

DE LA RUE v. McNAMARA

tion the important right of every man charged with a crime to be admitted to bail pending his trial. There are, of course, certain well understood limitations to bail, and there is also an accused person's right to a prompt and speedy trial.

In carrying out the administration of the law the practice is that it is left to the Crown Prosecutor representing the Attorney-General to present the accused man for trial as he deems convenient. Remands or adjournments, on the application either of the Crown or the prisoner, are considered and granted as circumstances warrant. This man was admitted to bail pending his trial. He was presented in due course, and he was then remanded for trial. He still stands remanded. No assurance has or can be given to me that he will be tried at any time or at all, although he has a right to be tried at the present sittings of the Court of General Sessions. This much is clear. The discretion in certain circumstances to refuse bail can never be used by way of punishment or for the purpose of putting coercion on a prisoner to do something that he is not bound in law to do. It appears here that the Judge's discretion has been misapplied under the mistaken idea of putting duress on the prisoner to change his costume. That is an abuse of that discretion. This occasion is therefore one of these rare occasions in which I must interfere with the exercise of the discretion.

*Bail granted.*

[Solicitors—For the Crown, Menzies, Crown Solicitor; for the prisoner, Sonenberg and Goldberg.]

F. D. C.S.

Before Martin, J.

Dec. 15, 21, 1939.

**DE LA RUE v. McNAMARA.**

*Criminal law—Police Offences—Conviction—Occupier of a house where a contrivance for gaming is kept—Proof of mens rea—Forfeiture of contrivance for gaming—Person aggrieved—Police Offences Act 1928 (No. 3749), sec. 155, 163\*—Justices Act 1928 (No. 3708), sec. 136.*

The licensee of an hotel was charged with being the occupier of a house where a contrivance for gaming (a fruit machine) was kept. The information did not seek a forfeiture of the machine.

\* Police Offences Act 1928—

Sec. 155. Every person who constructs makes or uses . . . any machine device or contrivance for gaming or betting or any totalizator or device or contrivance of a like kind or having a like object . . . and the owner or occupier of every house or place where any such machine or device or contrivance or any such totalizator or device or contrivance is kept or used or is in operation shall be guilty of an offence.

Sec. 163. All instruments of gaming and all money and securities for money lawfully seized under the provisions of any Act relating to lotteries betting gaming or totalizators may in the discretion of the court be forfeited to His Majesty the King by order of any court of petty sessions.

During the absence of the defendant and without her knowledge, the machine had been installed in the hotel by her son, who managed the hotel during her absence. The machine, which had been operated in the hotel during the defendant's absence and without her knowledge, was seized under a search warrant issued under section 124 of the Police Offences Act 1928.

A Court of Petty Sessions convicted the defendant, and forfeited the machine.

After appeal to a Court of General Sessions, a case having been stated,—

*Held*, that the knowledge of the defendant's servants and agents should be imputed to the defendant, and the conviction and order of forfeiture were correct.

*Held* also, that there was no issue between the informant and the defendant as to the forfeiture.

Although section 163 of the Act does not require notice of an application for forfeiture to be given, anyone interested in the machine would be entitled to be heard if he appeared to resist the application for forfeiture.

*Quære*, whether the defendant had any right of appeal to General Sessions from the order of forfeiture.

CASE STATED.

Stacia Annie McNamara was the occupier of the Court House Hotel at Shepparton. On the 20th of July, 1939, she was, on the information of Arthur De La Rue, convicted by the Court of Petty Sessions at Shepparton of an offence against sec. 155 of the Police Offences Act 1928. The offence charged was for that, at Shepparton, between the 13th and the 19th of June, 1939, she was the occupier of a certain house or place, to wit the Court House Hotel aforesaid, where a contrivance for gaming was kept. Upon conviction she was ordered to be fined £5, in default one month's imprisonment, and an order was made for the forfeiture of the contrivance in question, which was a fruit machine.

