1895.
September 26.

WIKRAMASOORIYA *v.* APPUSINHO.

P. C., Balapitiya, 14,269.

Criminal Procedure Code, ss. 175, 238, and 242—Power of Police Magistrate to try a lower offence, while a charge for a higher offence beyond his jurisdiction remained formally undisposed of—Power of "Attorney-General" under ss. 241–243.

Complaint was made against accused for intentional insult under section 484 of the Penal Code and criminal intimidation under section 486. The Magistrate heard evidence, formulated charges under both these sections, and forwarded proceedings to the Solicitor-General under section 175 of the Criminal Procedure Code. On the return of the record to the Police Magistrate, he proceeded to try the accused summarily for the offence under section 484 only, and convicted him of it. At this trial the complainant and his witnesses confined themselves to that part of their story which applied to this offence and omitted the rest of it :

Held, that such procedure was irregular.

The intention of section 238 of the Criminal Procedure Code, as amended by Ordinance No. 22 of 1890, is to prevent the Magistrate being satisfied that the evidence disclosed an offence which he had no jurisdiction to try, and having framed a charge for the graver offence was not at liberty to dispose of the minor offence.

Observations of the Chief Justice on the impropriety of getting witnesses to say only what will square with the particular charge which the Court has determined to try.

Under sections 241, 242, and 243 the "Attorney-General" may follow one of these courses : (1) If he is satisfied that the proceedings are in order, he may nominate the Court of trial. (2) If he thinks that no further proceedings should be taken, he may direct the discharge of the accused. (3) If he finds the evidence defective, he may require the Magistrate to take further evidence.

1895.
September 26.

THE facts of the case are fully set forth in the judgment of his lordship the Chief Justice.

Pereira, for accused appellant, cited *Christian v. Pedro, 2 C. L. R., p. 197*, and contended that it was irregular on the part of the Police Magistrate to have tried the accused for the lower offence, dropping the charge formulated in respect of the higher offence which was triable only by a higher court. Such a procedure was inconsistent with Ordinance No. 22 of 1890, section 238.

Jayawardene, for respondent. The case cited can be differentiated from the present case. There the facts on which the Magistrate convicted the accused of affray were necessary to constitute the graver offence of rioting. When the facts which make up the minor offence do not enter into the constitution of the graver offence, the Magistrate can try the minor offence and commit the accused for trial on the graver offence. The test is to see whether the verdict of the Magistrate could be pleaded in bar—as autrefois acquit or autrefois convict—to an indictment on the graver offence. In this case, the Magistrate has in no way adjudicated on the facts which go to make up the graver offence. Hence, the verdict of the Magistrate cannot be pleaded as a plea of autrefois acquit or autrefois convict.

His Lordship desired to hear the Solicitor-General upon the points involved.

Rámanáthan, S.-G., appeared for the Crown,—

It was open to the Police Magistrate to discharge the accused from the higher charge. The framing of the charge shall not, indeed, take place except when there are sufficient grounds for committing the accused, as provided in section 169, but here, for the sake of convenience and economy of time, the charge was framed even though the evidence was insufficient, and the case forwarded to the Solicitor-General, who returned it, apparently with the opinion that it was not worth while committing the case to a higher court upon the charge laid under section 486 in view of the fact that the threat to cause death was made in self-defence, when the complainant took up a stick to strike the accused. If a formal order of discharge under the hand of the Attorney-General is held to be necessary so as to justify the Magistrate's order of discharge, it may be produced *nunc pro tunc*. [BONSER, C.J.—If that be so, "all the proceedings taken upon such inquiry shall "cease and be determined," and the proceedings in respect of the lesser offence would also cease]. No, because "such inquiry" in section 242 would refer only to the "complaint, information, or "charge" in respect of the higher offence. It would not affect the

proceedings on which the lesser offence rests. The spirit of section 238 has not been violated, as the conviction for the lesser offence was not arrived at with the object of withdrawing the higher offence from a higher tribunal. [BONSER, C.J.,—But what justification has the Magistrate for recording, at the later inquiry or trial, only so much of the evidence as relates to the lower offence?] He might have thought it unnecessary to burden the record with evidence irrelevant to the lower charge, which had been dropped.

26th September, 1895. BONSER, C.J.—

In this case the appellant was charged and convicted of the offence of insult under section 484 of the Penal Code, and was sentenced to undergo one month's imprisonment. He has appealed against that decision, and claims that he ought to be tried by a higher Court. Now, the facts of the case are these: a complaint was filed against him charging him, first, with insult under section 484, and secondly, with criminal intimidation under section 486, the threat being to cause death. The latter was an offence which the Magistrate had no power to try. The Magistrate entertained the complaint and heard the evidence of the complainant and his witnesses, who all swore to the fact that appellant drew a knife and threatened to kill the complainant, and was only prevented from using the knife by the interference of his brother.

