Present : Mr. Justice Middleton.

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RATWATTE *v.* KADORIS.

P. C., Colombo (Addl.), 8,743.

Ordinance No. 17 of 1889, s. 5—Keeping a common gaming place — Acquittal by Village Tribunal of gaming — Plea of autrefois acquit *— Jurisdiction of Village Tribunal — Village Committee Rules — Evidence necessary to support a charge of keeping a common gaming place—Search warrant.*

An acquittal of a person by a Village Tribunal of the offence of unlawful gaming cannot be pleaded in bar to a prosecution for keeping a common gaming place under section 5 (*a*) of Ordinance No. 17 of 1889 before the Police Court, the two offences being quite distinct.

Rule 43 of the rules[1] made under section 7 of the Village Communities' Ordinance, No. 24 of 1889, which enacts as follows :—

"*Sub-section 12.—Prevention of Gambling and Cock-fighting.*

"43. *Gambling.*—No person shall engage in gambling or cock-fighting, or abet these offences by his presence or by allowing the use of his house or land for such purposes. (Any person who organizes or takes part in a lottery shall be deemed to have engaged in gambling within the meaning of this rule.)"—

does not include the offence of keeping a common gaming place, and such an offence is not triable by a Village Tribunal.

In order to support a charge under section 5 (*a*) of Ordinance No. 17 of 1889, it is not sufficient to prove that the accused collected *thon* (commission) and settled disputes among the gamblers. There must be some evidence that the accused exercised some kind of control over the place or the persons frequenting the place.

THE accused was charged under section 5 (*a*) of Ordinance No. 17 of 1889, in that "he on January 20, 1909, at Pitipane, having the use of a shed at Indigahawelakamatha, kept it as a common gaming place."

The evidence in support of the charge was that the accused collected *thon* at the gaming place, and settled disputes that arose among those who took part in the gaming.

The Additional Police Magistrate (M. S. Pinto, Esq.) convicted the accused of the charge, and sentenced him to pay a fine of Rs. 200. The Magistrate held as follows (June 29, 1909) :—.

"There is no evidence that the accused is one of the co-owners or occupiers of the shed in question. But he collected *thon* on this occasion and settled disputes which arose. That he, therefore, had the use of the shed, and that he kept it as a common gaming place

[1] Published in the *Ceylon Government Gazette* of September 29, 1905.

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is clear. On similar evidence the accused in the Sedawatta gaming case (*Abeykoon v. Philip et al.*[1]) recently tried in this Court was convicted of keeping a common gaming place."

The accused appealed.

H. A. Jayewardene (*G. K. W. Perera* with him), for the accused, appellant.

There was no appearance for the respondent.

The arguments and cases cited sufficiently appear in the judgment.

Cur. adv. vult.

August 6, 1909. MIDDLETON J.—

The accused was convicted on June 29, 1909, under section 5 of Ordinance No. 17 of 1889, of keeping a common gaming place at Pitipane on January 20, 1909, and sentenced to pay a fine of Rs. 200.

On January 23, 1909, the accused and several others were charged before the Village Tribunal of Athurugiriya with gambling at Pitipane on January 20, 1909, in breach of the Village Committee Rule 43 dated September 29, 1908, and acquitted.

It is contended before me (1) that the offence of which the accused has been convicted in the Police Court is within the exclusive jurisdiction of the Village Tribunal by virtue of a judgment delivered by Layard C.J. and reported at page 74 of *9 N. L. R.*, which was followed by Lascelles A.C.J. in 219–223, P. C., Chilaw, 24,699, on June 6, 1906, and by Wood Renton J. in *3 Balasingham 113*, and supported to some extent by a judgment of my own in 559, P. C. (Ity.), Colombo, 19,334, dated October 19, 1906; (2) that although the accused did not plead in the Police Court that he had been previously acquitted, he was now entitled to raise that plea, which stood proved on the face of the record; (3) that the evidence did not justify the conviction.

In the first place, I see no reason to question the ruling of Layard C.J., that where a breach has been committed by a native within the jurisdiction of a Village Tribunal of the rules made by a Village Committee, that such Tribunal has exclusive jurisdiction to deal with such breach of rules. I can find no direction on the record by the Attorney-General, Government Agent, or Assistant Government Agent under section 3 (28 B) of Ordinance No. 3 of 1908 excluding the jurisdiction of the Village Tribunal.

On looking at the petition of appeal, I find that these two points, which were points of law, were not set out in it, and there is no certificate in it by an advocate or proctor that there are any matters of law fit for adjudication by the Supreme Court. I think, therefore, that I can only consider these points in revision. As regards the first point, the offence of which the accused had been convicted in the Police Court, is, I think, not one against Rule 43.

