1907.
June 5.

Present: Mr. Justice Middleton.

THE ATTORNEY-GENERAL *v.* APPUWA VEDA.

D. C. (Criminal), Kegalla, 1,343.

Autrefois acquit — *Withdrawal of indictment — Discharge — Acquittal — Validity of commitment — Amendment of indictment — Criminal Procedure Code, ss.* 3, 151 (1), 185, 191, 195, 199, 202, 252.

In the course of a criminal trial in the District Court objection was raised to a document being received in evidence on the ground that the document was not entered on the back of the indictment. The objection having been upheld, the Crown Proctor moved to withdraw the indictment. The Judge permitted this to be done, and discharged the accused under section 202 of the Criminal Procedure Code. Subsequently fresh proceedings were taken against the accused, and he was committed for trial for the same offence. The accused pleaded *autrefois acquit.*

Held, that the plea was untenable, as a discharge under section 202 did not amount to an acquittal.

Held, also, the District Judge was not competent to inquire into the validity of the commitment, and that it was the duty of the District Judge to try the accused on the indictment presented by the Attorney-General, such indictment being good on the face of it.

Held, further, that when the objection to the reception of the document in evidence was raised, the Court might have amended the indictment and given the accused an adjournment, if necessary.

APPEAL by the Attorney-General from an acquittal. The facts sufficiently appear in the judgment.

Walter Pereira, K.C., S.-G., for the Crown.

A. St. V. Jayewardene, for the accused, respondent.

Cur. adv. vult.

5th June, 1907. MIDDLETON J.—

In this case the Attorney-General appeals against an order of the District Court acquitting the accused. The District Judge purports to follow a ruling of Withers J. in *Ukkurala v. David Singho.*[1]

I agree with the learned Attorney-General that that case has no application to this case, as in that case, which was under section 228 of Ordinance No. 22 of 1890, now re-enacted by section 194 of the Criminal Procedure Code, the Magistrate ordered the discharge of the accused where the law required him to acquit him.

[1] (1895) 1 *N. L. R.* 339.

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In the present case, on the 20th December, 1906, owing to a document required for the prosecution not having been entered in the indictment, objection was taken to its being used in evidence, and the objection being upheld, the Crown Proctor applied, under section 202, Criminal Procedure Code, to withdraw the indictment. The Judge permitted this to be done, and discharged the accused.

Subsequently, it would appear fresh proceedings were taken, and the indictment, completed by the insertion of the name of the required document in the list of production, was, with the accused, brought before the District Judge again, presumably, the Attorney-General having directed the accused to be re-committed, and filed either an amended or new indictment.

Counsel for the accused thereafter raised the plea of *autrefois acquit*, which the District Judge held good, and acquitted the accused, while his counsel before me has relied to some extent on the same ground, but in addition urges that the re-committal of the accused was irregular, and called my attention to sections 185, 191, 250, and 252 of the Criminal Procedure Code and to *Re application of V. C. Vellavarayam for a writ of prohibition*.[1]

I think it is clear that the word " discharge " in section 202, looking at section 3 of the Code, is used in its ordinary sense, and does not import an acquittal. The principle involved is that no man ought to be twice brought into danger for the same crime.

The withdrawal of the indictment removes the foundation on which the trial must be based and takes the accused out of the jeopardy involved in the trial therein. The District Judge could not try him without the indictment, and has not tried him, and therefore has not acquitted him, and he was not therefore brought into danger on the 20th December, 1906. A discharge under section 191 may, as Pereira A.P.J. holds in *Eliyatamby v. Tabiyah*,[2] operate under sections 151 (1), 199, and 195, or if fresh proceedings are taken on the same charge be supported as an acquittal by a plea of *autrefois acquit*, as was held in 7 *N. L. R.* 116; but a discharge under section 202 is, in my opinion, in no sense an acquittal, as there is no danger of conviction when the indictment is withdrawn, and the Judge's duty is not to acquit, but to discharge. In my judgment also section 85 will not apply to cases of this kind, but only to the special circumstances produced in that section. The ruling of Chief Justice Burnside in *The King v. Kolandawel*[3] and that of Chief Justice Layard in *The King v. Harmanis*[4] seem to me to support the view contended for by the learned Solicitor-General, that the District Judge in the presence of an indictment good on the face of it, and supported by a commitment by the Attorney-General, has no jurisdiction to inquire into the validity of the commitment.

[1] (1903) 7 *L. N. R.* 116.
[2] 2 *Balasingham* 22.
[3] (1891) 1 *S. C. R.* 198.
[4] (1903) 8 *N. L. R.* 138.

In all non-summary cases where an accused has been discharged he is liable to re-arrest, further inquiry, and commitment, and his discharge by a District Judge. Section 202 does not appear to have the right to renewed inquiry or re-commitment.

I must confess that I do not suppose the author of the Criminal Procedure Code contemplated that section 202 would be used in the way adopted in the present case, for it seems to me that an amendment might have been made by the District Judge, and, if necessary, and adjournment given to the accused, if it appeared that immediate trial after amendment would have prejudiced him, which I doubt.

In my opinion the acquittal by the District Court should be set aside, and the case sent back for trial in due course.

Appeal allowed: case remanded.