SAMUEL SILVESTRO ....................APPELLANT;

1964
*Oct. 20, 21
Nov. 19

AND

HER MAJESTY THE QUEEN ............RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Common betting house and book-making—Trial judge expressing doubt as to modus operandi—Whether necessary for Crown to prove precise manner in which offence committed—Criminal Code, 1953-54 (Can.), c. 51, ss. 21, 168, 169, 176(1), 177(1)(e), 592(4)(1), 597(2).*

The accused was charged with keeping a common betting house and engaging in book-making. The trial judge found that there was a *prima facie* case against him on both charges. However he acquitted him on the

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Ritchie and Spence JJ.

ground that the first charge had not been proved beyond a reasonable doubt. The Crown appealed to the Court of Appeal and contended that the magistrate erred in holding that the Crown should have proved affirmatively the precise manner in which the offence was committed. The Court of Appeal reversed the judgment at trial and substituted verdicts of guilty in respect of the two charges. The accused appealed to this Court.

*Held* (Cartwright and Spence JJ. dissenting): The appeal should be dismissed.

*Per* Taschereau C.J. and Fauteux and Ritchie JJ.: In order to sustain a conviction under s. 176(1) of the Code it is not necessary that there should be direct evidence of the accused having either received or recorded a bet, it being enough, under the provision s. 168(1)(*c*), if it be proved that he kept a disorderly house for the purpose of "enabling any person to receive bets". Once it has been established that the accused was the keeper of such a house, it is not necessary for the Crown to prove affirmatively the manner in which bets were received or recorded therein. The accused would necessarily have been found guilty by the magistrate but for this error in law. The Court of Appeal was justified in entering a verdict of guilty with respect to these offences.

*Per* Cartwright and Spence JJ., *dissenting*: The magistrate did not misdirect himself but was merely putting to himself the well-known rule in *Hodge's* case. The magistrate was putting to himself the basic proposition of criminal jurisprudence that the Crown must prove its case beyond a reasonable doubt.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside two verdicts of acquittal and substituting therefore verdicts of guilty. Appeal dismissed, Cartwright and Spence JJ. dissenting.

*A. Maloney, Q.C.*, and *B. Clive Bynoe,* for the appellant.

*F. W. Callaghan,* for the respondent.

The judgment of Taschereau C.J., and Fauteux and Ritchie JJ, was delivered by

RITCHIE J.:—This is an appeal brought pursuant to 597(2) of the *Criminal Code* from a judgment of the Court of Appeal of Ontario[1] setting aside two verdicts acquitting the appellant of the offences of keeping a common betting house and of book-making which were entered by Magistrate Howitt of the City of Guelph on August 14, 1963, and substituting therefor verdicts of guilty in respect of the following charges:

1. Samuel Silvestro on the 24th day of April and one month previous thereto at the City of Guelph A.D. 1963 in the County of Wellington did unlawfully keep a disorderly house to wit: a common bet-

[1] [1964] 1 O.R. 602, 2 C.C.C. 116, 42 C.R. 184.

ting house at 165 Ferguson Street in the City of Guelph contrary to the Criminal Code Sec. 176(1).

2. Samuel Silvestro on the 24th of April and one month prior thereto at the City of Guelph, A.D. 1963 in the said County of Wellington did unlawfully engage in bookmaking contrary to the Criminal Code Sec. 177(1)(*e*).

It appears to me to be desirable to analyze the nature of these charges before proceeding to a consideration of the question of law raised by this appeal.

As to the first charge, the relevant sections of the *Criminal Code* read as follows:

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.

168. (1) In this Part,

(*c*) "common betting house" means a place that is opened, kept or used for the purpose of

(ii) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting.

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

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

(*e*) "disorderly house" means a common bawdy-house, a common betting house or a common gaming house.

169. In proceedings under this Part,

(*a*) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is *prima facie* evidence that the place is a disorderly house.

It will be seen from the above that any keeper of a disorderly house which is opened, kept or used for the purpose of enabling any person to receive bets is guilty of keeping a common betting house contrary to 176(1).

