1895.
*November 5.*

## JAYAWARDANA *v.* DON THOMAS *et al.*

*P. C., Tangalla, 9,456.*

*Criminal Procedure Code, s. 207—Misjoinder of accused—Unlawful gaming—Keeping a common gaming house—Evidence—Ordinance No. 17 of 1889.*

It is a misjoinder to try a person charged with the offence of keeping a common gaming-house along with one charged with unlawful gaming.

The essence of the offence of unlawful gaming under Ordinance No. 17 of 1889 is the publicity which attracts idlers of all sorts to various forms of public nuisance. It is therefore incumbent on the prosecution, on a charge of unlawful gaming, to prove that the house in which the gaming was carried on was a common gaming-place.

If a man choose to allow the public access to his house, with or without payment, to play with cards for money, he uses it as a common gaming-house. But any number of a man's friends or acquaintances may play in his house every day with cards for money without an offence being committed against the Ordinance.

ON appeal against a conviction under the Ordinance No. 17 of 1889—

*Dornhorst*, for appellants, contended that the proceedings were irregular. Unlawful gaming and keeping a common gaming-house being two distinct offences, the 14th accused who was charged with keeping a common gaming-house should not have been put upon his trial together with the other accused who were charged with unlawful gaming. This court had held so in 23,756, P. C., Mátara (11th July, 1895). And there was no evidence of unlawful gaming.

*Drieberg*, heard contra.

5th November, 1895. WITHERS, J.—

The fourteenth accused in this case has been convicted of keeping a common gaming-house, and the other accused of unlawful gaming.

The fourteenth accused should have been tried separately from the others in accordance with section 207, Criminal Procedure Code. The offence of keeping a gaming-house is quite distinct from the offence of unlawful gaming.

In any case I should quash the conviction against the fourteenth accused. But having heard the whole case laid before me by counsel, I come to the conclusion that the conviction cannot be sustained against any of the appellants.

As I have often said before, the policy of the Gaming Ordinance is to prevent people from betting or playing games for a stake in a public place, and to prevent them from turning private houses into public gaming-places. The real essence of the offence is the

publicity which attracts idlers of all sorts to various forms of public nuisance. Before any of these appellants could be convicted, it was incumbent on the prosecution to prove that the house in which the accused were evidently playing with cards for money is a common gaming-place.

The house, in this case, is the private dwelling house of the fourteenth accused, and if a man chooses to allow the public access to his house, with or without payment, to play with cards for money, he uses it as a common gaming-house.

Any number of a man's friends or acquaintances may play in his house every day with cards for money, without an offence being committed against the Ordinance.

I have no doubt the Magistrate is right in his finding that several people were playing with cards for money on the night in question, including the fourteenth accused and the second accused. That does not of itself constitute unlawful gaming. It is for the prosecution to prove that on the night in question anybody might have come to the house and join in the game played, whether he paid for the privilege or not. Accordingly, the prosecution is bound to prove that the house was open to the public on that night; of this there is really no evidence to my mind. Accordingly, I must set aside the conviction and acquit and discharge all the accused.