1962
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HER MAJESTY THE QUEEN .....APPELLANT;

AND

SEITALI KERIM .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Hall leased for bingo games—Owner's president on premises when games played—No participation in games by president—Refreshment stand and commissionaire provided by company—Whether president was "one who keeps a common gaming house"—Criminal Code, 1953-54 (Can.), c. 51, s. 176.

A company, of which the respondent was president, owned an hotel and was licensed to carry on the business of a public hall. The company leased its hall on four successive nights of each week to four different charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes. These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played in the games. The respondent was on the premises each evening, but did not participate in any way in the games. The company employed a commissionaire and operated a refreshment stand. The respondent was convicted on a charge of keeping a common gaming house contrary to s. 176(1) of the *Criminal Code*, but this conviction was quashed by a majority decision of the Court of Appeal. The Crown appealed to this Court.

Held (Kerwin C.J. and Taschereau J. dissenting): The appeal should be dismissed.

Per Cartwright, Martland and Ritchie JJ.: In order to constitute the offence of keeping a common gaming house, there must be something more than the keeping of a place whose use, by someone other than the accused, makes it a common gaming house. The position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for that purpose, and who permits such use, is that which was contemplated when the lesser offence defined in s. 176(2)(*b*) was created. That offence must have been created because it was not contemplated that such a person was, himself, keeping the common gaming house within the meaning of s. 176(1).

The offence defined in s. 176(1) involves some act of participation in the wrongful use of the place and the evidence in the instant case did not establish any such participation on the part of the respondent.

Per Kerwin C.J. and Taschereau J., *dissenting:* By subs. (1)(*h*)(ii) of s. 168 of the Code, wherein "keeper" is defined, the respondent was a person who "assists or acts on behalf of an owner or occupier of a place" or at least "appears" to do so. The fact that by subs. (2)(*b*) of s. 176 everyone who, as agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting

*PRESENT: Kerwin C.J., Taschereau, Cartwright, Martland and Ritchie JJ.

house is guilty of an offence *punishable on summary conviction* could not by itself restrict the broad meaning given by Parliament to the word "keeper" in s. 168. A person who falls within the definition of a "keeper", "keeps" a "common gaming house" within s. 176(1).

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a conviction for keeping a common gaming house. Appeal dismissed, Kerwin C.J. and Taschereau J. dissenting.

J. W. Austin, for the appellant.

P. B. C. Pepper, Q.C., for the respondent.

The judgment of Kerwin C.J. and of Taschereau J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This appeal is concerned with the proper interpretation of portions of s. 168 and s. 176 of the *Criminal Code:*

168. (1) In this Part,

* * *

(*d*) "common gaming house" means a place that is
(i) kept for gain to which persons resort for the purpose of playing games; or
(ii) kept or used for the purpose of playing games

* * *

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

* * *

(*h*) "keeper" includes a person who
(i) is an owner or occupier of a place,
(ii) assists or acts on behalf of an owner or occupier of a place,
(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,
(iv) has the care or management of a place, or
(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not
(i) it is covered or enclosed,
(ii) it is used permanently or temporarily, or
(iii) any person has an exclusive right of user with respect to it.

(2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)

* * *

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

1963

THE QUEEN
v.
KERIM

Kerwin C.J.

(b) while occasionally it is used by charitable or religious organizations for the purpose of playing games for which a direct fee is charged to persons for the right or privilege of playing, if the proceeds from the games are to be used for a charitable or religious object.

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

* * *

176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(a) is found, without lawful excuse, in a common gaming house, or common betting house, or

(b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction.

The respondent was convicted by a magistrate, in the Province of Ontario, on a charge that in 1959 and 1960 he, in the Municipality of Metropolitan Toronto, in the County of York, unlawfully did keep a common gaming house situate and known as the Club Kingsway, contrary to the *Criminal Code*. On appeal to the Court of Appeal for Ontario[1] the conviction was set aside, MacKay J.A. dissenting.

Kerim Brothers Limited was the registered owner of a lot and of a building thereon in which it carried on business as proprietor of an hotel known as the Kingsway Hotel. That company was licensed by the Metropolitan Licensing Commission. The company operated on the premises a club, known as The Kingsway, and the building was used for a number of purposes including dancing, banquets, receptions and displays. During the period in question the company leased its hall on four successive nights of each week to four different religious and charitable organizations which conducted bingo games, the proceeds of which were used for charitable purposes. These various organizations supplied their own equipment and personnel for the bingo games and paid to the company a standard rental for the use of the hall irrespective of the number of persons who played the games. The respondent was the president of the company and while he did not participate in the bingo games, the

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

fees were paid either in cash or by cheque to him or to one Buckingham. The cheques were not made payable to either of these men.

Undoubtedly the charge was laid under subs. (1) of s. 176 of the *Criminal Code,* which is in Part V of the Code and by subs. (1)(*d*) of s. 168, which is in the same Part and which might be repeated:

168. (1) In this Part,

* * *

(*d*) "common gaming house" means a place that is

(i) kept for gain to which persons resort for the purpose of playing games; or

(ii) kept or used for the purpose of playing games

* * *

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

Subsection (2), which might also be repeated, reads as follows:

(2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)

* * *

(*b*) while occasionally it is used by charitable or religious organizations for the purpose of playing games for which a direct fee is charged to persons for the right or privilege of playing, if the proceeds from the games are to be used for a charitable or religious object.

