[JACKSON, C.J., AND GRIFFITH WILLIAMS, J.]

(May 12, June 2, 1951)

MICHAEL HAJI PANAYIS KOUNGAS AND ANOTHER, *Appellants*,

*v.*

THE POLICE, *Respondents*.

(*Criminal Appeal No.* 1898)

*Gambling—Keeping a Gaming House—Betting Houses, Gaming Houses, Lotteries and Gambling Prevention Law*, 1947, *sections* 3 (1) (*a*), 7, 9, 12, 13 (3) *and* 17—*Conditions under which rewards under section* 17 *are payable—References to enactments in the charge—Criminal Procedure Law, section* 38 (*c*) *to be included.*

An attempt by anyone to escape from any place entered by the police under section 9 of the Law is a circumstance giving rise to certain presumptions under section 13 (3) when the place is entered "in connection with the playing of any of the games to which section 7 applies." But none of the presumptions under section 13 could arise in this case as the café was not "entered under the provisions of the Law". Neither of the police officers concerned was in charge of a station nor was either of them of or above the rank of sergeant.

*J. Clerides* for appellants.

*P. N. Paschalis*, Crown Counsel, for respondents.

The facts sufficiently appear in the judgment of the Court which was delivered by the Chief Justice.

JACKSON, C.J.: This is an appeal by two persons who were convicted in the District Court of Famagusta on charges under the Betting Houses, Gaming Houses, Lotteries and Gambling Prevention Law, 1947.

The first appellant is a café keeper and was convicted under sec. 3 (1) (*a*) of the Law for using his café as a gaming house for the playing of the game of "zari" (dice). That is one of the games mentioned in section 7 of the Law, by which playing at certain specified games is made punishable. This appellant was also convicted, on another charge, for playing the game of *zari* contrary to section 7 (1) of the Law.

The second appellant was convicted at the same time for playing the game of *zari*. Five other persons were also convicted on the same charge but have not appealed. The two appellants were sentenced to imprisonment for two months and the five other persons to fines.

At the conclusion of the hearing we expressed our opinion that the evidence was insufficient to justify the conviction of either of the appellants and that their convictions should be quashed. We now give our reasons for that opinion.

The evidence was that two police constables, suspecting that gambling was taking place in the first appellant's café, approached the entrance to investigate. The time was eleven o'clock in the morning of a weekday in January. The second appellant was standing at the door of the café and, apparently recognising the approaching constables, though they were not in uniform, called back into the café " stop ". The constables thereupon rushed into the café, passing through the outer room to an inner room behind it. Two of the seven men who were later charged attempted to rush out of that room but were stopped by the constables. Neither of them is an appellant.

The first constable who entered the inner room saw four of the accused, including the first appellant, the café keeper, but not the second appellant, sitting around an open " tavli " or backgammon board. The correct number of " stones " (or draughts) for the game of *tavli*, 15 black and 15 white, were on the board but were mixed together and not in their proper places for a game. Also on the board were two dice and one small leather dice-box. A second dice-box, similar to the first, was found in the pocket of the first accused, the café keeper, but there was no evidence that it was being used on that occasion. The constable who first entered the room saw no one playing any game. No money was found, either on the floor or on the table or anywhere else.

The constable seized the dice and apparently told the café keeper and the other persons present that they would be charged with playing *zari*. The café keeper replied " Do your duty, but first count the stones." The constable did so and found the correct number for the game of *tavli*.

*Tavli* is not a prohibited game and there was evidence that it is commonly played in all cafés and that two dice and a dice-box are used in playing it.

The second constable entered the inner room of the café, after the first, but claimed to have seen the first appellant, the café keeper, actually playing *zari* with the first accused. The first constable, as we have said, saw nobody playing anything. The second constable also differed from the first as to the identity of the two accused who tried to leave the inner room. This police witness also went further than his companion, who had preceded him, in saying that the second appellant had tried to stop them from entering the café.

Six of the accused men gave sworn evidence in their own defence. The other, the second appellant, spoke from the dock. The sworn evidence of the six who were in the inner room was that the first and fifth accused were playing " tavli " for two *coca colas* and that the others were looking on. The second appellant, who was not in the inner room, denied that he had shouted " stop " as the police approached and that he had tried to obstruct their entrance.

