

1948

Present : Gratiaen J.

SABAPATHY, Appellant, and RICHARD (Inspector of Police,) Respondent.

S. C. 312—M. C. Kandy, 30,992.

Betting—Possessing instruments of unlawful betting—Search without authority—Presumption—Betting on Horse Racing Ordinance (Chapter 36)—Section 17.

The possession of instruments of unlawful betting is not in itself an offence. It merely raises a presumption that the person in possession is guilty of the offence of unlawful betting on a race horse. Even this presumption does not arise unless such person was searched in accordance with the provisions of the Ordinance.

A PPEAL from a judgment of the Magistrate, Kandy.

N. M. de Silva, with E. A. G. de Silva, for the accused, appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 28, 1948. GRATIAEN J.—

There were two accused in this case. The 1st accused appeals from a conviction entered against him on the following charge which was framed against both accused :—

“That they did at King’s Street, Kandy, on January 3, 1948, in breach of section 3 (3) (6) of Ordinance No. 55 of 1943, have in their possession instruments of unlawful betting, to wit, 2 envelopes containing 8 betting slips with names of horses proposed to be run in India on January 3, 1948, and thereby committed an offence punishable under section 10, Chapter 36, as amended by section 6 (3) (2) (a) of Ordinance No. 55 of 1943.”

The 2nd accused was also convicted, but has not appealed from his conviction.

The evidence led by the prosecution proves beyond doubt that on the day in question Sub-Inspector Richard who was attached to the Kandy Police arrested both accused on suspicion near a hotel in King’s Street. The second accused was searched and on his person were discovered 8 betting slips with the names of horses entered to run in a race-meet in India. The appellant was also searched, and on his person were discovered a racing newspaper and a cash account.

The first question which arises for consideration is whether the mere possession of these documents constituted what the charge describes as the offence of “possessing instruments of unlawful betting”. The substantial amendments introduced by Ordinance No. 55 of 1943 to the original Betting on Horse Racing Ordinance, Chapter 36, are somewhat confusing because no re-print of the entire Ordinance, as amended, is yet available.

The original Ordinance introduced certain statutory offences, to the list of which the amending Ordinance added other offences including the offence of “*unlawful betting on a horse race.*” This has been defined as “making, placing, receiving, or negotiating a bet on a horse-race other than a taxable bet.” Section 9 of the amending Ordinance provides *inter alia*, that a new section numbered 17 shall be added to the original Ordinance to read as follows :—

“Any person who is found :

- (a) in any premises kept or used for the purpose of unlawful betting on a horse-race ; or
- (b) in possession of an instrument of unlawful betting on the occasion of his being searched under this Ordinance,

shall be presumed, until the contrary is proved, to be guilty of the offence of unlawful betting on a horse-race.”

The term “instrument of unlawful betting” is also defined by the amending Ordinance and clearly includes documents such as the 2nd accused was proved to have been in possession of at the relevant date.

An examination of the sections to which I have referred makes it clear that the possession of "instruments of unlawful betting" is not an offence of any kind, but that such possession may in certain circumstances raise the rebuttable statutory presumption that the offence of "unlawful betting on a horse-race" has been committed. It is evidence of an offence but not an offence in itself. It follows that the only offence with which the accused could have been charged was "unlawful betting on a horse-race." The charge framed against the accused in this case was therefore defective in that it alleges the commission of an act which does not constitute an offence against the law.

It is unnecessary to consider whether the case should be sent back for the appellant to be retried on a proper charge because I have come to the conclusion that the evidence led by the prosecution does not establish the commission of the offence of "unlawful betting on a horse-race." The prosecution has not suggested that any documents discovered during the search were "instruments of unlawful betting" apart from the betting slips all of which were found in the possession of the 2nd accused. Moreover, the prosecution must fail for a more fundamental reason. The mere possession of "instruments of unlawful betting" by an accused person does not *per se* raise a presumption of guilt unless one or other of the circumstances laid down in section 17 which I have quoted above has been established. Section 17 (a) admittedly does not apply. Section 17 (b) would only apply if the incriminating documents had been discovered on an accused person "on the occasion of his being searched under the Ordinance." In other words, it lies upon the prosecution to establish that the search was authorised by the provisions of the Ordinance before it can invite the Court to draw the statutory presumption created by section 17 (b). Evidence of the discovery of such documents in the course of an unauthorized search may of course be admissible at the trial, but is not sufficient, unless other evidence is also forthcoming, to prove "unlawful betting".

The right of search in cases of this nature is laid down by section 15 of the original Ordinance (Chapter 36) as amended by section 8 of Ordinance No. 55 of 1943. Sub-section 1 permits a search only on the authority of a Magistrate, and Inspector Richard does not claim to have had any such authority. Sub-section 2, as amended, authorizes "a police officer of or above the rank of Sergeant in charge of a Police Station" and no other person to exercise similar powers of search, but only after certain specified conditions have first been satisfied. Not only has Inspector Richard not satisfied those conditions but he has frankly admitted that he was not in charge of a Police Station at the relevant date. Police officers should realise that searching a person on the public highway involves a serious interference with the liberty of the subject and should not be resorted to unless it has the clear sanction of the law. In this case the search was unauthorized by the Ordinance and section 17 can have no application. I therefore make order setting aside the conviction of the appellant and I acquit him. I also quash the conviction of the 2nd accused in the exercise of my revisionary powers.

Accused acquitted.