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Re Application of V. C. VELLAVARAYAM for a Writ of Prohibition on the Police Magistrate of Colombo, and the Complainant in P.C., Col. 83,148.

Criminal Procedure Code, ss. 191, 391—Power of Police Magistrate to open proceedings after discharging accused in a case summarily triable by him—Power of Attorney-General to direct the Magistrate to proceed afresh—Writ of prohibition on Magistrate—Plea in bar.

When a Police Court had discharged, under section 191 of the Criminal Procedure Code, a person charged with an offence triable summarily, and on instructions from the Attorney-General, opened up the proceedings, an objection by the accused that the order already entered was a bar to further proceedings should be advanced by way of plea in bar, and not asserted by motion for a writ of prohibition, as such an objection is based not on the incompetency of the Court, but on the privilege of the accused that he shall not be vexed a second time for the same cause.

The Attorney-General may by his instructions regulate the Magistrate's proceedings in a summary case as well as in a non-summary case, but such instructions can only be issued in a pending case and not in one which, so far as the Police Court is concerned, has been finally determined as by an order of discharge under section 191 of the Criminal Procedure Code.

A discharge of an accused, under section 191 of the Criminal Procedure Code (Ordinance No. 15 of 1898), by a Police Magistrate in a case summarily triable by him is final, and so long as it stands unreversed it would prevent the Magistrate himself re-opening the prosecution. Such discharge, however, would not have the same effect as an acquittal in barring a fresh prosecution.

There is no provision in the Criminal Procedure Code enabling the Attorney-General to overrule or set aside an order of discharge made by a Magistrate in a summary case.

THREE accused persons were charged before the Police Court of Colombo with offences triable summarily and punishable under sections 314, 315, and 343 of the Penal Code. The Magistrate

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examined the complainant and ordered summons to issue for an offence under section 314 only. Upon the appearance of the accused he proceeded to try them summarily for that offence. He examined the complainant and three other witnesses for the prosecution, recorded his disbelief of their evidence, and discharged the accused.

The complainant thereupon applied for the Attorney-General's sanction to appeal as from an acquittal. The Attorney-General desired the Magistrate duly to record his verdict under section 190 of the Criminal Procedure Code. The Magistrate recorded that in discharging the accused he had not acted under section 190, but under section 191, and stated at greater length his reasons for having done so.

The Attorney-General, by letter dated 2nd November, 1903, desired the Magistrate, "under the provisions of section 390 (2) of the Criminal Procedure Code, to proceed afresh against the accused under chapter 16 of that Code on the charges brought against them and to forward the proceedings to him in due course for instructions."

The Magistrate issued notice to the parties. The accused were not served, but their proctors appeared for them and submitted that the Attorney-General had no authority to order a fresh inquiry, because the accused had been discharged in the course of a summary trial. The Magistrate agreed with this view, but being of opinion that he could not refuse to carry out the order of the Attorney-General, he ordered summons to re-issue.

Before the returnable date application was made to the Supreme Court on behalf of the first accused for a *rule nisi* calling upon the Magistrate and the complainant to show cause why a writ of prohibition should not issue prohibiting them from further proceeding with the case.

This was allowed, and notice ordered to be given to the Attorney-General also.

The case was argued on 24th November, 1903.

Bawa, for applicant.—Section 46 of The Courts Ordinance empowers this Court to issue writ of prohibition (*Perera's Institutes*, p. 166; 1 N. L. R. 181). A Police Court has no jurisdiction to set aside an order of discharge entered by it under section 190 of the Criminal Procedure Code. When it attempts to do so, as in this case, it acts without jurisdiction, and the prohibition lies (*Bacon's Abridgment*, *Tit.* "*Prohibition*"). The rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so, and on the contrary nothing shall be intended to be within the jurisdiction