As to the second charge, the relevant provisions of the *Criminal Code* read as follows:

177. (1) Every one commits an offence who

(*e*) engages . . . in the business or occupation of betting, or . . .

21. (1) Every one is a party to an offence who

(*b*) does or omits to do anything for the purpose of aiding any person to commit it . . .

It will accordingly be seen that anyone who does anything for the purpose of aiding another to engage in the occupation of betting is guilty of an offence under this section.

In the present case the learned Magistrate made the following findings of fact:

1. As to the premises being a disorderly house:

I find as a fact that entry was wilfully delayed by the accused and therefore, there is a prima facie evidence that the place is a disorderly house.

2. As to the appellant being the keeper of the premises:

Although counsel for the accused strenuously argued that there was not sufficient evidence to establish that the accused Silvestro was the keeper of the premises, I find as a fact that he was.

3. As to certain telephone calls made to the premises in question while the telephone was being monitored by the police:

I find as a fact that the telephone conversations were accurately recorded and that such evidence is admissible to prove the nature, character and atmosphere of the premises but not proof of the matters asserted . . . The conversations were about placing bets on horses that were running at various race tracks that day. Such evidence standing by itself, is not enough to substantiate a conclusion that the premises were being kept for betting. It is evidence of some value, however, tending to prove the charge.

In my opinion, the learned Magistrate's finding that the telephone conversations were properly recorded carries with it an acceptance of the record as to the number of betting messages which were received over the telephone at the premises while the police were listening in, and this discloses that between 1:35 and 2:34 p.m. there were eleven such calls, eight of which took place in the first twenty-eight minutes.

None of these findings of fact was disturbed by the Court of Appeal and I can see no basis for interfering with them in this Court. When they are read together, I am unable to construe these findings as amounting to anything other than a *prima facie* case that the appellant was the keeper of a disorderly house which was used for the purpose of enabling persons to receive telephone messages about placing bets on horses, and this, in my opinion, constitutes an offence under s. 176(1) of the *Criminal Code*. In my view also, a keeper of a common betting house is one who does something for the purpose of aiding other persons to engage in the occupation of betting, and I am therefore of opinion that having regard to the provisions of s. 21, the findings of fact above referred to also constitute a *prima facie* case under s. 177(1)(*e*). Notwithstanding the above, however, the learned Magistrate, after considering all the evidence, was left in doubt as to the guilt of the appellant on both charges, and it is the question of whether or not his doubts

were founded solely on an error in law which forms the subject of this appeal.

No evidence was called for the defence, and the considerations which gave rise to doubt in the Magistrate's mind appear to me to be illustrated by the following excerpts from his reasons for judgment:

1. I feel that in order to register a conviction not only must I find as fact that the accused received and recorded bets, but also I must outline and describe how he did it. This I find a little difficult to do as I am faced on the one hand with the suggestion that the accused used a flash board on which to record bets and on the other hand with the suggestion that he used the arborite table top for this purpose.
2. There is no direct evidence that the accused received or recorded a bet.
3. In the present case I am left wondering just what method the accused used to carry out his alleged illegal activity. There are no betting slips and scratch sheets in evidence. Also, I think it is obvious that a book maker must have some printed or written record of the day's racing contestants immediately at hand, as a reference before receiving a bet. In the case before me there is no sign of any such information. Admittedly there were the newspapers in the parked automobile but they were not being used at the time of the raid.
4. I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation.

The following question of law was stated in the notice of appeal of the Attorney-General of Ontario to the Court of Appeal:

> The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.

It is true that the question so stated does not embody the exact language used in the reasons for judgment delivered at trial, but it does appear to me that in acquitting the appellant the learned Magistrate made it clear that he was acting in accordance with his opinion that in order to convict it was necessary for him to have affirmative proof, not only that the accused received bets, but also that he recorded them and that there must in addition be proof, amounting to reasonable certainty, of the manner in which these things were done.

In my view, one of the questions of law raised by the opinion so expressed by the Magistrate is fairly reflected in the question posed by the notice of appeal.

