1923.

Present : Jayewardene A.J.

THE POLICE OFFICER, DONDRA, *v.* BABAN.

410—P. C. Matara, 28,011.

Punishment—Plea of not guilty—Accused not to be punished more severely because he claimed to be tried.

An accused, who pleads not guilty and claims to be tried, is not to be punished when found guilty more severely on that account, than a co-accused who has pleaded guilty.

Where an appeal lies on a matter of law only, the certificate that the matter of law is a fit question for adjudication should refer specifically to the point of law certified.

THE facts are set out in the judgment.

No appearance.

August 22, 1923. JAYEWARDENE A.J.—

In this case the appellant has been convicted under the Gaming Ordinance and sentenced to pay a fine of Rs. 6. He appeals on a point of law: That the Police Magistrate who fined his co-accused who pleaded guilty Rs. 3 was not justified in fining him Rs. 6 because he pleaded not guilty and claimed to be tried. After the petition of appeal raising this point was filed, the learned Magistrate gave his reasons for the conviction and sentence, and dealing with the objection he says :—

> " Counsel for the defence, however, questions my right to impose varying sentences in the case of the same offence. My only answer to that is that it is a practice universally followed, and I think, very rightly followed for a judge to regard a frank and open plea of guilt (when not made boastfully) as a justification for treating the accused with somewhat less severity. A man who aggravates his original offence by putting forward a vexatious and frivolous defence cannot, I think, claim as a right from the Court the same sentence as has been imposed on those who admitted their guilt."

There is a great deal of truth and force in what the Magistrate says, but the practice is one which has often been condemned, and, if I may say so, rightly condemned by this Court. It holds out a strong temptation to innocent persons to plead guilty. Thus in *Seyatuwa v. Appuwa*[1] five people were charged with unlawful

[1] *(1896)* 2 *N. L. R. 212.*

gaming, the first three accused pleaded guilty and were fined Rs. 5 each. The fourth and fifth accused pleaded not guilty and claimed to be tried. After trial, the Magistrate found them guilty and sentenced them to one month's rigorous imprisonment. Bonser C.J. reduced the sentences of imprisonment to fines of Rs. 5. He said :—

> " If a sentence of Rs. 5 was considered sufficient punishment for the other men, it appears to me from the evidence that it is equally sufficient for the appellants. It would seem as if the Magistrate punished the appellants more severely because they claimed to be tried. I reduce the sentence to a fine of Rs. 5. A man ought not to be in a worse position because he claims to be tried."

In another gambling case (*Belliate v Don Lewis*[1]) Wendt J. made the following observation :—

> " Again it is not an offence to plead not guilty when one is really guilty, and a person doing so cannot be punished more heavily than one who fully admits the charge or *vice versa.*"

If the conviction of the accused is to be sustained, the fine should be reduced to Rs. 3.

I should like to draw attention to the way in which the point of law was certified by the proctor for the appellant. As this was a case in which the accused had been sentenced to a fine not exceeding Rs. 25, and no leave of the Court had been obtained, no appeal would lie except on a matter of law. When the appeal is on a matter of law, the petition must contain a statement of the matter of law and must bear a certificate by an advocate or proctor that such matter of law is a fit question for adjudication by the Supreme Court (section 340 (2) of the Criminal Procedure Code). The petition of appeal in this case contains seven grounds marked (*a*) to (*g*), and the matter of law is raised in paragraph (*a*). All the others raise questions of fact. The certificate of the proctor does not refer specifically to ground (*a*), but certifies generally " that the above matters of law stated in this petition are fit and proper for the consideration of the Honourable the Supreme Court." Such a certificate is, in my opinion, not regular. The certificate should refer specifically to the ground which embodies the point of law raised. This is, I think, clear from the form of the petition of appeal given in the Criminal Procedure Code, see Schedule III., Form 12. That gives the form of the certificate to be attached to the petition of appeal thus : " I certify that the matter of law stated in ground of appeal is a fit question for adjudication by the Supreme Court."

The grounds of appeal must be numbered consecutively and the form requires the number of the ground (or the letter of the

[1] *(1907) 1 Aserwatham's Rep. p. 2.*

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alphabet attached to it) should be referred to in the certificate. The certificate in question refers to " matters of law," and I had to send the case back for the proctor to state what the paragraphs were which contained the matters of law certified. If the practice indicated by the Code is followed, it would lead to more certainty and less delay in dealing with such appeals.

But there is a ground on which, I think, the conviction of the accused should be set aside altogether. The accused was charged with unlawful gaming under section 4 of the Gaming Ordinance, 1889, and the prosecution had to prove that the accused played a game for a stake " (*a*) in or upon any path, street, road, or place to which the public have access, whether as of right or no ; or (*b*) (not material) ; or (*c*) in or at a common gaming place . . . . See section 3 (2) of the Ordinance. There is, however, I regret to find, not a word of evidence that this accused and the other accused played a game for a stake, or that they did so in any of the places referred to in section 3 (2) of the Ordinance. The charge against the accused which is contained in the summons was that they " did on the 4th day of May, 1923, at Menikkalawatta . . . . commit unlawful gaming by playing with cards for stakes a game called " Bebi." The only witness for the prosecution was the police officer of Dondra West who said : " On May 4 these two people (that is, the appellant and the 3rd accused who had also pleaded not guilty) were among the people I found gambling in the jungle." He was cross examined, but his replies were not material. This evidence does not prove that the accused committed " unlawful gaming " within the meaning of section 4 of the Ordinance. It proves absolutely nothing. The charge stated that the unlawful gaming took place in Menikkalawatta, but the witness says that it took place in the jungle. Is the jungle a part of Menikkalawatta, and if so, private property ? It is not a path, street, or road. Is it a place to which the public have access whether as of right or not ? There is not a word of evidence on this point. It is not suggested that it is a common gaming place. The witness also does not say that the gambling was for a stake. These are of the very essence of the offence of unlawful gaming, but there has been a total failure to prove them. In the circumstances it is impossible to maintain the conviction of the appellant, and I set it aside. In revision, I also set aside the conviction of the 3rd accused who pleaded not guilty and has been convicted on the same evidence.

Set aside.