In convicting the first appellant of both charges against him and all seven accused, including both the appellants, of playing *zari*, the District Judge mentioned the evidence which had weighed with him. He mentioned the fact that the second appellant had shouted " stop " and that two of the accused had tried to rush out of the inner room. He also mentioned the finding of the " tavli " board and dice and dice-box, and the position of the " stones ", or draughts, on the board when first seen. The Judge considered that these circumstances were not consistent with the accused's statement that they were playing *tavli*. He thought that the *tavli* board had been put out as a blind in case the police came in and concluded that all seven accused were playing *zari* at the time and place mentioned in the charges.

The Judge did not refer to the statement of the second police witness that he had actually seen the first appellant and another of the accused playing *zari* together or to this witness's statement that the second appellant had tried to obstruct the entry of the police. Those omissions would suggest that the Judge had not believed this witness.

Gambling cases often give rise to points of difficulty and the present case was not a simple one. The first of the two charges against the first appellant, the café keeper, was framed, as we have said, under section 3 (1) (*a*) of the Gambling Law of 1947. It stated that this appellant, being the occupier of a café, did use such place as a gaming house for playing at a game commonly known as " zari ".

Section 3 (1) (*a*) of the Law reads as follows :—

" Any person who—

(*a*) being the owner or occupier of any place or having the use temporarily or otherwise thereof, keeps or uses such place as a betting house or a gaming house or for carrying on a lottery or for playing at any of the games to which section 7 of this law applies ;

shall be guilty of an offence . . . ".

It will be seen that the first charge against the first appellant specified two distinct offences : (1) using his café as a gaming house and (2) using his café for playing the game of *zari*, one of the games to which section 7 applies. Nor were these offences charged in the alternative. They were charged as one offence.

We shall not, however, deal in this judgment with the interpretation of section 38 (*d*) of the Criminal Procedure Law, 1948, which relates to the form of a charge when an offence consists of the doing of any one of a number of different acts in the alternative. That paragraph is the same as rule 5 (1) in the first schedule to the Indictments Act, 1915, and there are English authorities on the

interpretation of that rule. Duplicity in the charge was not a ground upon which leave was given to appeal against conviction and no argument upon that ground was addressed to us by counsel on either side. The only ground upon which leave to appeal was given was the question of the sufficiency of the evidence to support the convictions and we shall *confine ourselves to that.*

The first appellant was convicted on the first charge as framed, namely, for keeping his café as a gaming house for playing at *zari.*

" Gaming house " is defined by section 2 of the Law to include " any place kept or used for gambling " and the definition goes on to state that " a place shall be deemed to be used for gambling if it is used for gambling even on one occasion only."

The next definition in the same section is that of the word " gamble ". In short, the word means to play at any game of chance or of mixed chance and skill for money or money's worth. A proviso excludes playing at such games if the Court is satisfied that the play was for social amusement and recreation and not for gain.

Even assuming that the District Judge was entitled to hold that the game of *zari* was being played on the occasion mentioned in the charge, and that it is a game of chance, the prosecution offered no evidence that the game was being played for money or money's worth. The only mention of stakes was made by the first appellant in cross-examination. He said that the stakes were two *coca colas* and the game being played was not *zari* but *tavli.*

There was therefore no evidence at all of gambling and consequently no evidence that the appellant's café was kept or used as a gaming house and no advantage could therefore be taken of that part of the definition of " gaming house " which declares that a place shall be deemed to be used for gambling if it is so used even once.

By section 13 of the Law any place entered under the provisions of the Law is presumed to be kept or used as a gaming house until the contrary is proved, if certain specified conditions are found. By sub-section (4) the same presumptions are extended to places entered in connection with the playing of any of the games mentioned in sec. 7. It does not appear, however, that the District Judge relied on any of the presumptions created by that section. Nor could he have done so, for the appellant's café was not " entered under the provisions of the law ". Powers of entry without warrant are given by section 9, but they are given only to a member of the police force in charge of a station and to police officers of or above the rank of sergeant. The two police officers who entered the appellant's café were described as police constables and it was not suggested that either of them was in charge of a station.