It will be noted that a substantial part of the difficulty which led the Magistrate to hold that the first charge was

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not proved beyond a reasonable doubt sprang from his being under the impression that in order to convict he must be satisfied as to how the bets were recorded. In fact, as Roach J.A. has pointed out in the course of his reasons for judgment rendered on behalf of the Court of Appeal, the learned Magistrate, like the Court of Appeal of Ontario in *Regina v. Failkaw*[1], was wrong in considering that the *recording* of bets is an essential ingredient of the offence under s. 176(1). Indeed, in order to sustain a conviction under that section it is not necessary that there should be direct evidence of the accused having either received or recorded a bet, it being enough, under the provisions of s. 167(1)(*c*), if it be proved that he kept a disorderly house for the purpose of "enabling any person to receive bets". Once it has been established that the accused was the keeper of such a house, it is not necessary for the Crown to prove affirmatively the manner in which bets were received or recorded therein.

As I consider that the findings of fact above referred to constitute a *prima facie* case of guilt as to both charges, and as there was no evidence for the defence, I am of opinion that the accused would necessarily have been found guilty by the learned Magistrate but for the errors in law which I have indicated, and I am of the further opinion that the Court of Appeal, in the exercise of the jurisdiction conferred upon it by s. 592(1)(i) of the *Criminal Code*, was justified in entering a verdict of guilty with respect to these offences.

I would accordingly dismiss the appeal.

The judgment of Cartwright and Spence JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal by the accused from the judgment of the Court of Appeal for Ontario[2] dated January 31, 1964. By that judgment, the Court of Appeal for Ontario allowed the appeal of the Attorney General for Ontario from the acquittal of the accused by His Worship Magistrate Howitt on August 14, 1963. The accused had been charged with two offences as follows:

> (1) On the 24th day of April and one month previous A.D. 1963, at the City of Guelph in the said County of Wellington did unlawfully keep a disorderly house, to wit: a common betting house at 165 Ferguson Street, in the City of Guelph, contrary to the Criminal Code, Section 176, subsection (1).
> and

[1] [1963] 2 C.C.C. 42, 40 C.R. 151.

[2] [1964] 1 O.R. 602, 2 C.C.C. 116, 42 C.R. 184.

(2) On the 24th day of April and one month prior thereto at the City of Guelph A.D. 1963, in the said County of Wellington did unlawfully engage in bookmaking, contrary to the Criminal Code, Section 177, subsection (1)(*e*).

The trial took place on June 26, 1963, the learned magistrate reserved judgment, and on August 14, 1963, gave written reasons for the acquittal of the accused upon both charges.

The Attorney-General for the Province of Ontario appealed to the Court of Appeal for Ontario by notice of appeal dated August 23, 1963. I repeat in full the grounds of appeal set out therein:

> The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.

The Court of Appeal for Ontario gave effect to this ground of appeal. In the course of his judgment, Roach J.A. said:

> The question of law on which the Attorney General founds this appeal is stated in his notice of appeal, thus:
>
> > The learned Magistrate erred in law in holding that in order to convict the accused it was necessary for the Crown to prove affirmatively the precise manner in which the offence was committed.
>
> In my opinion that objection as applied to these charges is well taken and the learned Magistrate misdirected himself.

The appellant urged many grounds of appeal before this Court. In my view, the appeal may be decided by reference only to the first thereof, i.e., that the learned magistrate did not misdirect himself and that the statement quoted inaccurately in the notice of appeal was not an attempt by the magistrate to direct himself at all. It is probably unnecessary to cite at length the reasons for the judgment given by the learned magistrate and a short summary thereof will be sufficient. Firstly, the magistrate found upon evidence that the provisions of s. 169(*a*) of the Code applied to the circumstances and that there was *prima facie* evidence that the premises were a disorderly house. Secondly, the learned magistrate found that the accused was the keeper of that house. Thirdly, the learned magistrate found that the telephone messages adduced in evidence as having been received at the premises by an officer in the hour which followed the officer's entry upon the premises were accurately recorded in the tape recording produced

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as a witness. Fourthly, the magistrate recounted the other evidence as to what was found in the premises and outside the premises in an automobile, and then continued:

