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not disallow a seizure merely because the complainant is poor, or for other like reason.

The appeals should be dismissed.

Appeals dismissed with costs.

Solicitor for the appellant, *Joan Rosanove.*

Solicitor for the respondent, *Frank G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

POWELL . . . . . APPELLANT;

AND

LENTHALL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1930.

ADELAIDE, *Sept.* 23.

SYDNEY, *Dec.* 3.

Rich, Starke and Dixon JJ.

Lottery and Gaming—"Reasonable suspicion" in mind of Special Magistrate—Prima facie evidence—Failure by Magistrate to hold that there was a "reasonable suspicion"—Whether subject to appeal—Lottery and Gaming Acts 1917-1928 (*S.A.*) (*No.* 1285—*No.* 1877), *secs.* 39, 78—*Lottery and Gaming Act Amendment Act* 1921 (*S.A.*) (*No.* 1494), *sec.* 14—*Justices Act* 1921 (*S.A.*) (*No.* 1479), *secs.* 4, 163, 176, 177.

Sec. 14 of the *Lottery and Gaming Act Amendment Act* 1921 (S.A.) provides that if, on the hearing of any information against any person for unlawful gaming, the evidence for the prosecution is such as to raise in the mind of the Special Magistrate hearing such information a reasonable suspicion that such person is guilty of the offence charged, such evidence shall be deemed prima facie evidence of his guilt. Sec. 78 of the *Lottery and Gaming Act* 1917 (S.A.), with which the amending Act is incorporated, provides that all proceedings under the Act shall be disposed of summarily and there shall be an appeal in respect of such proceedings. This appeal is provided for by Part VI. of the *Justices Act* 1921 (S.A.), and sec. 177 of that Act (which is contained in

Part VI.) confers upon the Supreme Court on appeal all the powers and duties, as to amendment and otherwise, of the justices whose decision is appealed from.

The appellant was charged before a Special Magistrate with an offence which amounted to unlawful gaming. At the close of the case for the prosecution, the Magistrate was asked to rule, and did rule, that there was no case to answer. He said that "the evidence was too weak for him to hold that there was a reasonable suspicion that the defendant was in the hotel for the purpose of betting."

Held, by *Rich* and *Dixon* JJ. (*Starke* J. dissenting), that the authority conferred by sec. 14 of the *Lottery and Gaming Act Amendment Act* 1921 should be regarded as a "power" within the meaning of sec. 177 of the *Justices Act* 1921; and that the jurisdiction of the Supreme Court on appeal extended to examining the whole adjudication or determination of the Special Magistrate under sec. 14, including not only the question whether he did entertain a suspicion but also whether he ought to have done so, and that the facts necessarily raised a reasonable suspicion of the appellant's guilt of the offence charged.

Decision of the Supreme Court of South Australia (Full Court): *Lenthall* v. *Powell*, (1930) S.A.S.R. 185, affirmed.

APPEAL from the Supreme Court of South Australia.

The complainant, Richard Alfred Lenthall, charged the appellant, William Joseph Powell, under sec. 39 of the *Lottery and Gaming Acts* 1917 *to* 1928 (S.A.) with being in a public place, to wit a hotel, for the purpose of betting otherwise than by means of a totalizator. The evidence called in support of the charge appears sufficiently from the judgment of *Rich* and *Dixon* JJ. hereunder. At the close of the case for the prosecution, the Special Magistrate by whom the charge was heard was asked to rule, and did rule, that there was no case to answer. The Magistrate said that "the evidence was too weak for him to hold that there was a reasonable suspicion that the defendant was in the hotel for the purpose of betting," and he dismissed the complaint.

On appeal to the Supreme Court, *Richards* J. upheld the Special Magistrate (*Lenthall* v *Powell* (1)); but this judgment was reversed by the Full Court of South Australia, which set aside the order for dismissal and remitted the case for further hearing: *Lenthall* v. *Powell* (2).

From the decision of the Full Court the appellant now, by special leave, appealed to the High Court.

(1) (1930) S.A.S.R. 13.