From this conviction the defendant appellant appealed to the Court of General Sessions at Shepparton. The appeal was heard by His Honour Judge Wasley as Chairman, and was dismissed, the conviction being affirmed, and a case was stated setting out the following facts as given in evidence:—

A constable named McLintock visited the hotel on the 14th of June, 1939, and there in a parlour off the bar he saw a fruit machine and several men playing at it. Another constable, named Meikle, on the 17th of June, 1939, with other police, entered the hotel premises by virtue of a special warrant issued under sec. 124 of the Police Offences Act 1928. He saw a number of people about the fruit machine. He seized

the machine, but under the warrant no one was arrested or searched. The defendant, Mrs. McNamara, was absent from the hotel premises. She was at Mount Gambier from the 11th of June, 1939, till the 25th of June, 1939, and she had no knowledge that the fruit machine was in her hotel.

Judge Wasley found the following as facts:—

1. That the fruit machine was a contrivance for gaming, and was kept on the hotel premises between the dates mentioned in the information, when the defendant was the occupier of the premises.

2. That the defendant was not on the hotel premises between those dates, but was absent at Mount Gambier.

3. That the defendant at no time before the 25th of June, 1939, knew that the machine was on the premises, and she had not given permission for it to be placed there.

4. That Clement McNamara, the son of the defendant, was in charge of the premises, and had been responsible for the installation of the fruit machine.

5. The only action taken on the warrant, apart from the entry into the hotel premises, was the seizure of the machine.

The questions asked in the Special Case were: Was I right in holding that the appellant was liable on the facts as I found them? And was I right on the facts as found in confirming the forfeiture of the said fruit machine?

*Fullagar, K.C.* (with him *Cullity*), for the defendant appellant.—Under sec. 155 *mens rea* or a guilty knowledge must be proved. In the alternative, the absence of guilty knowledge is a defence. Decisions under the Licensing Act 1928 are inapplicable. This machine is capable of an innocent use, therefore guilty knowledge must be proved. The machine ought not to have been forfeited, because there was not a strict compliance with sec. 124 of the Police Offences Act 1928 in executing the warrant. No one was arrested or searched. The owner of the machine was not heard on the proceeding to forfeit, and no attempt was made to find him. The forfeiture is therefore illegal. The forfeiture was made in proceedings to which the appellant was a party, and she is therefore a person "aggrieved" by the decision in the forfeiture proceedings. The fact that she repudiated ownership of the fruit machine is immaterial. He referred to—*Henderson v. O'Connell*, [1937] V.L.R. 171, [1937] A.L.R. 218; *Thomas v. R.* (1937) 59 C.L.R. 279; *R. v. Thomas*, [1937] A.L.R. 566; *Bond v. Foran*, (1934) 52 C.L.R. 364, [1935] 41 A.L.R. 1; *Maier v. Musson*, (1934) 52 C.L.R. 100, [1935] 41 A.L.R. 80; *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; *R. v. Tolson*, (1889) L.R. 23 Q.B.D. 168; *Chisholm v. Doulton*, (1889) L.R. 22 Q.B.D. 736; *Mousell Bros. v. London and North-Western Railway Company*, [1917] 2 K.B. 836, 845, 846; *Commissioners of Police v. Cartman*, [1896] 1 Q.B. 655; *Graves v. Bet Jong*, (1904) 10 A.L.R. 217,

26 A.L.T. 101; *Barnett and Grant v. Campbell*, (1902) 21 N.Z. L.R. 484; *Windeyer on Wagers, Gaming and Lotteries in Australia*, pp. 143, 145.

*Woinarski* for the informant respondent.—Proof of *mens rea* is unnecessary. The section does not contain the words "knowingly" or "wilfully," or any word of like import. Section 155 is derived from the Lotteries, Gaming and Betting Act 1906, where sec. 31 is under the heading "Totalizators." The search warrant was properly executed. There was no need to discover the owner of the machine or to hear what he had to say. As the appellant says that the fruit machine does not belong to her, she is not a person "aggrieved" by the order of forfeiture. He referred to—*Keith v. Bourne* (No. 2), (1924) 41 W.N. (N.S.W.) 69; *Wells v. Noblett*, (1933) S.A.S.R. 134; *Betts v. Armstead*, (1888) L.R. 20 Q.B.D. 771.