It was not agreed for the Crown in this appeal that the presumptions created by section 13 of the Law, or by the definition of gaming house in section 2, could be invoked to support the conviction of either appellant. Without those presumptions the charge against the first appellant, as the charge was framed, required evidence of the existence of the conditions : (*a*) that he kept or used his café as a place in which games of chance, or of mixed skill and chance, were played for money or money's worth ; and (*b*) that he kept or used his café as a place where the game of *zari* was played. As we have said, the prosecution offered no evidence that any game was being played for money or money's worth, either on the occasion mentioned in the charge or on any other. There was therefore no evidence upon which the first appellant could be convicted of using his café as a gaming house.

As to the second condition (*b*), even if the District Judge was entitled to hold that the game of *zari* was being played on the occasion mentioned in the charge, there was no evidence that it had been played in that café on any other occasion. There was therefore no evidence that the first appellant kept or used his café as a place for playing *zari*.

It is clear, therefore, that the appeal of the first appellant against his conviction on the first charge must be allowed and the conviction quashed.

We turn to the second charge against both appellants, that they were found playing the game of *zari* in the first appellant's café on the day mentioned in the charge.

The District Judge observed in his judgment, as we have already noted, that in his opinion neither the position of the " stones ", or draughts, on the *tavli* board, " nor any of the surrounding circumstances ", (whatever he may have meant by that phrase) were consistent with the defence that a game of *tavli* was being played. As to that observation it must be remarked, before passing to the particulars of the evidence, that it was not for the accused persons to prove that a game of *tavli* was being played. It was for the prosecution to satisfy the Court beyond reasonable doubt that the accused were playing *zari*.

We have already referred to the evidence of the second constable that he actually saw the first appellant and another of the seven accused playing *zari* together and we have said that we think that the Judge must have rejected it. If he had not, he might be expected to have referred in his judgment to the only direct evidence in support of the charge. An examination of the record suggests that there were good reasons for doubting that witness's statement on that particular point.

The District Judge appears to have been strongly influenced by the fact that the second appellant, who was standing at the entrance to the café, turned towards the

entrance and shouted " stop ", apparently to those inside, when he saw the two police constables approaching. That was undoubtedly a highly suspicious circumstance but caution is necessary in determining the weight to be given to it as tending to establish a charge that a particular prohibited game was being played in the inner room of the café at the time.

This appellant was not charged under section 12 of the Law, by which it is made an offence to keep watch for persons gambling or playing prohibited games or to warn them of approaching risk of discovery. There was no evidence that the second appellant was at the entrance to the café for any such purpose or that he could see or knew what was happening in the inner room. His shout is certainly a very strong indication that he thought something might be happening, or was probably happening, in the inner room which would get the participants into trouble if they were caught. But, by itself and without evidence that he was actually keeping watch, or could see or knew what those in the inner room were doing, it is no proof of what was in fact happening or that a particular prohibited game was then being played.

This appellant's shout was evidence of his state of mind but not of what those inside the café were actually doing, and it would be explained by his knowledge, or belief, that gambling, in one or other of its many forms, did sometimes, or even often, take place in that inner room, though he had no knowledge that it was actually taking place at that time and, still less, that a particular prohibited game was then being played.

Another fact mentioned by the District Judge as having influenced him was the fact that, when the police entered the café, two of the seven accused (neither of them is an appellant) tried to rush out of the inner room.

An attempt by anyone to escape from any place entered by the police under section 9 of the Law is one of the circumstances giving rise to certain presumptions under section 13 (3) when the place is entered " in connection with the playing of any of the games to which section 7 applies ". It is not necessary for us to construe that particular subsection in this appeal. We shall assume, however, for the purpose of our argument, that if a place is entered under section 9 on reasonable suspicion that it is being used as a place for playing a prohibited game, for example, *zari*, a person found in that place, or seen escaping from it, are presumed, until the contrary is proved, to have been playing that game in that place. That may be a strong presumption when applied to a particular game as opposed to gambling in general, but the only point that we wish to make for our present purpose is that certain facts are declared by the Law

to give rise to certain presumptions because they would not necessarily justify those presumptions unless it were enacted that they did.

