on the premises a Magistrate may order destruction removal or forfeiture thereof.

On my consideration of the Ordinance the legislature has not made it an offence to possess purchase or use implements or appliances for gaming and regulation 36(1) cannot be said to give effect to any of the provisions of the Ordinance.

B Had section 36(1) prohibited the playing of any game by means of a machine of the type described in the regulation, as section 36(2) has prohibited the game of crown and anchor, it would appear to be *intra vires*. It might still be necessary in my view to exclude machines designed purely for amusement which are operated by coins and where there is no money or moneys worth involved as a prize. There is the situation, also, that many cruise liners coming to Fiji have machines which are commonly and appropriately called "one armed bandits", which are used by passengers while in port.

C It might be argued that regulation 36(1), if complied with, would effectively prevent any game of chance being played by means of such a machine and was the means adopted by the Minister to prohibit any game on such a machine.

D In *Attorney General v. Great Eastern Railway* (1880) 5 App. Cas. 473, 478 the House of Lords has laid down the principle that "Whatever may fairly be regarded as incidental to, or consequent upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*".

E I cannot, however apply this principle in the instant case. Section 21(a) of the Ordinance is perfectly clear and only confers power on the Minister to prohibit by regulation the playing of any game absolutely or conditionally. Also the provisions of the Ordinance to which I have already referred indicate what action can be taken as regards implements or appliances for gaming and such provisions, do not as I have already stated, refer to possession purchase or use unless such use is for gaming. In my view prohibiting possession of a machine could not fairly be regarded as incidental to or consequent upon the prohibition of playing a game on the machine.

F I am only concerned in the instant case in considering whether the Minister is empowered by the Ordinance to prohibit possession of the machine under consideration. In my view he is not empowered by section 21 of the Ordinance to make regulations prohibiting possession of a machine for playing a game of chance, and regulation 36(1) is to that extent invalid.

G If the club in which the machine was being used was at the time a common gaming house, a matter which I do not have to decide and have not considered, the provisions of the Ordinance are adequate to put a stop to any infringement of the law and to deal with implements and appliances for gaming found on the club premises.

H In this case, however, the prosecution charged the appellant with breach of regulation 36(1) which I have held to be invalid in so far as it refers to possession of the machine in question. It follows he should not have been convicted. The appellant succeeds on his first ground of appeal. The appeal is allowed. The conviction of the appellant is quashed and he is acquitted.

Appeal allowed; conviction quashed.