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of an inferior Court but that which is so expressly alleged (*Peacock v. Bell, 1 Williams' Notes on Saunders' Rep. 96; L. R. 2 H. L. 259*). The rule that in inferior Courts and proceedings by Magistrates the maxim "*omnia præsumuntur rite esse acta*" does not apply to give jurisdiction, has never been questioned (*Rex v. All Saints' Parish, 7 B. & C. 785; Rex v. Bolton, 1 Q. B. 66; Chen v. Holroyd, 8 Ex. 249*). In a prohibition for want of jurisdiction the question is not whether the party or the Court has done a wilful wrong, but whether the Court, has or has not jurisdiction (*Ede v. Jackson, Fort. 345*). [WENDT, J.—Should not your client plead want of jurisdiction in the lower Court?] A party proceeded against may at his option either plead there, or apply for a prohibition (*L. R. 2 H. L. 284*). In this case, however, he did plead but the Magistrate rejected his plea on the ground that the Attorney-General had, under section 390 (2) of the Criminal Procedure Code, ordered him to take non-summary proceedings. It is submitted that it was *ultra vires* of the Attorney-General to make the order. He could do so only in a pending case, and not in a case in which so far as the Police Magistrate is concerned the proceedings are closed. The words are "an inquiry or trial has been or is being held before him." The true reading of these words is "an inquiry *has been*, or trial is *being, held.*" It is only the Supreme Court that can set aside in a summary case an order of discharge under section 190. In a non-summary case the Attorney-General has power under section 391 to re-open inquiry. Under section 390 (1) the Attorney-General can send for a record of a trial, but he can only give instructions with regard to inquiry and not to trial. "Trial" in section 390 must be interpreted to mean summary trials, and "inquiry" to mean non-summary investigation—*Vide* section 152 (2) and section 192 (1).

The Attorney-General (*Lascelles, K.C.*).—The applicant has not made out a case for prohibition. Prohibition is a statutory remedy, and is generally given to prevent encroachment on the jurisdiction of a higher Court (*Bacon's Abridgment, Tit.* "*Prohibition*"). These proceedings have been misconceived. Applicant's proper remedy, if any, is a plea of *autrefois acquit* when the case comes up for trial. The Attorney-General has, under section 390, power to give instructions to the Police Magistrate to re-open proceedings whether of an "inquiry" or "trial," which has ended in a discharge and not an acquittal. He can authorize re-opening of proceedings in a summary case in which the Police Magistrate has entered an order of discharge under section 190. The words "has been or is being held" are the predicate of

"inquiry" as well as of "trial," and, therefore, the Attorney-General can act in a case in which trial has been held and not only in the case of a trial which is being held. An order under section 190 is not appealable, as it does not amount to an acquittal. "Inquiry" includes trial. See definition of Inquiry, section 3 of the Criminal Procedure Code.

H. A. Jayewardene, for complainant, respondent.—If the facts stated are correct, the applicant might successfully plead *autrefois acquit;* but that is no ground for interference by writ of prohibition. This is not a case in which prohibition ought to issue. No want of jurisdiction or excess of jurisdiction in the Police Court of Colombo has been shown (*Worthington v. Jeffreys, C. P. 209,* Short p. 456).

Bawa in reply:—If the words "has been held" are to be taken as predicate of "trial," then the Attorney-General can interefere in the case of an acquittal also, for it is a case in which trial has been held. This cannot be. Besides, there will be no meaning to the following word: "whereupon such trial shall be suspended in the same and the like manner as upon an adjournment thereof." How can a trial which has been held be adjourned pending the Attorney-General's orders? Though the definition of the word "inquiry" will take in "trial" in section 390, it should be restricted to non-summary investigations as opposed to "summary proceedings." Chapter XVI. speaks of the "inquiry into cases," &c., whereas chapter XVIII. refers to the "trial of cases," &c., thus drawing a distinction between "inquiry" and "trial," the one as applicable to non-summary, and the other to summary, cases.

10th December, 1903. WENDT, J. (after setting out the facts of the case),—

It was objected in the first instance that the writ of prohibition had no place in a case of this kind, because it could not be said that the Magistrate had no jurisdiction. "A writ of prohibition," says Blackstone (3 Com. 112), "is a writ.....directed to the Judge or parties to a suit in any inferior Court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court." It is not contested that the writ is applicable to criminal matters as well as to civil. In the present case it is not denied that the Police Court of Colombo, against which the prohibition is asked for, has jurisdiction over the offences in question and over the parties accused. It is admitted that, but for

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an order already made by it, that Court would be the proper Court to take cognizance of the accusation, as it is about to do. The order referred to is said to have the effect of an acquittal, so far at least as the Police Court itself is concerned, and therefore to be a bar to the further proceedings contemplated. (It will be observed how this contention itself assumes the jurisdiction of the Court.) But such an objection is based not on the incompetency of the Court, but on the privilege of the accused that he shall not be vexed a second time for the same cause, and it ought to be advanced by way of plea in bar and not asserted by motion for prohibition. The Court has jurisdiction over the cause, and is competent to try and adjudicate upon the plea in bar. No case has been cited to us in which the writ has gone upon the proof merely that the inferior Court has overruled or is likely to overrule a plea of *autrefois acquit* or *autrefois convict* in a cause over which it has jurisdiction, and I think on this ground the application should be refused.