The Magistrate, after hearing the evidence, was apparently of opinion that there were sufficient grounds for committing the accused for trial, for he framed charges under section 484 and section 486—he framed a double charge—and then, as required by section 175 of the Code, forwarded the proceedings to the "Attorney-General," in order to be instructed by him as to the Court to which the committal should be made. Now, the duties and powers of the Attorney-General on receipt of such proceedings are set out in section 241 and the following sections. There appear to be three courses The first is, if he is satisfied that everything is in order, to specify the Court which is to try the case, whether it is to be the District Court or the Supreme Court. If, however, he is of opinion that no further proceedings should be taken in the case, he may make an order in writing, signed by himself, directing the accused to be discharged from the matter of the complaint, information, or charge. If he takes that course, section 242 provides that all proceedings shall cease and be determined, and that makes an end of the case. The third course is that if he is of opinion that there is a criminal offence disclosed, but that the evidence is defective, he may order the Police Magistrate to take

further evidence in order to supplement the defect. These appear to be the three courses open to him.

What was done by the Attorney-General in this case does not appear. There is no record of it. But when the parties appeared again before the Magistrate he proceeded to try the accused summarily on the first of the two charges, the charge under section 484, and with the result I have mentioned. The appellant says that that course was irregular, and that having been charged with an offence under section 486, one of the three courses to which I have referred ought to have been taken; and that it was not competent for the Court, while the graver charge was still hanging over his head, to deal with the lesser charge.

He also relied upon section 247 of the Criminal Procedure Code, which provides for the Attorney-General designating the Court before which the case is to be tried, and requires that it must be either the Supreme Court or a District Court; and he says that the Attorney-General has no power to designate the Police Court, as has been done in this case. However that may be in this case, there is no evidence that the Attorney-General did direct it to be tried in the Police Court, and we must deal with it as if the Magistrate on his own initiative imposed on himself the duty of dealing with the lesser charge.

It was also urged that the course taken was inconsistent with section 238 of the Ordinance No. 22 of 1890. That section provides that where a Police Court is dealing with an offence which is not triable summarily, "it shall not be at liberty to "disregard material parts of the evidence and convict for a lesser "offence, and so withdraw the case from the proper tribunal, but "that it shall be the duty of such Court to stop further proceedings "under that chapter and to proceed under chapter XVI.," that is, it must take proceedings with a view to commit the accused for trial by a Superior Court.

The Solicitor-General argued that the words "to withdraw the "case from the proper tribunal" meant that the section only applied to cases where there was a deliberate intention on the part of the Magistrate to withdraw the case from the proper tribunal. I do not think that the words necessarily bear that sense. The intention of that section is to prevent what was done in this case, and I am of opinion that the Magistrate being satisfied that the evidence disclosed an offence, which he had no jurisdiction to try, and having framed a charge for the graver offence, was not at liberty to dispose of the minor offence. Now, one evil of such a course appears very clearly in these proceedings. In the first proceeding the complainant and all his witnesses spoke

of the threats of the accused to use a knife, and stated how he was restrained by his brother from carrying his threat into execution. On the second hearing the complainant and his witnesses suppressed the whole of the evidence relating to this part of the case, so as to make the affair appear different from the reality. It is said that that evidence was irrelevant to the charge then being tried, and it is suggested that the complainant's proctor abstained for that reason from bringing out this evidence.

It seems to me that this has a serious bearing on the administration of justice. If witnesses are to be taught to say only what will square with the particular charge which they are told is to be established, there will be an end to all confidence in the administration of justice.

One of the great crying evils in our Courts is the way in which witnesses suppress the truth, and tell stories which are made to fit their ideas of what is required by their own interest, or by the interests of persons for whom they appear to give evidence; and anything in the course of practice or procedure which would in any way encourage such a state of things is to be strongly reprobated. Therefore, even if such a course of procedure were technically correct, I should say that it was not for the interests of justice that it should be adopted, and sitting as a Court of Appeal I should discountenance it. It seems to me that the proper order to make would be, that the conviction be quashed, and that these proceedings go back to be dealt with on the charges already framed by the Magistrate, leaving it to the Attorney-General to designate the Court to which the accused should be committed for trial.

WITHERS, J.—The Chief Justice's judgment has my hearty concurrence.

The course pursued by the Magistrate not only defeats the wise policy of section 238 of the Ordinance No. 22 of 1890, but is calculated to stifle truth.

Mr. Jayawardene urged that this offence of insult in the circumstances disclosed was quite distinct from the offence of criminal intimidation under section 426, and that in consequence the Magistrate has power to deal with it summarily.

I am against him on that point, as I consider that the offences were so minutely connected as clearly to embrace one and the same transaction.

It would be at once unfair and impolitic to try this man before the Police Magistrate for insult on one day, and before a Superior Court for intimidation another day. A Court which is competent

to try the higher offence should try the lesser at one and the same time.

Speaking for myself, I remain of the opinion which I expressed in the case of *Christian v. Pedro Appu* (reported in *2 C. L. R., p. 197*), and which is accurately put in the head-note as follows :—

Where, after evidence, an accused is charged by a Police Magistrate for an offence not summarily triable, and is not discharged from the matter of the charge, it is not competent for the Police Magistrate, while such charge is still pending, to formulate another charge for a lesser offence arising out of the same circumstances, and to try the accused summarily thereon.