FRED. BAILEY .....APPELLANT;

AND

THE KING .....RESPONDENT.

1938

*June 7.
*June 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge of keeping common gaming house—Article found on premises as constituting prima facie evidence of guilt—Cr. Code, ss. 985, 986 (2)—Nature of article—Prizes for punching in a board holes containing "winning letters" contained in correct answers to printed questions—Possibility of use of knowledge to punch with certainty correct holes—Difficult nature of questions—Probable and contemplated manner of using the board—Sufficiency of evidence to support magistrate's finding against accused.

Appellant was convicted of keeping a common gaming house contrary to s. 229 of the *Cr. Code*. Under a search warrant there was seized in appellant's drug store what was described as a "skill puzzle board" containing (*inter alia*) a list of prizes, lists of numbered questions, and rows (numbered correspondingly to the questions) of holes, the operator to win a prize if he punched a hole containing a "winning letter" (which letter would be in its proper place in the spelling of the answer, concealed under the row of holes, to the correspondingly numbered question). It was stated that if the operator knew the answer to a question he could make with certainty a winning punch. It was apparent (as found by the court) that very few persons who had not previously examined the questions and undertaken to search in books of reference, etc., would know the answers. Appellant contended that, there being only one correct answer to each question, there was no gaming or chance connected with the operation of the board. The question on this appeal was whether or not there was before the magistrate evidence sufficient in point of law to support a finding that the article was a "means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting" within s. 986 (2) of the *Cr. Code*.

Held: The conviction should be sustained. As applicable to this appeal, the effect of ss. 985 and 986 (2), *Cr. Code*, was to render it unnecessary for the prosecution to adduce evidence that persons had resorted to appellant's drug store for the purpose of using the board. As to its manner of use: The court must apply its knowledge of the usual everyday custom of mankind and hold that the ordinary person entering the store would pay the sum required (10 cents) for the chance of winning a prize, without critically examining the questions and returning later with a correct answer or answers. It was quite apparent that it was never intended that the board would be so used, but, on the contrary, it was expected that some persons entering the store would be inveigled to pay for punching a hole and the chance of winning a prize. This consideration sufficed to demonstrate that the board was a means or contrivance for playing a game of chance or, at any rate, a mixed game of chance and skill.

Per Duff C.J.: The magistrate was entitled to look at the character of the questions and to consider the probability that people participating in the game would seriously undergo the labour of ascertaining the

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1938

BAILEY
v.
THE KING.

correct answers, as well as the probability that anybody offering the game to people entering a public shop would expect that any such thing would be done. The magistrate evidently concluded that, while the game could be played as one involving research and with certain results, it would in actual practice be operated in such a manner that the result, favourable or unfavourable, would depend entirely upon luck, and that such was the shopkeeper's expectation. It could not be said that there was no evidence upon which the magistrate, employing his knowledge as a man of the world, as it was his duty to do, could take this view. It was an admissible conclusion, if the magistrate was so satisfied, that there was no other reasonable explanation of the proved facts. There was, therefore, evidence to support his finding that the article was a means or contrivance for playing a game of chance and was operated for gain by appellant.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) which (Masten J.A. dissenting) dismissed his appeal from his conviction by a magistrate of keeping a common gaming house, contrary to s. 229 of the *Criminal Code*. The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed.

L. M. Singer K.C. for the appellant.

C. L. Snyder K.C. and *C. P. Hope K.C.* for the respondent.

THE CHIEF JUSTICE.—I have had the opportunity of reading the judgment of Mr. Justice Kerwin in which I agree. I merely add that the controversy turns upon the application of sections 985 and 986, *Cr. C.* Subsection 2 of section 986 is in the following terms:—

If any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming house or common betting house as the means or contrivance may indicate;

and the question we have to determine is whether or not there was before the magistrate evidence sufficient in point of law to support a finding that the article produced is a "means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting."

It is not disputed that the article was not in the shop for sale. It is equally clear that it is a "means or contrivance for playing a game." On the payment of ten

(1) [1938] Ont. W.N. 81; [1938] 2 D.L.R. 762.

cents, the person desiring to participate in the game is entitled, if he succeeds in punching a hole containing one of the winning letters, to receive a prize specified as appertaining to that letter.

Mr. Singer argues that the game is not a "game of chance or a mixed game of chance and skill, gaming or betting" because each of the questions in the six columns has one and only one correct answer—which can be ascertained; and if such correct answers are ascertained each one of the winning letters will appear in one or more of them.

The magistrate was entitled to look at the character of the questions and to consider the probability that people participating in this game would seriously undergo the labour of ascertaining the correct answers to these questions, as well as the probability that anybody offering this game to people entering a public shop would expect that any such thing would be done. The magistrate evidently came to the conclusion that, while the game could be played as a game involving research and with certain results, it would, nevertheless, in actual practice, be operated in such a manner that the result, favourable or unfavourable, would depend entirely upon luck, and that such was the expectation of the shopkeeper.