I have so far dealt with the application irrespective of the fact that the Magistrate was acting under the instructions of the Attorney-General. It was not contended that those instructions were in themselves a sufficient warrant without entering into the question of their legal authority, but it was argued that the Attorney-General had power, under section 390 (2) of the Criminal Procedure Code, to require the Magistrate, in spite of his order of discharge under section 191, to hold the inquiry anew. I have formed an opinion on the point, and, although it is not necessary for our decision, will express it as it may be of assistance to the parties.

Section 390, under which the Attorney-General purported to act, is in the following terms:—

(1) A Police Magistrate shall, whenever required in writing by the Attorney-General, forthwith transmit to the Attorney-General the proceedings in any case in which an inquiry or trial has been or is being held before him, and thereupon such inquiry or trial shall be suspended in the same and like manner as upon an adjournment thereof.

(2) It shall be competent for the Attorney-General, upon the proceedings in any case being transmitted to him under the provisions of this section, to give such instructions with regard to the inquiry to which such proceedings relate as he may consider requisite, and thereupon it shall be the duty of the Police Magistrate to carry into effect, subject to the provisions of this Code, the instructions of the Attorney-General and to conduct and conclude such inquiry in accordance with the terms of such instructions.

This section is a reproduction of sections 252 and 253 of the old Criminal Procedure Code with the addition of the words " or trial " after the word " inquiry " in sub-section (1). It was contended for the accused that the express mention of " trial " in sub-section (1) (which entitles the Attorney-General to call for the record) and its omission in sub-section (2) (which empowers the Attorney-General to give instructions to the Police Magistrate with regard to the proceedings) showed that the Attorney-General could not interfere to control the proceedings of the Magistrate in the case of a " trial." This contention depended for its validity upon the further contention that in the Code generally, but in any case in section 390 specially, " trial " meant the trial by a Police Magistrate of an offence which was triable summarily, while " inquiry " meant the investigation by him into a charge not summarily triable, with a view to committal to a higher Court. Now, " inquiry " is defined by section 3 of the Code as including " every inquiry conducted under this Code before a Police Court or by an inquirer." It was not contested that the definition included a summary trial. (It may be observed that in the Indian Criminal Procedure Code " trial " is expressly excluded from the definition of " inquiry.") Reference was also made to the headings of Chapters XVI. and XVIII., but on the other hand numerous instances occur throughout the Code in which the word " inquiry " is used in the sense defined, and I do not think it can be said that there is any authority in the enacting words of the Code itself for limiting the term " inquiry " to non-summary investigations. Further, I do not consider that the mention of both inquiry and trial in sub-section (1) of section 390 constitutes a case in which a meaning of the word " inquiry " in sub-section (2), other than that defined, is called for by the subject or context.

The effect of this reading is that the Attorney-General may by his instructions regulate the Magistrate's proceedings in a summary as well as in a non-summary case.

But it was further argued, on behalf of the applicant that, assuming this to be so, such instructions can only be issued in a pending case, and not in one which so far as the Police Court is concerned has been finally determined. I think the contention is sound. By discharging under section 191 the Magistrate puts a final end to the proceedings. Under our old Code (section 224), as under the present Indian Code, he could only acquit (not discharge) in summary cases, but the discharge under our present section 191 appears to be final. The Magistrate may then, as in the case of an acquittal, condemn the complainant in Crown costs and compensation to the accused (section 197 (1)). It was

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however, admitted that such a discharge would not have the same effect as an acquittal in barring a fresh prosecution, though so long as it stood unreversed it would prevent the Magistrate himself re-opening the prosecution. It is true that section 390 (1) speaks of a case in which an inquiry or trial " has been or is being held," but I think the words which follow, providing for the " suspension " of the inquiry or trial " as upon an adjournment thereof, " imply that the proceedings have not terminated. Then sub-section (2) requires the Magistrate to " conduct and conclude " the inquiry in accordance with the Attorney-General's instructions. That again implies that the inquiry has not already been concluded. Where the inquiry has been concluded there is express provision in section 391 enabling the Attorney-General to direct that it should be re-opened, but that is limited to cases not summarily triable by the Police Court.

There is therefore no provision enabling the Attorney-General to overrule or set aside the order of discharge made by a Magistrate under section 191 in a summary case, and if not set aside the order would apparently have the same effect as in non-summary cases; that is, while not amounting to an acquittal, it would prevent the Magistrate taking fresh proceedings except under the Attorney-General's express direction under section 391. This power of ordering fresh proceedings is in India confined to Courts superior to that which made the discharge.

MIDDLETON, J.—I agree entirely.