> The evidence which I have outlined is wholly circumstantial. There is no direct testimony that the accused received or recorded a bet. The Crown asks that a conviction be made, suggesting that evidence indicates that the accused received bets over the telephone and recorded them in pencil on the arborite table top or on flash paper, which paper burns instantly on being ignited. It is argued that the burnt match points to the fact that flash paper was used. Further, it is submitted that the pencil found on the accused man was used to record the bets on the table and the smudge mark or marks, barely discernable, on the table, were made after the face cloth was used in an effort to destroy all evidence of bets having been so recorded.
>
> I feel that in order to register a conviction not only must I find as fact that the accused received and recorded bets, but also I must outline and describe how he did it. This I find a little difficult to do as I am faced on the one hand with the suggestion the accused used flash paper on which to record bets and on the other hand, with the suggestion that he used the arborite table top for this purpose.
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> Also I feel that in cases of this kind, I should look for very tangible evidence. The circumstantial evidence, although any part of it may be capable of innocent interpretation, should be closely connected so that the cumulative effect should almost impel me to find the accused guilty. The evidence should be inconsistent with any other rational conclusion of innocence.
>
> In the present case I am left wondering just what method the accused used to carry out his alleged illegal activity. There are no betting slips and scratch sheets in evidence. Also, I think it is obvious that a book maker must have some printed or written record of the day's racing contestants immediately at hand, as a reference before receiving a bet.
>
> In the case before me, there is no sign of any such printed information. Admittedly there were the newspapers in the parked automobile but they were not being used at the time of the raid. The gist of the offence is the keeping of the premises for betting (and I emphasize "keeping"). No doubt, Samuel Silvestro is a keeper, but there is some evidence, the admissibility of it being doubtful, that a Frank Silvestro is involved. Did the accused use the name of Frank Silvestro in answering the telephone or was a Frank Silvestro actually engaged or about to engage in receiving and recording bets on the 24th day of April 1963? Do Frank and Samuel Silvestro work together in such an illegal enterprise? These questions are not answered.
>
> It may be that a man is so enveloped by a web or network of inculpatory evidence, that it is incumbent upon him to make an explanation or be convicted. This is not so here. I am left to draw too many inferences in order to reach the conclusion that the accused is guilty. Although my suspicions are strong that the accused was carrying on betting operations at 165 Ferguson Street, I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation.

It is the sentence from that portion of the learned magistrate's reasons reading, "I feel that in order to register conviction not only must I find it a fact that the accused received and recorded bets but also I must outline and

describe how he did it", that the Crown took the proposition set out in its notice of appeal. It should first be noted that the magistrate is not even purporting to say what the Crown must prove, he says rather what he must do. He has pointed out the circumstantial nature of the evidence and, of course, there was no other kind of evidence, and by saying, "the circumstantial evidence although any part of it may be capable of innocent interpretation, should be closely connected so that the cumulative effect should almost impel me to find the accused guilty", he was putting to himself the well-recognized rule in *Hodge's* case[1]. When he says, "I am left to draw too many inferences in order to reach the conclusion that the accused is guilty. Although my suspicions are strong that the accused was carrying on betting operations at 165 Ferguson Street, I feel the evidence is not strong enough and it does not disclose with reasonable certainty his method of operation", the learned magistrate is putting to himself again the basic proposition of criminal jurisprudence that the Crown must prove its case beyond reasonable doubt, and when the magistrate used the words objected to and which I have quoted above, the magistrate was simply saying what he felt he should be able to determine in order to come to his conclusion beyond reasonable doubt. It may well be that neither the members of the Court of Appeal nor I, had we heard the evidence adduced at trial, would have any reasonable doubt, but it is not a doubt in our minds which is at issue, it is a reasonable doubt in the mind of the learned magistrate who tried the charges.

I therefore am of the opinion that the appeal should be allowed, the judgment of the Court of Appeal reversed, and that of the magistrate restored.

*Appeal dismissed,* CARTWRIGHT *and* SPENCE JJ. *dissenting.*

*Solicitors for the appellant: Maloney & Hess, Toronto.*

*Solicitor for the respondent: W. C. Bowman, Toronto.*

[1] (1838), 2 Lewin C.C. 227, 168 E.R. 1136.