HER MAJESTY THE QUEEN ..... APPELLANT;

1965
*June 16
Oct.14

AND

ELMER R. MacDONALD and MOUNT PLEASANT (BRITISH COLUMBIA No. 177) BRANCH OF THE ROYAL CANADIAN LEGION ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Common gaming house—Premises occupied by branch of Canadian Legion—Bingo—Whether bona fide social club—Criminal law, 1953-54 (Can.), c. 51, ss. 168 (2) (a) (i), (ii), 176.

The respondents, an incorporated branch of the Canadian Legion and its secretary, were convicted on a charge of keeping a common gaming house, contrary to s. 176 of the *Criminal Code*. They operated bingo games afternoons and evenings, six days per week, at which the daily attendance averaged 1,800 persons. The games were open to the public. The participants had to pay an admission fee of 50 cents, and if they wished to share in the prize money (and everybody did), they had to pay a further 50 cents. The respondents retained only the 50 cents admission fee; all other moneys received were returned on the same day as prizes to successful participants. The respondents were acquitted by the Court of Appeal. The Crown was granted leave to appeal to this Court on the question as to whether the premises were used by an incorporated *bona fide* social club within the meaning of s. 168(2)(*a*) of the Code.

Held: The appeal should be allowed and the convictions restored.

The premises in question were not being used as a *bona fide* social club. Their use for bingo on such a wide-spread scale contradicted any possible inference of their use as a *bona fide* social club. The whole or a portion of the bets on or proceeds from the games were directly or indirectly paid to the keeper. The significant feature of subs. (2)(*a*)(i) of s. 168 is not the ultimate disposition of the moneys received by the keeper but the simple fact of payment to the keeper. It was also apparent that the respondents failed to qualify for the exemption under subs. (2)(*a*)(ii). It was impossible to break down what the participants paid into a 50 cents charge for admission and a further charge for the cards for the purpose of paying lip service to the requirements of that subsection. The word "persons" in subs. (2)(*a*)(ii) means persons who play bingo in premises while used by a social club in a *bona fide* manner in keeping with the objects for which it was incorporated.

Droit criminel—Maison de jeu—Local occupé par une branche de la Légion canadienne—Bingo—S'agit-il d'un club social authentique—Code criminel, 1953-1954 (Can.), c. 51, arts. 168(2)(a)(i), (ii), 176.

Les intimés, une branche de la Légion canadienne constituée en corporation et son secrétaire, ont été trouvés coupables sur une accusation d'avoir

* PRESENT: Taschereau C.J. and Fauteux, Martland, Judson and Hall JJ.

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tenu une maison de jeu, contrairement à l'art. 176 du *Code criminel*. Ils exploitaient des jeux de bingo l'après-midi et le soir, six jours par semaine, et auxquels 1,800 personnes assistaient en moyenne chaque jour. Les jeux étaient accessibles au public. Les joueurs devaient payer une cotisation d'admission de 50 sous, et s'ils désiraient obtenir des prix, ils devaient payer une autre somme de 50 sous, ce que tous les joueurs faisaient. Les intimés gardaient seulement le 50 sous de cotisation d'admission; tous les autres argents reçus étaient remis le même jour comme prix aux joueurs gagnants. Le verdict de culpabilité fut renversé par la Cour d'Appel. La Couronne a obtenu la permission d'en appeler devant cette Cour sur la question de savoir si le local en question était utilisé par un club social authentique constitué en corporation selon le sens de l'art. 168(2)(*a*) du Code.

Arrêt: L'appel doit être maintenu et le verdict de culpabilité rétabli.

Le local en question n'était pas utilisé comme club social authentique. Son usage pour des jeux de bingo sur une échelle aussi étendue contredisait toute inférence possible qu'il pouvait être utilisé comme club social authentique. La totalité ou une partie des paris sur les jeux ou des recettes de ces jeux était directement ou indirectement payée au tenancier. La caractéristique significative du sous-para. (2)(*a*)(i) de l'art. 168 n'est pas la disposition finale des argents reçus par le tenancier mais le simple fait du paiement au tenancier. Il était évident de plus que les intimés n'avaient pas réussi à se qualifier sous l'exemption du sous-para. (2)(*a*)(ii). Il était impossible de répartir ce que les joueurs avaient payé entre une cotisation pour admission de 50 sous et une charge additionnelle pour les cartes dans le but de satisfaire seulement des lèvres les exigences du sous-paragraphe. Le mot «personnes» dans le sous-para. (2)(*a*)(ii) signifie les personnes qui jouent le bingo dans le local alors qu'il est utilisé par un club social d'une manière authentique selon les objets pour lesquels il avait été incorporé.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique, renversant un verdict de culpabilité. Appel maintenu.

APPEAL from a judgment of the Court of Appeal for British Columbia, reversing a conviction. Appeal allowed.