(2) (1930) S.A.S.R. 185.

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Rollison (with him *Alderman*), for the appellant. The Special Magistrate decided that he did not have the requisite suspicion, and the Full Court had no power to substitute its suspicion for that of the Special Magistrate. If the evidence is equally consistent with innocence as with guilt, it is not reasonable to suspect guilt (*White* v. *Kain* (1)).

Hannan (with him *Pickering*), for the respondent. The appeal is by way of rehearing, and a Court of appeal has the powers of a Special Magistrate. This Court will not substitute its own opinion, if matters are nicely balanced; but if the Special Magistrate has clearly misdirected himself, then this Court will draw inferences which he should have drawn. The Special Magistrate actually did suspect, but did not think he had reasonable grounds. Sec. 14 means evidence of such a nature that it should raise a reasonable suspicion. [Counsel referred to *Dominion Trust Co.* v. *New York Life Insurance Co.* (2); *Almond* v. *Allchurch* (3); *Sharp* v. *Adamson* (4); *Pierce* v. *Kennedy* (5); *Hunter* v. *Walsh* (6); *Lewis* v. *Tonkin* (7); *Fox* v. *Allchurch* (8); *Peacock* v. *The King* (9).]

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered :—

RICH AND DIXON JJ. This is an appeal by special leave from an order of the Full Court of the Supreme Court of South Australia which reversed a judgment of *Richards* J., and set aside an order of a Special Magistrate dismissing a prosecution under the *Lottery and Gaming Acts* 1917 to 1928 (S.A.). The complainant charged the appellant under sec. 39 of these Acts with being in a public place, to wit an hotel, for the purpose of betting otherwise than by means of a totalizator. Evidence was called in support of the charge to the following effect :—At ten minutes past four on a Saturday afternoon the police found the appellant in a room behind the hotel

(1) (1921) S.A.S.R. 339, at pp. 343, 345.
(2) (1919) A.C. 254.
(3) (1925) S.A.S.R. 53, at p. 59.
(4) (1918) S.A.L.R. 301, at p. 312.
(5) (1923) S.A.S.R. 476.
(6) (1928) S.A.S.R. 336.
(7) (1929) S.A.S.R. 324.
(8) (1927) 40 C.L.R. 135.
(9) (1911) 13 C.L.R. 619, at p. 651.

bar facing about a dozen men. He had some slips of paper in his hand upon which he appeared to be writing. In the room was a telephone, and at it stood a man apparently using it. An inspector of police took the slips of paper and the pencil from the appellant. The slips contained the names of horses running in the last two races of a meeting held that afternoon at Morphettville, headed each with the name of the race and the time at which it was to be run. One of them was to start at 4.15 p.m., i.e., five minutes after the police entered the room. The slip relating to this race had pencilled figures opposite the names of some of the horses. These figures, in the view of the Magistrate, related to the betting prices of horses, either the prices a bookmaker would lay or the prices of the totalizator. The police had put forward a different theory of their significance which the Magistrate did not accept. The police inspector thereupon questioned the appellant, who said that he was interested in races but was not at the hotel for the purposes of betting, and was interested in totalizator betting. At the inspector's request he produced a printed racing card or guide, the front page of which was marked "S.A.J.C. & V.R.C. Saturday October 5th," and, after giving a list of "forthcoming fixtures" for October for South Australia and Victoria, ended "with the compliments of" a person whose name was followed by the name of the hotel in question. The next two pages, headed "S.A.J.C.," gave a programme of races at Morphettville for that day. Each race to be run before the time at which the police entered was marked in pencil with two sets of three numbers in handwriting resembling that of the marks upon the slip. The next page was headed "V.R.C. Adelaide times" and gave a programme of races. The remaining page gave other racing information. The inspector arrested the appellant. When he was searched ten other slips were found in his pockets. Each of these contained a name of a race, a time, and a list of horses corresponding with one of the races in the pages of the book headed "V.R.C." They appeared to have been separated from one another, and two slips which looked like the tops of the sheets before separation were headed respectively "Flemington page one," "Flemington page two." All the slips appeared to be multigraphed from typewriting. In the case of the races the times of which were before the entry of