There can be no question that the premises were used as a common gaming house as defined, and no point is made that the organizations which conducted the games of bingo fell within subs. 2(*b*). By subs. (1)(*h*)(ii) of s. 168, the respondent is a person who "assists or acts on behalf of an owner or occupier of a place" or at least "appears" to do so. The fact that by subs. 2(*b*) of s. 176 everyone who, as agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house is guilty of an offence punishable on summary conviction cannot by itself restrict the broad meaning given by Parliament to the word "keeper" in s. 168. There are many examples where the Crown may proceed summarily or by indictment.

I can come to no conclusion other than that when Parliament widened the definition of a "keeper", a person who falls within that definition "keeps" a "common gaming

1963

THE QUEEN v. KERIM

Kerwin C.J.

house" within s. 176(1). If a tenant of a house operates it as a common gaming house, without the knowledge of the owner, the latter cannot be said to "knowingly" permit a place to be let or used for the purposes of a common gaming house or a common betting house.

I would allow the appeal, set aside the order of the Court of Appeal and restore the conviction.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—The respondent was charged with keeping a common gaming house, contrary to the provisions of subs. (1) of s. 176 of the *Criminal Code*. The facts, which are not in dispute, are as follows:

Kerim Brothers Limited (hereinafter referred to as "the company") for some years has been the registered owner of the Kingsway Hotel, in Metropolitan Toronto. The company was licensed to carry on the business of a public hall and to sell refreshments and cigarettes. The premises have, on occasion, been used for dances, banquets, receptions, business displays and other purposes. From about February of 1959 to June of 1961 the company leased its hall, on four successive nights of each week, to four different religious and charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes.

These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played in the games.

The respondent was the president of the company and was on the premises each evening, but he did not, himself, participate in any way in the bingo games. The company did employ a commissionaire and it operated a soft drinks refreshment stand.

The respondent was convicted of the offence charged, but the conviction was quashed by a majority decision of the Court of Appeal of Ontario[1]. From that decision the Crown has now appealed.

[1] (1962), 38 C.R. 71, 132 C.C.C. 186.

The relevant sections of the *Criminal Code* are the following:

168. (1) In this Part,

* * *

(*d*) "common gaming house" means a place that is

(i) kept for gain to which persons resort for the purpose of playing games; or

(ii) kept or used for the purpose of playing games

* * *

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

* * *

(*h*) "keeper" includes a person who

(i) is an owner or occupier of a place,

(ii) assists or acts on behalf of an owner or occupier of a place,

(iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,

(iv) has the care or management of a place, or

(v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and

(*i*) "place" includes any place, whether or not

(i) it is covered or enclosed,

(ii) it is used permanently or temporarily, or

(iii) any person has an exclusive right of user with respect to it.

* * *

176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(*a*) is found, without lawful excuse, in a common gaming house or common betting house, or

(*b*) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction.

As previously mentioned, the charge was laid under subs. (1) of s. 176 and the question in issue is whether, upon these facts, the respondent was "one who keeps a common gaming house".

The submission of the Crown is that the respondent, on these facts, was a "keeper", within the definition of that word, that the hall was a "common gaming house", within the definition of that term, and that, therefore, the respondent was "one who keeps a common gaming house", within s. 176(1).

1963

THE QUEEN v. KERIM

Martland J.

The position of the respondent is that a person who is a keeper, within the definition, is not necessarily one who keeps a common gaming house, within the meaning of s. 176(1), and this contention is supported on the ground that the word "keeper" is not used in that subsection and that specific provision was made in subs. (2)(*b*) for a lesser offence, punishable on summary conviction, in respect of classes of persons a member of which would fall within the definition of a keeper, who "knowingly permits a place to be let or used for the purposes of a common gaming house". It is argued that if a keeper, within the definition, is automatically guilty of an offence under subs. (1), because the place of which he is a keeper is used by others as a common gaming house, then there was no need to create the lesser offence, defined in subs. (2)(*b*).

On the facts, it would appear that the respondent fell within the definition of a keeper. It also appears that persons resorted to the premises in question for the purpose of playing games and that the premises were used for that purpose, so as to constitute them a common gaming house within the definition.

The definition of a keeper in s. 168(1)(*h*) is a very broad one and it relates to the keeper of a "place", which is also broadly defined. Every householder and, indeed, every landowner is a keeper within that definition. But this, of course, in itself, constitutes no offence. The offence defined in s. 176(1) is the keeping of a common gaming house. The question is, if the "place" is used in a manner which constitutes it a common gaming house, does everyone who falls within the definition of a keeper of that place automatically keep the common gaming house? In my opinion that conclusion does not follow. The offence is the keeping of the common gaming house, and, in my opinion, in order to constitute that offence, there must be something more than the keeping of a place whose use, by someone other than the accused, makes it a common gaming house. I do not, for example, see how the owner of a house leased to a tenant, who, without his knowledge, operates it as a common gaming house, could possibly be found guilty of the offence. What then is the position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for

that purpose, and who permits such use? This, it appears to me, is the sort of situation which was contemplated when the offence defined in s. 176(2)(*b*) was created and, in my opinion, that offence must have been created because it was not contemplated that such a person was, himself, keeping the common gaming house within the meaning of s. 176(1).

I agree with the conclusion reached by Laidlaw J.A., in the Court below, that the offence defined in s. 176(1) involves some act of participation in the wrongful use of the place and that the evidence in this case does not establish any such participation on the part of the respondent.

For these reasons, in my opinion, the appeal should be dismissed.

Appeal dismissed, KERWIN C.J. *and* TASCHEREAU J. *dissenting.*

Solicitor for the Attorney-General of Ontario: W. C. Bowman, Toronto.

Solicitors for the respondent: Willis & Dingwall, Toronto.