W. G. Burke-Robertson, Q.C., for the appellant.

W. J. Wallace, for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The respondents were charged under s. 176 of the *Criminal Code* with keeping a common gaming house. The issue in the appeal is whether the case is covered by the exception contained in s. 168(2)(*a*) of the *Criminal Code*, which reads:

(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)

(a) while it is occupied and used by an incorporated *bona fide* social club or branch thereof if

(i) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof, and

(ii) no fee in excess of ten cents an hour or fifty cents a day is charged to persons for the right or privilege of participating in the games played therein; . . .

The accused were convicted by the magistrate but acquitted on appeal. Leave to appeal was granted to this Court on the following question of law:

Was the place No. 2655 Main Street, Vancouver, in the circumstances of the charge, used by an incorporated *bona fide* social club within the meaning of Section 168, Subsection (2)(a) of the Criminal Code of Canada?

The facts are not in dispute. The respondent, Branch 177 of the Royal Canadian Legion, is an incorporated branch of the Royal Canadian Legion. The respondent Elmer MacDonald is the secretary-manager of Branch 177. The premises occupied by Branch 177 are at 2655 Main Street, Vancouver, a building constructed and owned by Mount Pleasant War Memorial Community Co-operative Association, which was organized by and operated by Legion members. This building consists of four floors, including the basement. The basement is leased to persons who run a bowling alley. The other three floors are leased to Branch 177 for an annual rental of approximately $75,000. The first floor is used for bingo games afternoons and evenings, six days per week, at which the daily attendance has averaged 1,800 persons.

Members of the public wishing to play bingo were admitted upon payment of a fifty cent admission fee. In order to participate in prize money, a further fifty cents was then paid. Although it was possible to play bingo without payment of a further fifty cents, and without, therefore, the right to participate in prize money, no one did so. The evidence of the respondent MacDonald was that this rule came into effect in 1962 but that no one availed himself of the opportunity although nearly half a million persons played bingo in this establishment in the year 1963 alone.

The opportunity to share in the prize money came from the sale of cards at fifty cents and a dollar each. Branch 177

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retained only the fifty cent admission fee; all other moneys received were returned on the same day as prizes to successful participants.

On these undisputed facts, the prosecution succeeds on the ground that 2655 Main Street was not being used as a *bona fide* social club. It was a place open to the public without discrimination and in daily use as a centre of public gambling. Nothing turns in this case upon s. 168(3), which places the onus on the accused of proving that a place is not a common gaming house. The undisputed facts speak for themselves. The public was admitted on payment of a fifty cent admission fee. Then, if they wished, they could all participate in gambling, and they all did. This is not occupation and use by a *bona fide* social club. It is unnecessary to go into the objects of the Canadian Legion or its incorporated Branch 177. The use of these premises for bingo on such a widespread scale contradicts any possible inference of the use as a *bona fide* social club.

The whole or a portion of the bets on or proceeds from the games played at 2655 Main Street were directly or indirectly paid to the keeper. The respondents were required to show under s. 168(3) that this was not so in order to come within the exception. Again, nothing turns upon presumptions or onus of proof. The evidence is clear that the admission fees collected at the door plus all further moneys received from players were paid to cashiers and persons selling cards and tickets who were assisting and acting on behalf of Branch 177. These persons and Branch 177 were keepers within the meaning of the section. All the moneys were paid to the keeper directly and the keeper then retained all admission fees and disbursed the other moneys paid by players in the form of prizes for those who won. The significant feature of subs. (2) (*a*) (i) is not the ultimate disposition of the moneys received by the keeper but the simple fact of payment to the keeper. This alone is sufficient to take the respondents outside the operation of subs. (2)(*a*)(i).

On the above facts it is also apparent that the respondents failed to qualify for the exemption under subs. (2)(*a*)(ii). More than fifty cents per day was charged to persons for the right or privilege of participating in the games. Again, it is clear on the evidence that all those who went to the premises, went for the purpose of participating in the game in the hope of winning a prize. All bingo players

during the period covered by the charge and as far back as 1962 paid more than fifty cents per day. It is impossible to break down what they paid into a fifty cent charge for admission and a further charge for the cards for the purpose of paying lip service to the requirements of subs. (2)(*a*)(ii).

Both the learned magistrate and the Court of Appeal felt that it was necessary to put an interpretation on the word "persons" in subs. (2)(*a*)(ii). The magistrate held that the word meant persons who were members of the club or guests of the members of the club. The Court of Appeal was of the contrary opinion and held that the word was completely general in its scope. One must, however, read the section as a whole. There are only two exceptions to the general definition of "common gaming house". These are social clubs and charitable or religious organizations. We are not concerned with the latter in this case. They may hold an occasional bingo if the proceeds go to charity. The other exception is "use or occupation by an incorporated *bona fide* social club" on certain conditions. In this context the word "persons" in subs. (2)(*a*)(ii) means persons who play bingo in premises while used by a social club in a *bona fide* manner in keeping with the objects for which it was incorporated. It does not mean the public at large who played bingo in the circumstances of the charge, because the social club, assuming that it was one, was not being operated in a *bona fide* manner.

I would answer the question on which leave was granted in the negative and restore the conviction of both respondents.

Appeal allowed.

Solicitor for the appellant: S. M. Toy, Vancouver.

Solicitor for the respondent: W. J. Wallace, Vancouver.