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the police, the slips contained figures opposite the names of the horses, and in the case of the earlier races, figures 1, 2 and 3 in front of the names of the horses and three numbers at the top of the page. Under the law then in force in Victoria totalizators were not permitted. At the close of the case for the prosecution, the Magistrate was asked to rule that there was no case for the defendant to answer. The question upon which this application depended was not simply whether there was evidence upon which a reasonable man might be satisfied of the guilt of the appellant, because the *Lottery and Gaming Acts* of South Australia contain a very unusual provision. This provision is sec. 14 (1) of the Act of 1921, which provides: "If on the hearing of any information against any person for unlawful gaming, the evidence for the prosecution is such as to raise in the mind of the Special Magistrate or justices hearing such information a reasonable suspicion that such person is guilty of the offence charged against him in such information, such evidence shall be deemed prima facie evidence that such person is guilty of such offence." After argument, the Magistrate gave his reasons for his conclusion that "the evidence was too weak for him to hold that there was a reasonable suspicion that the defendant was in the hotel for the purpose of betting." It is by no means clear whether the Magistrate entertained no suspicion at all that the appellant was there for that purpose, or whether he did suspect in fact, but considered that the materials before him did not warrant him in holding such a suspicion reasonable. The Judges in the Supreme Court inferred from the transcript of what took place at the hearing that the Magistrate's decision was founded upon some erroneous view of the requirements of the section.

The first contention of counsel for the appellant before this Court was that the Supreme Court had no power upon appeal to interfere with the Magistrate's refusal to hold that the evidence was such as to raise in his mind a reasonable suspicion that the appellant was guilty. This contention rests upon the exact language of sec. 14 (1). It is said that the section specifies the Special Magistrate or the justices hearing the case as the person or persons in whose "mind" the reasonable suspicion must be raised by the evidence. Accordingly the sufficiency of the evidence as proof of guilt under

the section would not depend upon the true force and effect of the evidence, as it does when the question is to be determined under the common law rule, but upon the intellectual process of the Magistrate. The test contended for is not objective, but depends upon the mental operation of the Magistrate. If the question thus raised was governed by the terms of this section only, and was not affected by other provisions of the Act, a consideration of these terms might perhaps lead to the conclusion that, unless the suspicion arises in the Magistrate's mind, the section is unavailing not only in the Court of summary jurisdiction, but also upon appeal. But, even so, it might nevertheless be thought that the question whether the Magistrate's suspicion is reasonable or not if he should happen to suspect cannot rest, like the suspicion itself, upon his state of mind, but must depend upon the materials which give rise to the suspicion. If this be so, and the Magistrate did in fact suspect, his conclusion that his suspicion was reasonable or unreasonable would be open to review like any other decision. If, for instance, he had in fact suspected, but his suspicion was based upon quite unreasonable grounds, it would be difficult to maintain that the Supreme Court were precluded from considering not only whether he might and did suspect at all, but whether his suspicion was reasonable. As it does not seem possible to discover whether the Magistrate in the present case entertained no suspicion in fact or, although suspecting, considered the circumstances were not enough to satisfy the requirement of reasonableness, this uncertainty as to the reason for the decision, together with the fact that the decision is more easily explained upon the former than upon the latter ground, might be enough in itself to justify the order of the Supreme Court which sent the case back to him. But the question does not depend on sec. 14 alone. It is true that in terms sec. 14 refers to the mind of the Special Magistrate or justices who hear the case. But sec. 2 of the Act of 1921 in which it occurs incorporates that Act with the Principal Act, and provides that they shall be read together as one Act, and sec. 78 of the Principal Act, which requires that all proceedings thereunder shall be disposed of summarily, goes on to provide that there shall be an appeal in respect of such proceedings. The appeal contemplated is provided for by Part VI. of the *Justices Act* 1921.

