1904.
June 30.

SERAHAMY *v.* RANKIRA.

P. C., Avisawella, 11,460.

Unlawful gaming—Public place—Ordinance No. 17 of 1889—Previous convictions—Admissions by accused—Mode of recording them.

Taking part in a game of cards on a threshing floor or *kamatha* common to several paddy fields, and accessible to the public, who in fact have access to it, though not of right, is unlawful and punishable under Ordinance No. 17 of 1889.

Admissions of accused parties as to previous convictions should be specifically recorded in the very words used by them. The questions put and the answers given should be taken down, if they are to have any probative value.

THREE persons were accused and convicted under the Gaming Ordinance, No. 17 of 1889, of unlawful gaming with cards on 12th April, 1904. The gaming was carried on on a *kamatha* or threshing floor, which is an open bit of ground in the midst of paddy fields. It is visible from and within hearing distance of a public cart road, and alongside of it is also a footpath used by villagers.

The Police Magistrate found as follows:—

"Two of the witnesses for the prosecution had access to the threshing floor. The witness called 'Muhandiram,' who appears to be a respectable man, and has no reason whatever to give false evidence, says that the sounds of gambling at this place are heard even from the high road (Ratnapura road). I hold this threshing floor is a place to which the public had access, though not of right."

The accused appealed, and the case was argued before Sampayo, A.J., on 27th June, 1904.

Browne, for appellant.—The *kamatha* is not a place to which the public have access, whether as of right or not. In *Perera v. Perera*, *2 C. L. R. 6*, Burnside, C.J., held that the word "access" in section 3 of the Ordinance No. 17 of 1889 meant legal access, *i.e.*, access as of right or by the express or tacit license of the owner of the land, and not such access as would constitute a trespass against the owner. This view was over-ruled by Layard, C.J., in *Elstone v. Marthelis Appu*, *6 N. L. R.* 256, and simply concurred in by Middleton, J., and Grenier, A.J. But the judgment of Layard, C.J., has omitted to take notice of the words "as of right." How can the public not have a right of access when they have a right of access? The decision of Burnside C.J., is the more correct one.

1904.
June 30.

Rámanáthan, S.-G., for respondent.—The decision of Layard, C.J., in *Elstone v. Marthelis Appu* is intelligible. The public may have access to a place in fact, though not of right. Such access cannot be spoken of as a right of access.

Cur. adv. vult.

30th June, 1904. SAMPAYO, A.J.—

The accused have been convicted of unlawful gaming under the Ordinance No. 17 of 1889. The accused and several others took part in a game of cards on 12th April last on a threshing floor or *kamatha*. The *kamatha* was an open bit of ground in the midst of paddy fields, the owners of which used it in common. It is visible from and within hearing distance of a public cart road, and alongside of it is also a footpath used by villagers. It was argued that this was not a "place to which the public have access, whether as of right or not," and the case reported in *2 C. L. R. 6* was cited in support of this argument. But that decision was dissented from by the Full Court in *Elstone v. Marthelis Appu, 6 N. L. R. 256*, which I follow, inasmuch as the facts of this case show that the *kamatha* in question is accessible to the public, who in fact have access to it, though not of right. I therefore see no reason to interfere with the conviction.

The appellants have been fined double the amount awarded against the other accused, who was convicted, on the ground that they were previously convicted of similar offences. The previous convictions were not proved, and there was no record, except in the judgment, of any admissions on the part of the accused. If admissions are to be depended on, the questions put and the answers given should be specifically recorded. I cannot regard the alleged previous convictions as having been established. I therefore reduce the fine inflicted on the accused appellants to a fine of Rs. 25 each, and in default of payment such defaulting accused will undergo rigorous imprisonment for a period of one month.