*Fullagar, K.C.*, in reply.

*Cur. adv. vult.*

MARTIN, J., read the following judgment:—Case stated by a Chairman of General Sessions. The appellant (defendant) was convicted by a Court of Petty Sessions on an information charging her that at Shepparton, between the 13th and 19th June, 1939, she was the occupier of a house or place where a contrivance for gaming was kept. The Court found her guilty and also ordered that the contrivance in question (a fruit machine) be forfeited to His Majesty the King. On appeal the learned Chairman of General Sessions heard evidence and found the following facts:—(1) That the fruit machine mentioned in the evidence and seized by the police was a contrivance for gaming within the meaning of sec. 155 of the Police Offences Act 1928; (2) that the said fruit machine was kept on the premises of the Court House Hotel, Shepparton, between the 13th June and the 19th June, 1939, and that the appellant was between these dates the occupier of the said premises; (3) that the appellant was not on the premises of the said Court House Hotel between the 13th June and the 19th June, 1939, having left for Mount Gambier, South Australia, on the 11th June, 1939, and not returning until the 25th June, 1939; (4) that the appellant at no time before the 25th June, 1939, knew that the said fruit machine was on the said premises, and that she had not given permission for it to be placed there; (5) that the son of the appellant, the witness Clement McNamara, was in charge of the said premises during the absence of the appellant, and had been responsible for the installation of the machine between the 13th June and the 17th June, 1939; (6) that the only action taken on the warrant apart from the entry into the Court House Hotel was the seizure of the fruit machine.

At the request of Counsel for the appellant he stated those facts and asked two questions for determination by this Court, *videlicet*: (a) Was I right in holding that the appellant was liable on the facts as I found

DE LA RUE v. McNAMARA

them. (b) Was I right on the facts as found in confirming the forfeiture of the said fruit machine?

The offence for which the appellant was convicted is prohibited by sec. 155 of the Police Offences Act 1928. It was not argued on her behalf that the fruit machine seized was not a contrivance for gaming, so the only matters to be considered in answering the first of the questions asked are, is the prohibition in the said section an absolute one, so that it is immaterial whether or not the occupier knows the contrivance is kept at her house or place, *i.e.*, that she has a guilty mind? If not, is it sufficient that her servant or agent has such knowledge?

The principles applicable to these questions were enunciated by Wright, J., in *Sherras v. De Rutzen*, [1895] 1 Q.B. 918 at p. 921, in a judgment which has been cited frequently. He points out that a presumption of *mens rea* is an essential ingredient of every offence, but that such presumption may be displaced either by the words of the statute constituting the offence or by the subject-matter with which it deals. He proceeds to detail the principal classes of exceptions to the general rules as (a) acts which are not criminal in any real sense but which in the public interest are prohibited under a penalty; (b) acts creating public nuisances; and (c) cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. The learned Judge then proceeds—[1895] 1 Q.B. 918 at p. 922—"But, except in such cases as these, there must 'in general be guilty knowledge on the part of the 'defendant, or of some one whom he has put in his 'place to act for him, generally, or in the particular 'matter, in order to constitute an offence.'" In *R. v. Tolson*, (1889) 23 Q.B.D. 168 at pp. 174, 175, Wills, J., in considering whether *mens rea* was an essential element of the offence of bigamy, and having dealt with offences in which it had and others in which it had not been held to be necessary to the commission of a crime, said—"It is obvious that assistance must 'be sought *aliunde*, and that all circumstances must 'be taken into consideration which tend to show that 'the one construction or the other is reasonable, and 'amongst such circumstances it is impossible to discard the consequences." In the same case, Stephen, J., said—(1889) 23 Q.B.D. 168 at p. 187—"Crimes are 'in the present day much more accurately defined by 'statute or otherwise than they formerly were. The 'mental element of most crimes is marked by one of 'the words 'maliciously,' 'fraudulently,' 'negligently,' 'or 'knowingly,' but it is the general—I might, I 'think, say the invariable—practice of the legislature 'to leave unexpressed some of the mental elements 'of crime."

