1955 *Present :* Gunasekara, J.

A. S. SILVA *et al.*, Appellants, *and* L. B. WARNASURIYA, Respondent

S. C. 337–338—M. C. Colombo, 48,932/B

Betting on Horse-racing Ordinance (Cap. 36)—Section 3A (1) (b), read with s. 16—"Occupier".

In a prosecution of two or more persons for unlawful betting in breach of section 3A (1) (b), read with section 16, of the Betting on Horse-racing Ordinance the fact that one of the accused was "working" in the premises where the betting took place, without any evidence as to the nature of his work, does not necessarily mean that he was an "occupier" of the premises within the meaning of that expression in section 2 of the Ordinance.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Colvin R. de Silva, with *A. W. W. Gunewardene*, for accused-appellant.

E. H. C. Jayatileke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 17, 1955. GUNASEKARA, J.—

These are appeals from a conviction of the two appellants on a charge laid against them jointly of an offence punishable under section 10 of the Betting on Horse-racing Ordinance (Cap. 36).

The charge alleges that they committed a breach of section 3A (1) (*b*) of the Ordinance in that they did " on 9.1.54. being the occupier of premises No. 556, Dematagoda Road, Dematagoda, use the said premises for the purpose of unlawful betting on Horse Races to be run or proposed to be run at the Boosa Race Course on 9th January, 1954 ". It also cites section 16 of the Ordinance, which is in these terms :

" Where any premises are entered under the authority of a search warrant issued by a Magistrate under section 15 (1) upon the Magistrate being satisfied that there is reason to suspect that an offence against section 3 (3) or section 3A is being or has been committed in those premises, then,—

(*a*) if any instrument of unlawful betting is found in those premises or upon any person found therein, or

(*b*) if persons are seen or heard to escape therefrom on the approach or entry of any person authorised under such warrant to enter and search such premises, or

(*c*) if any person so authorised is unlawfully prevented or obstructed or delayed in entering or approaching such premises—

it shall be presumed, until the contrary is proved, that such premises are kept or used for the purpose of unlawful betting on a horse-race and are so kept or used by the occupier thereof. "

The conviction of each of the appellants is based upon a finding that he is an occupier of the premises, that facts giving rise to the presumption created by this section have been proved and that the presumption has not been rebutted.

It has been proved by uncontradicted evidence which has been accepted by the learned magistrate that shortly after 10.30 a.m., on the 9th January, 1954, a party of police officers entered these premises under the authority of a search warrant such as is referred to in section 16, that on their entry about four men were seen to run out of the premises and that the police officers found in the premises and upon three persons who were there various documents and other things which the learned magistrate holds are instruments of unlawful betting. There is no ground for disturbing these findings, and they lead to the presumption that the premises were kept or used for the purpose of unlawful betting on a horse-race and were so kept or used by their occupier.

It has also been proved, by evidence that has not been contradicted or even challenged in cross-examination, that the 1st appellant Sangadasa was in occupation of the premises on the day in question, having taken them on rent from their owner some 4 or 5 years previously, and had a shop there in which he was carrying on a business in electrical goods. In terms of section 2 of the Ordinance, " ' occupier ', in relation to any

premises, includes any person having the use temporarily or otherwise of the premises and any agent of any such person ". It has been clearly proved that the 1st appellant was an occupier of the premises, for he undoubtedly had the use of them, at the material time.

The learned magistrate's conclusion that the 2nd appellant too was an occupier is based entirely upon a finding that he " works at No. 556 and he was in fact present during the raid ". This finding is supported by the evidence but is insufficient, in my opinion, to justify the conclusion that the 2nd appellant was an occupier of the premises. The magistrate cites the definition of " occupier, " implying that the fact of the 2nd appellant's working in the premises proves that he had the use of them or that he was an agent of the 1st appellant. While there is evidence from a prosecution witness that the 2nd appellant " works " in the 1st appellant's shop that is housed in these premises there is no evidence (and, of course, no finding) as to the nature of his work. In the absence of such evidence it does not seem to be possible to say that he was the 1st appellant's agent for any purpose or even that he had the use of the premises. I am unable to accept a contention of the learned crown counsel that working in the shop would necessarily involve a use of the premises; for there can be work, such as sweeping the premises or guarding them, that does not necessarily imply a use of the premises.

Evidence was given by a police officer to the effect that at the time of the raid the 2nd appellant was seated at a table upon which and in the drawers of which some of the " instruments of unlawful betting " were found; and by a man whom the police had employed as a decoy on this occasion that he had on previous occasions (though not on this) placed bets with each of the appellants in these premises. The learned crown counsel sought to rely on this evidence for an argument in support of the conviction of the appellants. It is not necessary to discuss the argument, however, for the learned magistrate has based no finding on this evidence and it does not appear from his judgment that any part of it has been accepted by him. Indeed he has expressly left the decoy's evidence out of consideration as evidence that " does not touch the case ".

The evidence that has been accepted by the learned magistrate is insufficient to prove that the second appellant was an occupier, and the conviction of this appellant, which depends solely on this finding, must therefore be set aside.

It is contended for the appellants that although they are accused of jointly committing the same offence section 16 of the Ordinance does not provide for a presumption that the offence was committed jointly by all the occupiers of the premises, and it is argued that therefore the conviction of the 1st appellant too must be set-aside. The effect of the construction of section 16 that is contended for by learned counsel for the appellants would, as I understand it, be that the prosecution could rely on the presumption for proof that the offence described in the charge was committed by each occupier of the premises but not for proof that it was committed by all of them jointly. A failure to prove that the offence was committed by the 1st appellant jointly with the 2nd, however, is not necessarily fatal to the conviction of the 1st, for the only

effect of the accusation that they jointly committed the same offence is that they could, in terms of section 184 of the Criminal Procedure Code, be charged and tried together or separately as the trial court thought fit. What gives the court this discretion is the fact that the accusation is made and not proof of its truth. In my opinion there is no justification for an order quashing the trial of the 1st appellant on the ground that the magistrate has erred in the exercise of his discretion to try the two appellants jointly or separately. Indeed no application was made to him for separate trials.

No evidence was called on behalf of the defence. According to the case for the prosecution the 1st appellant was not present in the shop at the time of the raid. The learned magistrate has considered the question whether this circumstance is sufficient to rebut the presumption that the offence charged was committed by the 1st appellant, and I am unable to say that his finding on this question is wrong.

I dismiss the appeal of the 1st appellant Sangadasa, and I set aside the conviction of the 2nd appellant Premaratne and the sentence passed on him and I acquit him.

Appeal of 1st Appellant dismissed.

Appeal of 2nd Appellant allowed.