VINCENT FEELEY, ANDREW HERGEL, GEORGE REID, EDWARD MEECHAN ..... APPELLANTS;

1952

*Oct. 27
*Dec. 15

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Common betting-house—Summary trial under Part XVI—Motion for non-suit—Criminal Code, ss. 229, 773(f), 777(a), 1013(4) 1023(2).

The appellants were jointly charged with having kept a common betting-house and were tried summarily before a magistrate pursuant to ss. 773(*f*) and 777(*a*) of the *Criminal Code*. On a motion for non-suit, made at the close of the case for the Crown, the charge was dismissed as against all four accused. Pursuant to s. 1013(4) of the *Code*, the Crown appealed the acquittal on the ground that there was evidence to support the case against the accused and the Court of Appeal for Ontario ordered a new trial.

Held: (1): The appeal of the appellant Feeley should be dismissed; there was evidence which, if accepted, showed circumstances from which the inference might fairly be drawn that the building in question was being used as a common betting-house; and the evidence as to the statements made by this appellant and as to his actions was such that, in the absence of explanation or denial, the tribunal of fact might properly have decided that he was guilty of being the keeper of such betting-house.

(2): The appeals of the appellants Reid, Hergel and Meechan should be allowed and a judgment of acquittal entered, there being no evidence on which a properly instructed jury, acting reasonably, could have found a verdict of guilty.

Held also, that the rules laid down in The *King* v. *Morabito* [1949] S.C.R. 172. (i) that the judicial officer presiding at the trial of a criminal charge can not dismiss the charge at the close of the case for the Crown and before the defence has elected whether or not to give evidence unless at that stage there is no evidence upon which a jury might convict, and (ii) that whether or not there is such evidence is a question of law alone, are applicable to the conduct of a trial under Part XVI of the *Criminal Code*.

APPEALS from the judgment of the Court of Appeal for Ontario, allowing the Crown's appeal from the acquittal of the accused and ordering a new trial.

W. E. MacDonald for the appellants.

C. P. Hope Q.C. for the respondent.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Cartwright and Fauteux JJ.

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The judgment of the Court was delivered by:—

CARTWRIGHT J.—The appellants were jointly charged that they,

> within six months ending on the 4th day of November A.D. 1950 at the Town of New Toronto in the County of York unlawfully did keep a common betting house at the premises situate and known as Lakeside Cigar Store, 132 Sixth Street in the said Town of New Toronto, contrary to Section 229 of the Criminal Code.

They were tried summarily before His Worship Magistrate Hand pursuant to sections 773(*f*) and 777(*a*) of the *Criminal Code*. Each of the appellants was separately represented. Upon the close of the case for the Crown on January 26, 1951, the counsel for each defendant moved "for non-suit and dismissal in respect of" his client. The learned Magistrate granted this motion as to the appellants Hergel and Meechan, reserved his judgment as to the appellants Feeley and Reid and adjourned the hearing to January 29, 1951, on which date he gave judgment dismissing the charge against them also.

The learned Magistrate did not give extended reasons for judgment. In dealing with the motion so far as Hergel and Meechan were concerned he said "I find no evidence for a conviction against Andrew Hergel and Edward Meechan and the charge against them will be dismissed." In dealing with the motion as to Feeley and Reid he simply stated that the motion would be granted and the charge dismissed.

From this judgment of acquittal the Attorney-General appealed to the Court of Appeal for Ontario pursuant to section 1013 (4) of the *Criminal Code* on the following ground:—

> That the learned Magistrate erred in holding that there was no evidence to support the Crown's case against the accused.

The appeal was allowed and a new trial directed as to all four of the appellants, who now appeal to this Court pursuant to section 1023 (2) of the *Code*. We have not the benefit of any written reasons for the judgment of the Court of Appeal.

It is common ground that had the learned Magistrate refused the motion the appellants would have had the right to call evidence for the defence if so advised and

counsel for the respondent submits that the decision of this Court in *The King* v. *Morabito* (1) establishes (i) that at that stage it was not open to the learned Magistrate to dismiss the charge unless there was no evidence on which, had the trial been before a jury, a properly instructed jury, acting reasonably, might have convicted the accused, and (ii) that whether or not there was such evidence is "a question of law alone" within the meaning of section 1013 (4) of the *Code*. I agree with this submission.

Counsel for the appellant sought to distinguish the *Morabito* case from the case at bar. It is true that in the former case the trial was held under the provisions of Part XVIII of the *Code* and in the latter under Part XVI; and that *Perry* v. *The King* (2), approved in the judgment of Kellock J., concurred in by Rand and Locke, JJ., in the *Morabito* case, dealt with a charge disposed of under Part XV of the *Code*. It would seem, however, that *Rex* v. *Olsen* (3) also, approved in the judgment of Kellock J., dealt with a charge tried under Part XVI. The offence there charged was one on which the Crown might have proceeded either summarily or upon indictment and the fact that there was an appeal to the Court of Appeal for British Columbia indicates that the latter course had been followed. It is true that the corresponding sections in Parts XV, XVI and XVIII of the *Code* are not identically worded but in proceedings under each of such parts the judicial officer before whom the trial is held acts as judge both of the law and of the facts and it appears to me that the rules laid down in the *Morabito* case are applicable to the conduct of a trial under Part XVI of the *Code*. It is therefore necessary to consider as to each appellant whether at the close of the Crown's case there was evidence upon which a properly instructed jury, acting reasonably, might have convicted him.

The charge being that of keeping a common betting-house it was essential for the Crown to prove (i) that the building known as 132 Sixth Street, New Toronto, was at the relevant time a common betting-house, and (ii) that each appellant was a keeper thereof.