The legislation contained in sec. 155 of the Police Offences Act 1928 was first enacted as sec. 31 of the Lotteries, Gaming and Betting Act 1906, and seems to have been original legislation, as it does not purport

to be taken from the Act of any other State or country. The object of Division 2 of the Lotteries, Gaming and Betting Act 1906 is to suppress gaming wherever the same is carried on in Victoria, whether upon land or water, and whether on private property or otherwise. The penalty provided for a first offence under any of the provisions of Part IV. of the Police Offences Act 1928 (in which Part is included the legislation which was originated by the Lotteries, Gaming and Betting Act 1906) is a fine of not less than £5 nor more than £100, or imprisonment for a term of not less than seven days nor more than three months, so a conviction under sec. 155 may be a serious matter for the defendant.

As was stressed in argument, the owner or occupier of every house or place where a contrivance for gaming is kept is guilty of an offence, which means, if *mens rea* is not an essential element, that the proprietor of a Victorian house who lived in another State would be liable under sec. 155 if his tenant kept therein a prohibited machine. On the other hand, in sec. 130 (which combines the effect of secs. 34 and 35 of the Lotteries, Gaming and Betting Act 1906), and which imposes a penalty on every owner and occupier and agent who permits a house to be used as a common gaming house or as a means of access to or exit from a house so used, it is expressly provided that an owner of such a house is not to be liable if the Court is satisfied that he had no reasonable grounds to suspect such a user—see also sec. 49 of the Lotteries, Gaming and Betting Act 1906. Mr. Woinarski contends this shows that the Legislature, when it desired to make ignorance a good answer, has expressed that intention—*Betts v. Armstead*, (1888) 20 Q.B.D. 771; *Keith v. Bourne* (No. 2), (1924) 41 W.N. (N.S.W.) 69. A similar argument was addressed to the High Court in *Maher v. Musson*, (1934) 52 C.L.R. 100, [1935] A.L.R. 80, where Evatt and McTiernan, JJ., held that the presence of the word "knowingly" in one sub-section which was absent in another had only the effect of shifting the burden of proof—in the first case the prosecution had to prove knowledge, whereas in the second the defendant had to prove he did not know. In that case the offence charged against the defendant was having in his custody illicit spirits. There was nothing in the nature of the spirits to suggest they were illicit, and this fact, together with the sanctions provided by the Act in question there—a penalty up to £500—led the Court to the conclusion that the Legislature had not intended the offence to be an absolute one, but the section did cast on the defendant the burden of showing that he had taken the spirits into his custody innocently. In view of the drastic nature of the penalty which might be imposed on one who neither by himself nor his agent had any knowledge of the presence of the forbidden article in her house, I would hesitate before deciding that *mens rea* was not an element of the offence constituted by sec. 155, in

the sense that once the defendant showed want of knowledge in herself or her agent of the presence of the article in her house, no offence was proved. But in this case the learned Chairman has found that the appellant's son was in charge of the premises during her absence, and he was responsible for installing the machine, so that he had knowledge that sec. 155 was being infringed, and it is necessary to consider whether his knowledge should be imputed to her.

