1985 November 27

[A. LOIZOU, DEMETRIADES, PIKIS, JJ.]

IOANNIS PROTOPAPAS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4639).

The Betting Houses, Gaming Houses and Gambling Prevention Law, Cap. 151—Ss. 2, 4, 12, 14 and 15—The definition and the proviso of the definition of "gamble" in section 2——Onus on the accused to prove the defence provided by the proviso—Such onus may be discharged on the balance of probabilities.

The appellant was found guilty of a charge of gambling contrary to ss. 4, 12, 14 and 15 of the Betting Houses, Gaming Houses and Gambling Prevention Law, Cap. 151.

The trial Judge accepted the evidence of the prosecution and found that on 14.12.84 the appellant was playing at the coffe-shop of ex-accused 5 situate in a Refugee Estate at Dherynia a game of open Poker (Poka) with ex-accused 1, 3 and 4.

The stakes found at the table amounted to £3.40. Appellant's income was £314 per month and as he stated his wife had an equally big salary and they had no debts. The appellant raised inter alia the defence that in any event he was not playing for gain, but for amusement. The defence was based on the proviso in the definition of the word "gamble" in section 2* of the Law. The trial Judge did not accept this defence because no evidence was adduced as regards whether the appellant had children

* The definition and the proviso are quoted at pp. 257-258 post.

and their ages, and as regards the personal circumstances of ex-accused 1, 3 and 4 who pleaded guilty to the charge. The trial Judge indicated that he could not overlook the fact that the place the accused were found to play was in a refugee settlement.

Held, dismissing the appeal:

(1) On the totality of the material before the trial Judge the verdict reached by him that appellant was in fact playing Poka with ex-accused 1, 3 and 4 was duly warranted by the evidence. There is no room for interference on appeal.

(2) As regards the application of the proviso to the definition of "gamble" in s. 2 of Cap. 151 the trial Judge rightly directed his mind that the onus is on the appellant to prove the defence he raised, namely that he was playing not for gain but for amusement, that such burden is discharged on the balance of probabilities and that if at the end of the day the Court entertains a doubt as to the guilt of the accused, he must be acquitted.

As seen from the wording of the proviso the totality of the circumstances including the stakes, should be considered. Such circumstances may include the nature of the game, the financial standing of the participants and every other factor shedding light on their intention.

As the trial Judge considered the matter in the correct perspective, there is no room for interference.

Appeal dismissed.

Cases referred to:

Pissourios and Others v. *The Police* (1967) 2 C.L.R. 258;

Pitsillos v. *The Police* (1969) 2 C.L.R 168;

Charalambous and Another v. *The Republic* (1985) 2 C.L.R. 97.

Appeal against conviction.

Appeal against conviction by Ioannis Protopapas who was convicted on the 30th May, 1985 at the District Court of Famagusta (Criminal Case No. 681/85) on one count of the offence of gambling contrary to sections 4, 12, 14 and 15 of the Betting Houses, Gaming Houses and Gambling Prevention Law, Cap. 151 and was sentenced by Arestis, D.J. to pay £17.- fine.

G. Pittadjis, for the appellant.

Ch. Kyriakides, Senior Counsel of the Republic with *E. Panteli*, for the respondents.

A. Loizou J. gave the following judgment of the Court. The appellant was found guilty by a Judge of the District Court of Famagusta, sitting at Paralimni, of a charge of gambling, contrary to sections 4, 12, 14, 15 of the Betting Houses, Gaming Houses and Gambling Prevention Law, Cap. 151.

The facts of the case as found by the learned trial Judge are briefly these: on the 14th December, 1984, at about 9:00 p.m. the main prosecution witness, a Police Sergeant, together with a special constable who was not called as a witness visited, upon information, the coffee-shop of ex-accused 5 situate in a Refugee Estate at Dherynia and found the appellant and three other persons—ex-accused 1, 3 and 4—sitting around a table and appearing to play cards.