(1) [1949] S.C.R. 172. (2) 82 Can. C.C. 240.
(3) 4 C.R. (Can.) 65.

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The burden resting upon the prosecution as to (ii) above is somewhat lightened by the terms of section 229 (3) of the *Criminal Code* reading as follows:—

> (3) Every one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and is liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof.

As in my view the order for a new trial should be upheld as to the appellant Feeley, I do not propose to discuss the evidence in detail. During the argument counsel for the Crown made it clear that he did not rely upon the presumptions created in certain circumstances by sections 985 and 986 (2) of the *Criminal Code*. He submitted that a *prima facie* case was made out against all of the appellants without the aid of these statutory presumptions.

In my view there was evidence which, if accepted, showed circumstances from which the inference might fairly be drawn that on the 3rd of November, 1950 the building in question was being used as a common betting-house. The more difficult question is whether there was evidence that the appellants were the keepers of such betting-house.

I have reached the conclusion that the evidence as to the statements made by the appellant Feeley, and as to his actions was such that, in the absence of explanation or denial, the tribunal of fact might properly have decided that he was guilty.

As to the appellants Reid, Hergel and Meechan respectively counsel for the respondent relies on the following items of evidence: As to Reid: (i) the license, Exhibit 30 (ii) the fact that in the pocket of a coat hanging in a closet on the premises was "a liquor permit in the name of George Reid" (iii) that he was found by the police in the cellar of the store in the circumstances to be mentioned hereafter.

As to Hergel: (i) that on November 3, 1950, he was twice seen to leave the premises in question and return (ii) the same as item (iii) in the case of Reid.

As to Meechan: (i) he had in his possession a key which would open the back door of the building in question and a key which would open the door of a small room in the building (ii) the same as item (iii) in the case of Reid.

It will be convenient to deal first with the third item mentioned in the case of Reid as it is common to these three appellants. There was evidence that Reid, Hergel and Meechan were all found by the police in the cellar room, under the building in question, containing the oil furnace. There was evidence from which it would have been open to a jury to draw the inference that one or more of them had been burning in the furnace pieces of paper which it was open to the jury to infer were betting slips but there was no evidence from which the jury could infer that all three of them had taken part in this or from which it could be determined which one had been doing it. This being so the effect of this item is only to warrant the drawing of an inference that each of the three was present while betting slips were being destroyed. It does not warrant the drawing of the inference as to any one of them that he destroyed betting slips.

Dealing next with item (i) as to Reid, there was evidence that a document, Exhibit 30, was on the wall in the building in question. It reads as follows:

TOWN OF NEW TORONTO No. 1 672

Tobacco

LICENSE

This License is granted to Lakeside Cigar Store of 132 6th St. to carry on Business or Businesses as above mentioned in the Town of New Toronto.

PROVIDED that the said Geo. Reid (L.C. St.) shall duly observe all By-laws made and provided by the Municipal Council of the Town of New Toronto, under which this License is Issued.

This License to continue in force until the 31st day of Dec. 1950 and no longer. This License may be Cancelled if the provisions of any By-law regarding the same are not fully observed.

ISSUED at the Town of New Toronto, this 1st day of February, 1950. Amount of License Fee $2.00

(Sgd.) F. R. LONGSTAFF

Municipal Treasurer

Below this appears a cash register printing shewing $2.00 paid on February 1, 1950.

Counsel for the appellant objects that this has no probative value in the absence of any evidence to identify the appellant George Reid with the individual intended to be described by the words "Geo. Reid" in the license. This point was not further developed in argument and I do not

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propose to discuss the numerous decisions, some of which are not easy to reconcile, in which the question has been considered as to whether and to what extent identity of name is evidence of identity of person. I will assume, without deciding, that a jury would have been entitled to infer that the appellant George Reid was the individual described by the words "Geo. Reid" in Exhibit 30. It might then be suggested that this indicated that on February 1, 1950, the appellant Reid was the licensee permitted to carry on business under the name "Lakeside Cigar Store" at the premises in question and that the presence of Exhibit 30 on such premises on November 3, 1950 indicated that he had up to that date continued in charge of such business. Be this as it may, it appears to me that if such an inference could otherwise have been drawn it was displaced by the evidence given by the Crown that Feeley was both the owner and the person in charge of the premises.

Item (ii) as to Reid seems to me to indicate nothing more than that the appellant Reid had hung up his coat in a closet in the premises in question and possessed a liquor permit. It throws no light on the question as to what he was doing on the premises.

In my opinion, these three items of evidence, taken together, are insufficient to make out a *prima facie* case that Reid was in fact the keeper or that he appeared, acted or behaved as the person having the care, government or management of the house in question or as assisting in such care, government or management.

In the case of Hergel the evidence as to his presence in the cellar in the circumstances mentioned, coupled with the evidence as to his twice leaving and entering the premises, falls far short of making out a *prima facie* case.

In the case of Meechan the evidence as to his presence in the cellar and as to the possession of the two keys mentioned above does not appear to me to indicate that he was a keeper. His possession of the keys would permit the jury to infer that he had a right to enter the building and a particular room therein, but would afford no foundation for a finding that he took any part in its care, government or management.

For the above reasons I have reached the conclusion that as to the appellants Reid, Hergel and Meechan there was no evidence on which a properly instructed jury, acting reasonably, might have found a verdict of guilty.

I would dismiss the appeal of the appellant Feeley. I would allow the appeals of the appellants Reid, Hergel and Meechan and direct that as to each of them a judgment of acquittal be entered.

Appeal of the appellant Feeley dismissed; appeals of the other appellants allowed.

Solicitor for the appellants: *W. E. MacDonald.*

Solicitor for the respondent: *C. P. Hope.*