[1] (*1909*) *12 N. L. R. 145*

The conviction is for keeping a common gaming place, and the rule is as follows :—

"43. *Gambling.*—No person shall engage in gambling or cock-fighting, or abet these offences by his presence or by allowing the use of his house or land for such purposes. (Any person who organizes or takes part in a lottery shall be deemed to have engaged in gambling within the meaning of this rule.)"

If a man allows the use of his house or land for gambling, he is to a certain extent keeping a common gaming place, but not to the extent contemplated by section 5 (*a*) of the Ordinance. It does not matter in either case if the house or land is not actually his own, but only occupied temporarily by him. This is clear from the definitions in sections 3 and 5 of the Gaming Ordinance of 1889.

The rule, however, in my opinion, refers rather to an abetment of gambling by suffering a house to be used as a common gaming place, and would not include the case of a person keeping his house in an active sense to be used as a common gaming place. The one is a passive infraction, the other an active infraction, of the law, punishable equally, it is true, under section 5 of the Ordinance, when they involve the using of a place as a common gaming place. The rule, however, seems to me to apply to the more trivial case of allowing a party of men to gamble or cock-fight in a house or garden without the place being used as a common gaming place to the full meaning of these words. It is true a place may be a common gaming place if proved to be so used only on one occasion. I think, therefore, the offence of which he has been convicted by the Police Court is not within the words and meaning of Rule 43, but a distinct offence, which is not within the jurisdiction of a Village Tribunal.

As regards the (2) point, it turns on section 330 of the Criminal Procedure Code, which enacts as follows :—"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181, or for which he might have been convicted under section 182." That is to say, if a man had been tried for theft and might have been charged and tried for receiving stolen property on the same facts, he could not have been tried on the same facts for receiving stolen property if acquitted of theft, or if he had been charged with theft, and it appeared his offence was receiving stolen property, and he was convicted on the latter charge, he cannot be tried again for theft.

Section 330, sub-section (2), further goes on to say : "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made

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against him on the former trial under sub-section (1) of section 180." So that if a man has been tried and acquitted for voluntarily causing hurt by wrongfully striking another with a cane under section 314 of the Penal Code, he may be subsequently tried and convicted on the same facts for criminal force or assault under section 343 (Example (*g*), sub-section (2), section 180).

Here he was acquitted of gaming, and has been tried a second time for the distinct offence of keeping a common gaming place. I think, therefore, he is not entitled to plead or succeed on the plea of *autrefois acquit*. I therefore must hear the case on its merits.

Having heard the case on the merits, His Lordship delivered the following judgment :—

I have now heard the evidence in the case read to me and commented on by counsel for the appellant. It would seem that the charge was originally one of keeping a common gaming place in a shed at Indigahawelakamatha, property belonging to Medapathige Kadoris, the accused, but on June 10, without any serious objection on the part of the learned advocate who appeared for the accused, this was amended to a charge " that he having the use of a shed at Indigahawelakamatha kept it as a common gaming place." The charge as amended would still be within section 5 of Ordinance No. 17 of 1889. It was contended before me that the evidence did not disclose any of the offences under that section, and it was pointed out that the Magistrate has stated in his judgment that there was no evidence that the accused is one of the co-owners or occupiers of the shed in question, but the Magistrate held that as he collected *thon* on this occasion and on several previous occasions, and settled disputes which arose, that he therefore had the use of the shed, and thus kept it as a common gaming place. Upon this point the decision of Chief Justice Bonser, reported at page 21 of Vol. 1 of *Weerakoon's Reports*, was relied on for the appellant. In that case the evidence was that the accused took commission and settled disputes by paying money, and the learned Chief Justice held that his acts were not sufficient to bring the accused within the words of the Ordinance on a charge of having the care or management of, or in any way helping in the management of, a place kept or used as a common gaming place.

The learned Judge went on to say that if there had been evidence that he refused access or refused to allow persons to stake or turned persons out or did any acts of that kind, then there would have been evidence from which the Court might have inferred that he had the care or management of the place. That case was followed by Mr. Justice Withers in the case reported in *3 Tambiah 71*. The authority of those decisions is, I think, sufficient for me to say here that the accused, on the evidence on the record, can neither be convicted of the original charge or the amended or any charge under sub-section (*c*) of section 5 of Ordinance No. 17 of 1889.

There is, however, another feature in the case, on the facts of which, I think, I ought to take notice as ground for holding that this man ought not to be convicted.

[His Lordship then dealt with the facts, and set aside the conviction and acquitted the accused on the ground that the evidence was unreliable.]

Appeal allowed.