"*Primâ facie* a principal is not to be made criminally responsible for the acts of his servants, yet the "Legislature may prohibit an act or enforce a duty in "such words as to make the prohibition or the duty "absolute; in which case the principal is liable if the "act is in fact done by his servants. To ascertain "whether a particular Act of Parliament has that "effect or not regard must be had to the object of the "statute, the words used, the nature of the duty laid "down the person upon whom it is imposed, the person "by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is "imposed"—*per* Atkin, J., in *Moussell Brothers v. London and North-Western Railway Company*, [1917] 2 K.B. 836 at p. 845; and I think it lies on one who alleges that the *primâ facie* position has been altered to show that the Legislature has done so. It is clear that, when enacting the Lotteries, Gaming and Betting Act 1906, the object of the Legislature was to stamp out gaming and facilities for gaming wherever the same existed in Victoria. The duty imposed on the owner or occupier is neither to keep nor use in his house or place a contrivance for gaming, and this duty would ordinarily be performed by whoever was in control of the house or place. Provision was made in secs. 34 and 35 of that Act for the owner or occupier or the agent of an owner or occupier to plead ignorance in the cases dealt with in those sections, but no such provision was made in sec. 31. There are numerous cases decided under Licensing and Health Acts—in some of which the penalty on conviction has been imprisonment—where the knowledge of a servant or agent has been imputed to the master, because the Legislature has considered it so necessary to prevent the particular offence from being committed that it places an absolute duty on the owner to see that it is not committed, and because of the ease with which a law could be infringed if the master could place an agent in charge of his hotel or shop, himself keep away from it, and plead ignorance of the agent's doings. The offence of suffering gaming on licensed premises has been held to be such an offence—*Bond v. Evans*, (1888) 21 Q.B.D. 249; *Tippett v. Heyman*, (1902) 19 W.N. (N.S.W.) 6—but of course the objects and contents of each Act in question have to be considered. In *Allen v. Whitehead*, [1930] 1 K.B. 211, it was held that the occupier and licensee of a refreshment house was properly convicted in that he, being the keeper of

premises where refreshments were sold, did knowingly suffer prostitutes to meet there, although he had no personal knowledge of the fact and had expressly forbidden his manager to permit prostitutes to meet there. Lord Hewart, C.J., quoted the words of Atkin, J., already referred to, and said—[1930] 1 K.B. 211 at pp. 220, 221—"Applying that canon to the present case, "I think that this provision in this statute would be "rendered nugatory if the contention raised on behalf "of this respondent were held to prevail. . . This "seems to me to be a case where the proprietor, the "keeper of the house, had delegated his duty to a "manager, so far as the conduct of the house was concerned. He had transferred to the manager the "exercise of discretion in the conduct of the business, "and it seems to me that the only reasonable conclusion is, regard being had to the purposes of this "Act, that the knowledge of the manager was the "knowledge of the keeper of the house." These extracts from the judgment of the Lord Chief Justice appear to me to be just as applicable to the case before me as to that with which he was dealing. In my opinion the Legislature has shown an intention to make the knowledge of the servant that of the master for the purpose of sec. 155, and, as it is clear the servant knew of this contrivance being kept in the house, his master cannot escape by pleading no personal knowledge of the fact.

The second question deals with the forfeiture of the fruit machine. As the information laid against the defendant did not seek forfeiture, there was no issue between her and the informant on that matter. The notice of appeal, which is attached to the case stated, contains no ground applicable to it, but deals merely with the conviction of and the punishment imposed on the defendant; so I am not at all clear how it was treated as a subject of the appeal to General Sessions. However, it was argued that an instrument of gaming cannot be seized by virtue of a warrant issued under sec. 124 of Police Offences Act 1928, unless at the same time someone is arrested and searched and brought before a justice. If this were so, a police officer executing such a warrant could not seize such an instrument if those operating it or those being mulcted by its operation were too speedy to be caught, which seems an astonishing proposition. It was also contended that the forfeiture was contrary to the maxim "*audi alteram partem*," since no one has been heard to say why it should not be forfeited.

The forfeiture was ordered under the power contained in sec. 163 of the Police Offences Act 1928. There is nothing in that section to suggest that any person should be given notice of an application to forfeit, but doubtless if anyone interested in advocating the "*alteram partem*" appeared, he would be heard by the Court of Petty Sessions. If no forfeiture could be ordered until the owner of a prohibited instrument was found or appeared, the sec-

TEXAS CO. (AUST.) LTD. v. COMMISSIONER OF TAXATION

tion would have little effect, as the owners of such ordinarily do not seek the limelight of a court of law. In any case it is no concern of the defendant.

In my opinion the questions asked by this case should be answered: (a) Yes. (b) If there was any jurisdiction to act, Yes.