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Sec. 163, which occurs in that Part, gives any person aggrieved by any order or adjudication of a Court of summary jurisdiction, including any order dismissing a complaint of a simple offence, a right of appeal to the Supreme Court from such order or adjudication in every case, unless some special Act expressly declares that such order or adjudication shall be final, or otherwise expressly prohibits any appeal against the same. Sec. 176 confines the evidence to be used on appeal to that given on the hearing, but subject to a power given to the Supreme Court to make an order allowing further evidence. Sec. 177 confers upon the Supreme Court all the powers and duties as to amendment or otherwise of the justices whose decision is appealed from. Possibly the conclusion of the Magistrate under sec. 14 of the *Lottery and Gaming Act* 1921 is an "adjudication" within the meaning of sec. 163, but, however this may be, there appears to be no reason why the authority conferred by sec. 14 should not be regarded as a "power" within the meaning of sec. 177. The provisions of Part VI. of the *Justices Act* 1921 manifest an intention of subjecting all the judicial determinations of the Courts of summary jurisdiction to the control of the Supreme Court exercisable upon appeal. A Special Magistrate or two or more justices compose Courts of summary jurisdiction (see sec. 43). And the expression "Court of summary jurisdiction" is defined by sec. 4 to mean the justices who form the Court, and the expression "justice" includes a Special Magistrate. When, therefore, the mind of the Special Magistrate or the justices is referred to, the tribunal is meant. The mind of the justices will be that of the majority. No distinction appears to have been intended between this expression and the expression "mind of the Court" in sec. 76 of the *Lottery and Gaming Acts.* Such provisions merely prescribe judicial functions which are to be exercised according to law in the process of administering the jurisdiction of the tribunal. The general observations in *National Telephone Co. Ltd.* v. *Postmaster-General* (1) which Viscount *Haldane* L.C. and Lord *Parker of Waddington* made in reference to subjects of jurisdiction appear equally applicable in the case of new powers, authorities or discretions to be used or pursued in the exercise of jurisdiction. Viscount *Haldane* L.C.

(1) (1913) A.C. 546.

says (1): "When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches." Lord *Parker of Waddington* says (2):—"Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same."

In our opinion the jurisdiction of the Supreme Court extends to examining the whole adjudication or determination of the justices under sec. 14, including not only the question whether they do entertain a suspicion, but also whether they ought to do so.

It by no means follows from the fact that the Supreme Court possesses such a jurisdiction that it should or would substitute its own suspicion or want of suspicion for the absence or presence of suspicion in the mind of the justices. In dealing with questions of fact Courts of appeal, however ample be their powers, proceed upon principles which are well settled, and give great weight to the conclusions of the primary tribunal. In matters of discretion, the views of the Court of first instance are not departed from lightly. Sec. 14 requires the justices to exercise a judgment upon a matter of fact by reference to a standard which, if not unique, is at least extremely unusual in English law, and requires them to estimate the effect of evidence which does not amount to proof in a way which, while not discretionary, yet involves discrimination and discernment or judgment of a different order from that needed in satisfying the judicial mind of a state of fact. No doubt the Supreme Court upon appeal would in these circumstances attribute an added importance to the opinion of the justices. But giving full effect to all these considerations, we share with the Supreme Court a difficulty in understanding why the Special Magistrate should decline to regard the evidence we have attempted to summarize as arousing a reasonable suspicion of guilt. We do not think that his view that the entries on the slips were prices as distinct from bets is enough to displace the suspicion which the

(1) (1913) A.C., at p. 552.

(2) (1913) A.C., at p. 562.