Ex-accused 4, was at that time holding a pack of cards and in the middle of the table there were several coins. In front of each player including the appellant, there were three cards, the one of the cards of the appellant was on the table with its face down and the other two cards open, whereas the other three players had two cards secret and one open. The witness also noticed that the appellant on seeing him took something and put it in his pocket. In that pocket he later found coins of a value of 60 cents which after counting them he returned them to him. He further stated that before he went in there he heard certain expressions and terms used by them in the course of playing, from which it was obvious that the game of cards they were playing was that of open poker commonly known in Greek as "Poka".

The coffee-shop keeper and the other three co-accused pleaded guilty to the respective charges whereas the appellant denied playing cards with the rest and the case proceeded for hearing, which ended with his conviction against which the present appeal was filed.

It has been argued on behalf of the appellant that his conviction should be set aside on the ground that having regard to the evidence adduced the verdict was unreasonable. Among the points stressed in support of this contention was that the pack of cards found by the Police and produced as exhibit at the trial were in all 24, that is to say they were starting from the nine upwards, whereas there was evidence that a game of "Poka" with four players is usually played with 32 cards starting from seven upwards.

The trial Judge believed the evidence adduced and discarded the version of the appellant and found him guilty as charged, in a judgment where he makes detailed analysis of the evidence and makes clear findings of fact which we need not reproduce here.

On the totality of the material before him the verdict reached was duly warranted in our view and we may say here that we have not been persuaded that there exist any reasons for interference by us on appeal. The prosecution was relying in this case on direct evidence inasmuch, as the cards used their distribution around the table, the coins in front of each player and in the middle of the table, the terms used, all constituted sufficient proof that the appellant and the three ex-accused were engaged at the time in a game of "Poka".

The learned trial Judge then examined the defence raised at the end of the trial to the effect that even if the evidence adduced was accepted as a whole by the Court it should not proceed to convict the appellant, given that he was not gambling for gain but played the game for purposes of amusement, taking into consideration his income, £314 per month, as he himself had stated to the Court, and that his wife had an equally big salary and they had no debts.

The defence was based on the proviso to the definition of the word "gamble" to be found in section 2 of the Law. It reads:

> " 'gamble' with its grammatical variations and cognate expressions, means to play at, or engage in, any game

of chance, or of mixed chance and skill, for money or money's worth;

Provided that the playing at, or engaging in, any such game shall not be deemed to be gambling if the person playing at, or engaging in, the same proves to the satisfaction of the Court trying the offence that, having regard to the circumstances including the stakes, he was playing at, or engaging in, such game for social amusement and recreation and not for gain;"

The learned trial Judge rightly directed himself on the onus of proof required when such a defence is available to an accused person, to the effect that when the onus of proof is cast on the defence such burden may be discharged by a lesser standard, on a balance of probabilities and not beyond reasonable doubt as would be required in the case of the prosecution in proving the charge. (See *Pissourios and Others* v. *The Police* (1967) 2 C.L.R. 258 at p. 265-266 and the authorities therein mentioned and also *Pitsillos* v. *The Police* (1969) 2 C.L.R. 168). If at the end of day the Court is in doubt as to the guilt of the accused and this is the ultimate question, he must be acquitted—*Charalambous and Another* v. *Republic* (1985) 2 C.L.R. 97.

The learned trial Judge referred to the evidence before him and pointed that although there was evidence regarding the income of the appellant and his wife and that the amount of the stakes found on the table were £3.40 cent, he had no evidence as regards the remaining family obligations of the appellant whether he had children and their ages, nor did he have any evidence regarding the personal circumstances of the other three persons charged with him and found guilty of gambling. He also indicated that he could not overlook the fact that they were engaged in gambling in a coffee-shop at a Refugee settlement—(we take this as a reference to the tragic situation that these people have found themselves, i.e. homeless and destitute)—and concluded that he was not satisfied that the game played by the four people including the appellant was for mere amusement and recreation and not for gain even a small one and consequently that they were not engaged in gambling as defined by the Law.

As seen from the wording of the proviso, a Court has to view the totality of the circumstances including the sums staked.

These circumstances may include the nature of the game, the financial standing of the participants and every other factor shedding light on their intention. The Judge considered the matter in the correct perspective. We find there is no room for interference.

For all the above reasons we have come to the conclusion that this appeal should fail and is hereby dismissed.

Appeal dismissed.