wait until he recovered himself and became fully awake . . . the driver must have known that drowsiness was overtaking him. The case was too clear for argument."

With the view of the Divisional Court I am in respectful agreement. Once the prosecution has established that the accused has driven to the danger of the public, the only defence open to him is to show that it was through no fault of his own. This the respondent was unable to do: on the contrary, by implication, he admitted his fault ; although drowsy, he had continued to drive.

With regard to the sentence, I think that in the public interest it is necessary to be severe. Drivers of motor vehicles should understand that if they are attacked by drowsiness they must cease driving immediately and not resume until the attack has been overcome. In my view, it would be disastrous if, to a charge of dangerous driving, a defence of asleep at the wheel were to be regarded as a mitigating circumstance.

The judgment of the Magistrate will be set aside and, in lieu thereof, the respondent will be convicted of dangerous driving as originally charged and, for penalty, he will pay a fine of £25 or in default of payment undergo imprisonment for three months with hard labour.

The Court has power, under s. 163 of the Criminal Procedure Code, to award the whole or any part of the fine, if paid, as compensation to the injured party, and if an application of this nature is made I shall be prepared to consider it, but I make no order for the time being.

JAINARAIN *ats.* POLICE.

[Appellate Jurisdiction (Seton, C.J.) July 9, 1946.]

Penal Code—s. 177—being the keeper of a common gaming house—evidence of cards being played on one occasion—whether sufficient to convict—s. 182—cards found on police raid—evidence vague as to exact position of cards—interpretation of " place ".

A police detachment raided a building owned and used as a garage by Jainarain. A man at the window of the garage shouted a warning and several persons, including the accused ran out of the building. A number of others were inside the building and, in a small room partitioned off at the back of the garage, were a number of sacks spread on the floor with seats arranged about them. A pack of playing cards was found by the Police party but although this was referred to in evidence, no evidence was given precisely fixing the position where the cards were found. The raid was made on a search warrant taken out at the instance of an informer who was called as witness for the prosecution. The informer was declared a hostile witness and a statement was proved in which he referred to gambling on the premises on several previous occasions. The Magistrate regarded this statement as evidence of gambling on former occasions.

HELD.—(1) The "place suspected of being a common gaming house" within the meaning of s. 182 of the Penal Code was the small back room.

(2) To establish that premises are a common gaming house it is not sufficient to prove an isolated instance of gambling.

Cases referred to :—

(1) *R. v. Davies* [1897] 2 Q.B. 199 ; 66 L.J.Q.B. 513 ; 76 L.T. 786 ; 13 T.L.R. 405 ; 18 Cox. C.C. 618 ; 25 Dig. 458.

(2) *Davis v. Tanner* [1931] 2 K.B. 210.

(3) *Martin v. Benjamin* [1907] 1 K.B. 64 ; 76 L.J.K.B. 81 ; 96 L.T. 197 ; 71 J.P. 30 ; 23 T.L.R. 53 ; 21 Cox. C.C. 378 ; 25 Dig. 458.

(4) *R. v. Saunders* [1899] 15 T.L.R. 186 ; 1 Q.B. 490 ; 68 L.J.K.B. 296 ; 80 L.T. 28 ; 63 J.P. 150 ; 15 T.L.R. 442 ; 14 Dig. 442.

(5) *R. v. Carr-Briant* [1943] 1 K.B. 607.

APPEAL AGAINST CONVICTION. The relevant facts appear from the judgment.

H. M. Scott, for the appellant : One isolated instance of gaming is not sufficient (*Reg. v. Davies* ; *Davis v. Tanner*). There is not even evidence that the game being played on this occasion was unlawful (*Martin v. Benjamin*). User on one accasion does not constitute keeping ("Words and Phrases Judicially Defined" Vol. III page 197). The Magistrate could not use unsworn statements of discredited witnesses as evidence to prove these matters.

E. M. Prichard, for the respondent : I cannot support the Magistrate's abuse of the law of evidence and must invoke s. 152 of the Criminal Procedure Code. It was the police case in the lower Court that s. 182 of the Code applies—and if so there was evidence that the place was used as a common gaming house. The contrary was certainly not made to appear (*R. v. Carr-Briant* [1943] 1 K.B. 607). However, apparently because the Police Prosecutor did not realise in the early stages of the evidence that he would have to fall back on s. 182, no evidence was led to fix the exact position where the cards were found. They were found under the wall of the garage, but where in relation to the small back room it not clear. Case must turn on whether "place" includes the whole building.

H. M. Scott, for the appellant, in reply : S. 182 applies only when the cards are found "in" the suspected gaming house. It was the police case that the gambling was in the small back room. Moreover, the section (182) does not say that the place shall be deemed a common gaming house—the fact that cards etc. are found is only evidence for what it is worth. The cards could have been placed under the wall by anyone—they might have been a "plant."

SETON, C.J.—The appellant was convicted under s. 177 of the Penal Code of being the keeper of a common gaming-house and was sentenced to pay a fine of £25 or, in default of payment, to undergo imprisonment for a period of three months ; from this conviction and sentence he appeals.

It must be conceded at the outset that the evidence at the trial was not very satisfactory. The Police had engaged the services of an agent, as they are often obliged to do in cases of this kind, and the agent, when giving evidence at the trial, turned hostile and testified in flat contradiction to statements which he had previously given to the Police. Other witnesses too went back on their previous statements to the Police. In these circumstances, the Court is only able to take notice of the evidence which is actually given before it ; it is not at liberty to disbelieve the sworn testimony of the witness and substitute for it the witness's unsworn statement, the truth of which he denies in the witness box (see Archbold, 31st Ed., pp. 471, 472).

When the evidence is looked at in this light, there was just sufficient evidence, in my opinion, to justify the Magistrate in coming to the conclusion that a game of cards was in progress on the day in question and that it was being played in the small room in the garage belonging to the appellant, but there was no admissible evidence that this small room was habitually used for gambling and it is not sufficient to prove one isolated instance (*R. v. Davies*, [1897] 2 Q.B., 199). The evidence that gaming had frequently taken place there was to have come from the Police agent, but, as has been mentioned before, he did not come up to expectations.

There remains to be considered the provisions of s. 182 of the Penal Code which provide that where any cards or other implements of gambling are found in any place which is suspected of being a common gaming house and has been entered under a warrant, it shall be evidence, until the contrary is made to appear, that such place is used as a common gaming-house.

Cards were found when the Police made their raid, but the evidence as to where they were found is vague. The witness Vereniki said, "I . . . went to search for some cards. I found them under some tin wall at the edge." The witness Noa Viriviri said, "I met Vereniki who gave me the cards and showed me where he found them. . . . They were found under the wall." The Magistrate says in his judgment, "As for no cards being found in the house . . . I am convinced as a result of personal inspection that there was ample time for the cards to be taken away." From the above, it would seem clear that, wherever the cards were, they were not found in the small room in the garage. For this reason I am of opinion that the provisions of s. 182 of the Penal Code are of no assistance to the prosecution ; the "place suspected of being a common gaming-house" means in this case the small room in the garage, and the cards were not found there.

Not without reluctance, I feel compelled to hold that evidence before the Court was insufficient to justify the conviction, and, that being the case, the appeal must be allowed and the conviction set aside.