Consequently, since no presumptions could be invoked in this case, it could not be presumed, from the fact that two persons tried to escape from the inner room of the first appellant's café, that the game of *zari* was being played in it and that they had been playing that game. Nor could it be presumed that the persons found in the inner room had been playing that particular game. The attempt of some to escape and the presence of others in the room would have only their ordinary probative value, and when the fact to be proved is that a particular game was being played, and not simply that some offence against the Law was being committed, the ordinary probative value of those particular actions is nothing at all. Apart from presumptions created by law, guilt is not established, particularly in this country, if, when the police enter premises with a view to a charge under the Gambling Law, some of those present think it wiser to remove themselves elsewhere.

The other circumstances mentioned by the District Judge, as reasons justifying his conclusion that the game of "zari" was being played, were the finding of the *tavli* board and the correct number of "stones", or draughts, needed for that game, but not in their correct positions, and the dice-box and dice. All those facts are consistent with a game of *tavli*, either about to begin or recently concluded. We do not think that they could have led the Judge to the conclusion that a game of *zari* was being played if there had not been also the evidence of the shout by the second appellant and the attempted escape of two others. We have already commented on the value of that evidence as tending to show that the particular game of *zari* was being played and it will be evident that, in our opinion, there was no evidence which entitled the Judge to conclude that it was. It might have been, and that is the most that can be said. Some other offence against the Gambling Law may have been in progress, but that was not the charge.

In view of the opinion which we expressed at the conclusion of the hearing, and for which we have now given our reasons, it is unnecessary for us to examine the evidence upon which the District Judge came to the conclusion that all seven of the accused, including the second appellant, who was never in the inner room, were actually taking part in the game of *zari*. No distinction was drawn between spectators and players and if the second appellant was convicted as an accessory in some capacity, and not as a player, one would have expected the Judge to say so.

There are two subsidiary matters upon which we wish to comment. Each of the two charges in this case was followed by references to a number of sections of the Gambling Law. The references following the second charge

included one to a section of the Criminal Code. There were five references following the first charge and six following the second. These were presumably included in supposed compliance with sec. 38 (*e*) of the Criminal Procedure Law, 1948, which prescribes, among other matters, the references to enactments, or sections of enactments, which a charge should include. These may be expressed shortly as a reference to the section of the enactment creating the offence, (or to more than one section or enactment if the offence is created by the joint effect of more than one), and to the section prescribing the punishment if it is a different section from the section creating the offence.

The first charge in this case included not only the references which were necessary, or might excusably be thought to be necessary, but also references to definitions of terms, to a section creating presumptions which had no application to the case and to a section providing for rewards to informers. The second charge included, not only the same unnecessary references as the first, but also a reference to a particular section of the Gambling Law, sec. 12, which created an offence which was not charged. Unnecessary references may be misleading. A reference to a section creating an offence which had not been charged is open to much stronger objection.

We might not have thought it necessary to draw attention to sec. 38 (*e*) of the Criminal Procedure Law in connection with this particular case if we had not observed, from many charges which have come before us in other cases, that there is a widespread tendency to misapply it.

The other point which we wish to mention is of more limited interest. When the two appellants and five others were convicted in this case, the District Judge ordered the payment of rewards, under section 17 of the Gambling Law, to the two police constables who had raided the first appelant's café and had given evidence in the case. (His attention had been drawn to that section by its inclusion among those mentioned in support of the charges). Having regard to the view which we expressed upon the convictions, those rewards will not now be paid, but we think we should say that, in our opinion, that section did not authorise the payment of rewards to the police constables to whom they were given in this case. A person is not debarred from a reward under the section because he is a police officer, but there was no evidence that the conditions existed in which a reward was payable. A reward is payable to a person who gives information which leads to the apprehension and conviction of an offender, but not for his apprehension by a police officer nor for the officer's evidence in Court.