1937 *Present :* **Soertsz J.**

WITTENSLEGER *v.* APPUHAMY *et al.*

158-159—P. C. Avissawella, 14,137.

Unlawful gaming—Common gaming place—Access to public—Plea of guilt by some accused—No necessity to acquit them in appeal—Gaming Ordinance, No. 19 of 1889, s. 3 (2) (c).

The Supreme Court is not bound in the exercise of its powers of revision to acquit accused, who pleaded guilty in the Court below merely because the case against the accused who pleaded not guilty succeeded in appeal.

Where a person is charged with unlawful gaming under section 3 (2) (c) of the Gaming Ordinance, it must be established that the gaming was carried on in a place to which the public had access.

***Weerakoon v. Appuhamy* (23 *N. L. R.* 5) followed.**

APPEAL from a conviction by the Police Magistrate of Avissawella.

R. G. C. Pereira, for accused, appellant.

Pulle, C.C., for respondent.

Cur. adv. vult.

May 19, 1937. SOERTSZ J.—

The learned Magistrate concludes his judgment in this case with a citation from the case of *Warnakulasuriya v. Meerasha* [1] in which Bertram C.J., in speaking of the Gaming Ordinance, 1889, said, "It is important, however, that this Ordinance should not be allowed to be encrusted with technicalities. It is a strict Ordinance, and must be strictly and jealously construed. But that does not mean that it must be construed in a meticulous or technical spirit". But, on this appeal the appellants' complaint is not a matter of technicalities, but that the essentials for a conviction under the Ordinance are lacking. I agree that that is the case. I find that the prosecution has not proved that the gaming that took place on this occasion was unlawful gaming. I doubt not that the learned Magistrate appreciates the fact that the Ordinance penalizes

[1] *24 N. L. R. 33.*

not *gaming*, but *unlawful gaming*. Now *unlawful gaming* has been defined in the Ordinance. It is of four kinds. It means (1) cock fighting whether for a stake or not, and whether practised publicly or privately; (2) the act of betting or playing a game for a stake *when practised*—(*a*) in or upon any path, street, road, or place to which the public have access, whether as of right or not; or (*b*) in any premises in respect of which a licence has been granted to distil, manufacture, sell or possess arrack, rum, toddy or any intoxicating liquor; or (*c*) in or at a common gaming place as *hereinafter defined*. And the definition is in these terms: "common gaming place shall include *any place* kept or used for betting or the playing of games for stakes, and to which the public may have access with or without payment". The defining clause goes on to say, "and a place shall be deemed to be kept or used, for the playing of games for stakes even if it is so used even on one occasion only". The case for the prosecution is that one K. Don William informed Sub-Inspector Wittensleger on January 15, at about 10.30 P.M. "that one Arnolis Appu was carrying on an unlawful gaming called "Baby" for money stakes in a vacant room of a house upstairs situated on a land looked after by Arnolis Appu". Sub-Inspector Wittensleger accompanied William to the house and "through a window upstairs watched the unlawful gaming for some time". He saw one of the accused deal the cards and two others place coins on the mat and call for the Jack. There were others seated in the circle. Arnolis Appu was moving from place to place among the gamblers. The door of the room was closed and the Inspector and his party after watching the gaming for about ten minutes invaded the room through the window. William testifies to the fact that Arnolis Appu collected "Thon". The Inspector and his constables arrested a number of men. Others escaped. These are the facts deposed to by the witnesses and accepted by the Magistrate. I accept them myself, but I reach the conclusion without any hestitation that on these facts it is impossible to hold that there was unlawful gaming. It was not unlawful gaming in the sense that it took place "in or upon any path, street, or road". (See section 3 (2) (*a*).) Was it then unlawful gaming in the sense that it was practised in a "place to which the public had access as of right or not"? (See again section 3 (2) (*a*).) The door of the room was shut. Don William had kept the place under observation for some time. Inspector Wittensleger had watched it for ten minutes before raiding it. Neither of them speaks to a single man having been admitted to the room while the gambling was going on. It was one and the same group that took part in the *gambling* during the whole period of their observation. The learned Magistrate says, "in the present case the place where the unlawful gaming was carried on was a vacant room in a house situated on a land looked after by the ninth accused who, according to the evidence, was the person who managed and supervised the gambling and collected 'Thon'. *The fact that the doors of the room were locked at the time of the raid does not prove that the public could not have had access to it*". The only comment I need make in regard to this last observation is that, if the fact of closed doors does not prove that the public had no access to the room, it certainly does not prove that the public had access to it. And it is for the

prosecution to prove that members of the public had access to it. The Magistrate continues: "The doors could quite easily have been opened by the ninth accused or anyone else and people admitted". No doubt. But it was quite as easy for the ninth accused or any one else not to open the doors and admit anyone. The point is that there is no evidence that the doors were opened and anyone admitted. The Magistrate continues: "In fact the presence of people in different status of life and of different castes establishes beyond any doubt that such was the case and that anyone could have repaired to this spot and indulged in unlawful gaming on payment of 'Thon' or commission to the accused".

