

Regina v. Kerin, [1963] S.C.R. 124

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E. CRIMINAL LAW

Regina v. Kerim, [1963] S.C.R. 124.

The material facts of the case are as follows. Kerim Brothers, Limited (hereinafter referred to as "the company"), for some years had been the registered owner of the Kingsway Hotel in Metropolitan Toronto. The company was licensed to carry on the business of a public hall and to sell refreshments and cigarettes. From February of 1959 to June of 1961, the company leased its hall on four successive nights of each week to four different religious and charitable organizations, which conducted bingo games, the proceeds of which were used for charitable purposes. These organizations, in each case, made their own arrangements for the conduct of the games, supplying their own equipment and personnel for that purpose. They paid to the company a standard rental per night for the use of the hall, which was not in any way dependent upon the number of persons who played the games. Accused was the president of the company and was on the premises each evening, but he did not, himself, participate in any way in the bingo games. The company did employ a commissionaire and it operated a soft drinks refreshment stand. Accused was charged under s. 176(1) of the Canadian Criminal Code² and convicted. His appeal was allowed by the Ontario Court of Appeal, and the Crown then appealed to the Supreme Court of Canada.

Section 176(1) provides that,

Everyone who keeps a common gaming house or common betting house is *guilty of an indictable offence* and is liable to imprisonment for two years.

Section 176(2) (b) provides that,

Everyone who — (b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house, is guilty of an offence *punishable on summary conviction*.

Section 168(h) provides that,

"keeper includes a person who (i) is an owner or occupier of a place, (ii) assists or acts on behalf of an owner or occupier of a place, (iii) appears to be, or to assist or act on behalf of an owner or occupier of a place, (iv) has the care or management of a place, or (v) uses a place permanently or temporarily, with or without the consent of the owner or occupier.

⁷ *Miller v. Decker*, [1957] S.C.R. 624, 9 D.L.R. (2d) 1.

¹ [1963] S.C.R. 124.

² 2-3 Eliz. II, c. 51.

The Crown contended that accused was a "keeper" within the wide terms of s. 168, and was thus brought within the charging section, s. 176(1). Accused argued that a person who was a "keeper" within the definition section was not necessarily one who "keeps a common gaming house," within the meaning of s. 176(1). This contention was supported on the ground that the word "keeper" was not used in s. 176(1), and that specific provision was made in s. 176(2) (b) for a lesser offence punishable on summary conviction, in respect of classes of persons a member of which would fall within the definition of a keeper, who "knowingly permits a place to be let or used for the purposes of a common gaming house". It was argued that if a "keeper," within the definition, was automatically guilty of an offence under s. 176(1) because the place of which he was keeper was used by others as a common gaming house, then there was no need to create the lesser offence defined in s. 176(2) (b).

Since it was conceded that the company could not rely on the exemption established by s. 168(2) (b) concerning occasional user by charitable or religious organizations, the sole issue in the case was the interpretation of the word "keeper" as applied to s. 176(1). In other words, the Court was concerned with, whether as a matter of statutory interpretation, a person will be convicted under the wide words of a definition section as applied to the charging section, even if by considering the charging section literally, there would be no offence.

The majority of the Supreme Court, Kerwin and Taschereau JJ. dissenting, held that the offence created by s. 176(1) is the keeping of the common gaming house, and in order to constitute that offence, there must be something more than the keeping of a place, whose use by someone other than the accused, makes it a common gaming house. The position of a "keeper" who does not in any way participate in the operation of the games played, but who knows that the place in question is being used for that purpose is that he falls within s. 172(2) (b). The Court was thus of the opinion that in order to give any meaning to subsection 2(b) of s. 176, section 176(1) had to be interpreted so that it involved some act of participation in the wrongful use of the place. To simply apply the liberal meaning of "keeper" to accused in order to bring him within the wording of the more serious offences created by s. 176(1), would denude subsection 2(b) of any meaning at all. On the facts accused did not come within s. 176(1), and the appeal was dismissed.

In contrast, the minority view was that accused was clearly a "keeper" within s. 168(1) (h) (ii), "a person who assists or acts on behalf of an owner or occupier of a place", and therefore accused was a person "who keeps a common gaming house" within s. 176(1). The late Chief Justice, delivering the minority opinion then went on to say that if a tenant of a house operated it as a common gaming house without the knowledge of the owner, the latter cannot be said to "knowingly" permit a place to be let or used for the purpose of a

common gaming house within s. 176(2) (b). It would appear that in the minority view a landlord, who was unaware of the fact that his tenant was operating a common gaming house on the rented premises, would not be within the summary conviction portion of the relevant section, as he could not be then said to *knowingly* permit a place to be let or used for the purpose of a common gaming house. However, by an application of s. 168(1)(h) (i) a "keeper" includes (i) an owner . . . of a place, the "unknowing" landlord could be brought within the indictable offence subsection of s. 176 which involves a maximum sanction of two years imprisonment. If this were the intention of Parliament it is submitted that the purpose must be more clearly expressed before such an anomalous result should obtain. The above illustration exemplifies the inconsistencies that are achieved by an application of the liberal meaning of "keeper" in section 168(h) to section 176. Such an application was made by the minority in the real question in issue in this case.

In conclusion, it is submitted the Court arrived at a desirable and logical interpretation of the existing section in the Code, and its approach is consistent with a well established practice of taking a restrictive view of penal statutes.

J.A.P.