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facts otherwise arouse. But we think the very object of the section was to render it unnecessary for the tribunal to form a conclusion at that stage of the case upon the true significance of such matters as the figures written down. It seems natural to seek an explanation of his failure to entertain suspicion which he thought reasonable upon such a state of facts in the hypothesis that it arose from some misconception of the true meaning and application of the section. This explanation the Supreme Court adopted, although it does not appear precisely how their Honors considered that the Magistrate had misdirected himself. The questions, however, what is a suspicion and when it is reasonable are susceptible of a great deal of subtlety and refinement of argument, and before the Magistrate counsel enlisted the aid of authority in support of a somewhat restrictive connotation of "reasonable suspicion." Perhaps the Magistrate was induced to adopt some artificial and misleading analysis of the expression "reasonable suspicion." Attempts to define such conceptions are seldom helpful. Indeed, it does not seem possible to paraphrase this expression, still less to arrive at any nice definition of the precise stages which the mind must have travelled from complete incredulity to comfortable belief before its condition answers the description "reasonable suspicion." But, whatever be the explanation of the Magistrate's view, it is enough in this case to say that the facts we have stated appear to us necessarily to raise a reasonable suspicion of the guilt of the offence charged in this case. Indeed, if they did not, the purpose of this highly drastic section would be completely defeated.

For these reasons the appeal should be dismissed with costs.

STARKE J. The *Lottery and Gaming Act Amendment Act* 1921 of South Australia provides (sec. 14 (1)): "If on the hearing of any information against any person for unlawful gaming, the evidence for the prosecution is such as to raise in the mind of the Special Magistrate or justices hearing such information a reasonable suspicion that such person is guilty of the offence charged against him in such information, such evidence shall be deemed to be prima facie evidence that such person is guilty of such offence." The charge against the

appellant was that he was in a certain public place, namely, an hotel, in Adelaide, for the purpose of betting otherwise than by means of a licensed totalizator, contrary to the provisions of the *Lottery and Gaming Acts* 1917 *to* 1928. Apart from the provisions of sec. 14, the evidence did not establish the charge. And the evidence did not raise in the mind of an experienced Special Magistrate "a reasonable suspicion" that the appellant was guilty. The section shifts the burden of proof upon the establishment, not of facts raising a reasonable suspicion of guilt, but of facts raising *in the mind of the Magistrate or justices* such suspicion. It is no doubt a judicial function that the Magistrate or justices exercise in forming his or their mind or minds, and, according to the law of South Australia, the decision of a Magistrate or justices is subject to appeal upon questions both of law and of fact. If the Magistrate or justices applied some wrong principle of law in reaching their conclusion, or excluded from their consideration facts which they ought to have considered, or considered facts which they ought not to have considered, or reached a conclusion absolutely unreasonable or perverse, which would show that they had not performed their duty—then, no doubt, an appellate tribunal could correct the Magistrate or justices and remit the case to them for the proper performance of their duty. But the principle is, on the plain words of the statute, that it is the mind of the Magistrate or the justices that must be affected with suspicion, and not that of any appellate tribunal.

In the present case, I can find no error of law on the part of the Magistrate, and his want of suspicion does not strike me as unreasonable or perverse. But the learned Judges of the Supreme Court of South Australia examined the evidence for themselves, and thought it so suspicious that the Magistrate must have applied some erroneous principle of law to the facts, and consequently they remitted the case to him for further hearing. It is not necessary, in my view, to traverse the evidence, but I ought, perhaps, to say that in my opinion the Special Magistrate was quite justified in refusing to entertain a suspicion of guilt on the meagre and unintelligible evidence submitted to him. And if, on a rehearing, he still entertains

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no suspicion of guilt, then it seems to me that it is his mind that must govern the situation and not the opinion of other tribunals.

The appeal ought to be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Rollison & Ziesing.*

Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

C. C. B.

[HIGH COURT OF AUSTRALIA.]

CARSON . . . . . APPELLANT;
RESPONDENT,

AND

HUMPHREYS . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1931.

SYDNEY, *Mar.* 26; *April* 1.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Rent owing by lessee—Distress levied by head-lessor on goods of sub-lessee on demised premises—No privity between head-lessor and sub-lessee—Deed of arrangement executed by sub-lessee—Distress lawful—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *secs.* 84, 88, 159, 192 (3), 206.

Sec. 88 of the *Bankruptcy Act* 1924-1930, which provides that no distress shall be levied or proceeded with as against the estate of the bankrupt, is confined to distress for rent owing by the bankrupt and therefore provable against the estate.

Decision of Judge *Lukin* reversed.

APPEAL from the Court of Bankruptcy, District of New South Wales and the Territory for the Seat of Government.