In my opinion, it would be most dangerous to draw the inference that a place is being used as a common gaming place from the single fact that there are present men of different castes or even communities among the gamblers. These are days in which people mingle very freely, and a man's circle of friends and acquaintances may well include members of different castes and communities. In this case the Magistrate lays stress on the fact that one of the gamblers was a lawyer's clerk suggesting thereby that he could not be said to be a friend of the others present. But I think it is notorious that a lawyer's clerk is just such a person as would come in contact with all sorts and conditions of men. But quite apart from that view of the matter, in my opinion, a man may go into the streets and by-ways of a town and collect a number of men and form a gaming party playing for stakes without rendering themselves liable under the Ordinance, so long as the gaming is confined to the members of the group so brought together. For in that event it cannot be properly said that the public have access to that party in order to take part in the gaming themselves. That was the view taken in the case of *Weerakoon v. Appuhamy*[1]. Schneider J. said, "on this point the evidence is that people of different 'nationalities' or castes were found in the place . . . . and the Police Inspector procured the opening of the closed door by the pretence that he had come from the Grand Hotel for gambling. If people from the Grand Hotel alone were admitted . . . . I fail to see how this evidence can be regarded as proving that the public had access." The same view was taken in the case of *Weerakoon v. Cumaru*[2] a case in which the facts were much stronger than those in this case. Then it is said that Arnolis Appu collected "Thon". But on the facts of this case no adverse inference can safely be drawn from that fact. In the Queen's Cottage case too there was evidence that "Thon" was collected but the essential element was missing as it is in this case, that the public had access. I therefore reach the conclusion that the unlawful gaming, in the sense attached to it by section 3 (2) (*a*) has not been established. It is obvious that there was no unlawful gaming within the meaning of section 3 (2) (*b*). The only other ground of liability is under section 3 (2) (*c*). But there is no evidence whatever to show that the room in which the gaming took place was a "common gaming place" in the meaning given to that phrase in the interpretation clause, for as I have already observed there is no evidence to show that the public

[1] *23 N. L. R. 5.*

[2] *24 N. L. R. 29.*

had access to the room. Indeed the evidence is that the public had no access. The doors were closed and the Police had to find their unwelcome way through the window. They had no freer access to the room than burglars would have had. I set aside the convictions of the accused-appellants and acquit them. I do not elect to interfere with the convictions of the other accused, who were convicted on their own pleas of guilty. I am aware that in the case of *Weerakoon v. Cumaru* (*supra*) Schneider J., acting in revision, set aside the convictions of the accused, who had not appealed, but I do not find myself compelled to follow that precedent at any rate in this case. The accused who pleaded guilty must be assumed to have known better than the Police were able to prove and to have made their pleas with a full consciousness of their guilt. By their pleas they exempted the Police from the necessity of proving the case against them. Their pleas supplied all the deficiencies. But in regard to those accused who did not plead guilty, the Police were bound to prove the case and they have failed to do so. No adverse inference can be drawn against them from the fact that the other accused had pleaded guilty. In fact that is not admissible evidence against them. At first sight this may appear a surprising result, but in reality it is not so. It is inevitable that sometimes surprising results should flow from the application of rigid legal rules and principles. As Lord Birkenhead remarked in the case of *Rutherford v. Richardson*[1], "it is of course a commonplace that the decision of legal issues must depend on rigid rules of evidence, necessarily general in their scope and very likely, therefore, in individual applications to present an appearance of artificiality and even of inconsistency".

I would have affirmed the conviction of the eighth accused-appellant too. He had pleaded guilty at one stage of the case, but later he asked to be allowed to withdraw that plea, and the Magistrate acceded to that application. So that in his case, the prosecution had to prove his guilt, and as I have already observed, the evidence falls short of establishing it. The case of *King v. Sidda*[2] shows that the Magistrate was entitled to base his finding in regard to the eighth accused on his admission of guilt although that plea was later retracted. But the Magistrate has not done so and I am not aware of the circumstances in which the plea was tendered and then retracted.

Set aside.

[1] *39 Times L. R. 42.*

[2] *20 N. L. R. 190.*