*Questions answered accordingly.*

[Solicitors—For the defendant appellant, R. H. Dunn; for the informant respondent, F. G. Menzies, Crown Solicitor.] W. P.

## High Court of Australia.

FULL COURT — (Latham, C.J.,

Rich, Starke, Dixon and

McTiernan, JJ.)

(Sydney and Melbourne.)

Dec. 5-14, 1939;

Mar. 18, 1940.

### TEXAS COMPANY (AUSTRALASIA) LTD. v. COMMISSIONER OF TAXATION.

*Revenue — Income tax — Overseas debts — For goods supplied — Exchange cost — Increase of — During period of credit — Deduction of increased exchange — In assessment for year of payment — Although price deducted in earlier year's accounts — Business also carried on in New Zealand — Loss in New Zealand — Not deductible in Australia — Board of Review — Powers on appeal — Decision not alterable — Rent of petrol pumps — Pumps supplied to retailers of petrol — Expenditure for installing and maintaining — Rents not income from property — Expenditure not deductible from other property income — Assessment based on percentage of receipts — Method of ascertaining income — Business not solely in Australia — Commonwealth Income Tax Act 1930, sec. 7A (1) — Income Tax Act 1931, sec. 5 (1) — Income Tax Assessment Act 1922-1934, secs. 14 (1) (q), 28, 44, 51.*

A company dealing in petroleum products in Australasia incurred debts in America for supplies of stock; and, owing to the company's being short of capital in Australasia, considerable delay occurred in payment of the debts. In the interval between the supply of the goods and the remittance of money in payment, the movement of exchange caused an increase in the number of Australian pounds required for discharge of the debts. Remittances were made for goods acquired in earlier years, the price of which goods had been expressed or valued in the company's accounts for these earlier years at a figure based on the then more favourable rate of exchange. In the company's return for income tax for the income year in which the remittances were made, a deduction was claimed in respect of the increased exchange costs arising from the delay in payment.—

*Held*, that the fact that the reason for the delay related to capital did not make the outgoing a capital loss, and so much of the increased exchange costs as was referable to expenditure in discharging liabilities on revenue or income account should be allowed as a deduction; but no deduction was allowable in respect of so much of the increased costs as was referable to repayment of money lent or to payment for plant which became part of the company's capital assets.

*Herald and Weekly Times Ltd. v. Commissioner of Taxation*, 48 C.L.R. 113 at p. 118, [1933] A.L.R. 46 at p. 48; and *Amalgamated Zinc (de Bavay's) Ltd. v. Same*, 54 C.L.R. 295, [1936] A.L.R. 67, referred to.

The company carried on business in the Commonwealth and in New Zealand. During 1930 the business in New Zealand resulted in a loss, and consequently the company was not charged with income tax there. The company claimed that in its Australian assessment a deduction should be allowed in respect of this loss.

*Held*, that the income of the New Zealand business was of such a nature as to be liable to be taxed, though not actually charged, and, that income being exempt in the Commonwealth by reason of section 14 (1) (q) of the Income Tax Assessment Act 1922-1934, the losses connected with it should not be brought into account.

The Commissioner of Taxation assessed the company on a percentage of its receipts as a company controlled outside Australia fulfilling the conditions of section 28 of the Assessment Act. Upon appeal the Board of Review held that section 28 was not applicable in the circumstances of a given year, and in respect of other years that the percentage of receipts fixed by the Commissioner was excessive, and it made its own assessment.

*Held*, that the Board had power both to uphold the objection regarding the application of section 28 and to make an assessment.

In reference to the year 1933, the Board of Review, having in July, 1937, upheld the objection that section 28 was not applicable, gave, in October, 1937, a decision that, notwithstanding that the business produced no taxable income, the Board did not think proper to assess tax on any percentage of the total receipts of the business under section 28.

*Held*, that the Board rightly refused to fix any percentage; and, further (*per* Dixon and McTiernan, JJ.), that the facts did not warrant any assessment under that section.