I find myself unable to hold that there was no evidence upon which the magistrate, employing his knowledge as a man of the world, as it was his duty to do, could take this view. It was an admissible conclusion, if the magistrate was so satisfied, that there was no other reasonable explanation of the proved facts. There was, therefore, evidence to support his finding that the article produced was a means or contrivance for playing a game of chance and was operated for gain by the appellant.

The judgment of Crocket, Davis, Kerwin and Hudson JJ. was delivered by

KERWIN, J.—The appellant was convicted of keeping a common gaming house contrary to section 229 of the *Criminal Code,* and his conviction was affirmed by the Court of Appeal for Ontario with Mr. Justice Masten dissenting in the following words:—

My opinion in this case rests on the simple ground that there is no evidence that this game has ever been played as a game of chance. The

1938

BAILEY
v.
THE KING.

Kerwin J.

accused is presumed innocent until proved guilty. So far as appeared on the presentation of this case to this Court the evidence is, that the device can be used and a successful result obtained *with certainty* as a result of research and skill, but no evidence is afforded that it was ever operated by any person as a game of chance.

For that reason I am of opinion that the prosecution fails. I think the appeal should be allowed and the conviction quashed.

By section 226 of the Code, a common gaming house is defined as

(*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill.

Section 985 provides as follows:—

When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied.

Subsection 2 of section 986 is important but in order to understand the reference therein of the words "any house, room or place," it is necessary to quote also what is really subsection 1 although not so numbered. These two subsections are as follows:—

In any prosecution under section two hundred and twenty-eight or under section two hundred and twenty-nine it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof.

2. If any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing or destroying such means or contrivance, it shall be *prima facie* evidence that such house, room or place is a common gaming house or common betting house as the means or contrivance may indicate.

In this case a search warrant was obtained under section 641 of the *Code* and in pursuance thereof a constable seized in the drug store occupied by the accused what is described as a skill puzzle board. A list of the prizes that might be won is given in large type on a piece of cardboard attached

at the top of the board itself, and on the latter appears the following:—

Read explanation on other side before punching.
WINNING LETTERS
The letter "J" wins a "Miracle Dry Shaver."
The letters W, Z and F win a Genuine Ronson Lighter.
The following letters: Q K M V win a Package (5's) of Eastman Thin Blades.
Last punch on board receives a "Miracle Dry Shaver."

The words "Read explanation on other side before punching" are in smaller type than any of the other printing. It is true that immediately above what has been extracted the same words appear in heavy blue type on the representation of the face of the board appearing in the case submitted to us, but an examination of the board itself, filed as an exhibit, shows that the list of prizes on the cardboard sheet is attached so as to cover this heavy blue type. This is really of no importance in the view I take of the matter but I think should be mentioned.

From a perusal of the explanation referred to, it appears that the operator of the board would first be required to know the answer to one of the questions contained in six columns. The answer consists of either a seven- or nine-letter word, according to the column in which the question appears. Below the lists of questions numbered from 1 to 12 is a series of holes similarly numbered and the object of the operator would be to punch, with the instrument attached to the board by a string, the particular hole which contains a strip of paper upon which is printed one of the letters of the alphabet described as "Winning Letters." It is stated that the answer to each question is the only correct, complete and precise answer to the correspondingly numbered and situated question in the question portion of the board. I do not attach any importance to the fact that the questions are printed on either a yellow or red background and are somewhat difficult to read, but it is apparent, upon reading the questions, that very few persons who had not previously examined them and undertaken to search for the answers in books of reference, etc., would know the correct response except perhaps in an isolated instance. Taking three questions at random as examples, we find the following:—

7. Column 1. Wife of King Valentinian in Fletcher's tragedy of 1612.
8. Column 5. Speaker of the House of Commons who promoted death of Mary, Queen of Scots.

1938

BAILEY
v.
THE KING.

Kerwin J.

11. Column 5. Professor of comparative philology, 1868-1875, at Oxford (Full name).

As applicable to this appeal, the effect of section 985 and subsection 2 of 986 was to render it unnecessary for the prosecution to adduce evidence that persons had resorted to the appellant's drug store for the purpose of using the board. The contention of the appellant is that, there being only one correct answer to each question, there is no gaming or no chance connected with the operation of the board. I think, however, we must apply our knowledge of the usual everyday custom of mankind and hold that the ordinary person entering the drug store would pay ten cents for the chance of winning a prize, without critically examining the questions and returning later with the correct answers to one or more of them. It is quite apparent that it was never intended that the board would be so used but, on the contrary, it was expected that some members of the public entering the drug store would be inveigled to pay ten cents for the opportunity of punching a hole, and the chance of winning a prize. This consideration is sufficient, in my opinion, to demonstrate that the board is a means or contrivance for playing a game of chance or, at any rate, a mixed game of chance and skill.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *L. M. Singer.*

Solicitor for the respondent: *A. O. Klein.*