1956 *Present :* **Gunasekara, J.**

EDWIN SINGHO, Appellant, *and* NANAYAKKARA (P.S. 2112), Respondent

S. C. 1571—M. C. Hatton, 7,096

Antrefois acquit—*Summary trial—No evidence led by prosecution—Right of accused to an order of acquittal—Criminal Procedure Code, ss. 152 (3), 190, 191,195,330.*

In a summary trial, the prosecuting officer stated to the Court that he was "unable to proceed to trial" on account of the absence of a witness and offered no evidence. Nor did he ask for a postponement of the trial. The Court thereupon made an order purporting to "discharge" the accused. Subsequently, a fresh prosecution was instituted in respect of the same offence and the accused was convicted.

Held, that the order made by the Magistrate in the first case must be regarded as an order of acquittal made under section 190 of the Criminal Procedure Code. Therefore, a plea of *autrefois acquit* could be taken in the second case.

[1] *(1921) 23 N. L. R. 453.* [2] *(1859) 3 Lorensz Reports 303.*

APPEAL from a judgment of the Magistrate's Court, Hatton.

M. M. Kumarakulasingham, for accused-appellant.

Daya Perera, Crown Counsel, for Attorney-General.

Cur. adv. vult.

August 21, 1956. GUNASEKARA, J.—

The appellant was convicted, after a summary trial under the provisions of section 152 (3) of the Criminal Procedure Code, on charges of housebreaking by night and theft, and was sentenced to rigorous imprisonment for 18 months. The conviction was based on the clearest possible evidence and the only ground on which the appeal was pressed was that a plea of *autrefois acquit* that the appellant had taken at the trial should have been upheld.

The proceedings in the present case began with the filing of a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code on the 29th August 1955, and the charge upon which the appellant has been convicted was framed by the magistrate on the 19th September 1955. A charge alleging the same offences had been framed against him on the 31st January 1955 in Case No. 5557 of the same court, in which too the magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code. The appellant pleaded not guilty to the charge and the trial was fixed for the 14th February 1955. He did not appear on that day but submitted to the magistrate a certificate from the district medical officer to the effect that he was too ill to attend court, and the magistrate, being satisfied that his absence was due to illness, postponed the trial to the 28th March 1955. The appellant appeared on that day but a witness for the prosecution was absent, having left for England, and the prosecuting officer stated to the court that he was " unable to proceed to trial " without that witness and he offered no evidence. The learned magistrate thereupon made an order purporting to " discharge " the appellant. It is contended for the appellant that in view of the provisions of section 190 of the Criminal Procedure Code this order amounted to an order acquitting him of the offences charged against him in that case and he was therefore not liable to be tried again for the same offences.

Section 190 of the Criminal Procedure Code, which occurs in the chapter prescribing the procedure for summary trials, provides that if the magistrate after taking the evidence for the prosecution and the defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal, and that if he finds the accused guilty he shall forthwith record a verdict of guilty ; and section 191 provides that nothing hereinbefore contained shall be deemed to prevent a magistrate from discharging the accused at any previous stage of the case. It is contended that the provisions of section 190 require the magistrate to acquit the accused and not merely discharge him if the prosecution offers no evidence against

him at the trial, and that therefore in the present case the magistrate must be taken to have intended to make an order of acquittal and not merely one of discharge. There is support for this view in the decisions of this court in *Don Abraham v. Christoffelsz* [1] and *Adrian Dias v. Weerasingham* [2]. In each of these cases, too, the prosecution offered no evidence at the trial because the prosecuting police officer found that owing to the absence of a witness he could not proceed with the case, and the magistrate thereupon purported to " discharge " the accused. It was held by Nagalingam A. C. J. that the order made by the magistrate must be regarded as an order of acquittal made under section 190 of the Criminal Procedure Code.

It has been held by the Court of Criminal Appeal that " the wording of section 190 means that a Magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution " : *R. v. William* [3]. It appears to be implied in this view that such an order may be made even though evidence for the defence has not been taken. The reason why that can be done must be that the requirement in section 190 as regards the taking of evidence for the defence is subject to the unexpressed condition that such evidence is tendered. It seems to follow that the requirement as regards the taking of evidence for the prosecution must be understood as being subject to a similar condition. The " end of the case for the prosecution " may, then, be reached without any evidence being taken, in a case where the prosecution informs the court that it offers no evidence. It seems to me, therefore, that there is no conflict between the decision of the Court of Criminal Appeal and the view taken by Nagalingam A. C. J. I therefore hold, following the decisions in *Don Abraham v. Christoffeisz* [1] and *Adrian Dias v. Weerasingham* [2], that the plea of *autrefois acquit* should have been upheld.

A possible view of the effect of the proceedings of the 28th March 1955 is that the complainant, who did not ask for a postponement of the trial but contented himself with stating that he was unable to proceed to trial without the absent witness and offering no evidence, had satisfied the magistrate that there were sufficient grounds for permitting him to withdraw the case and the magistrate virtually permitted him to withdraw it. In that view, too, the order must be regarded as an order of acquittal ; for section 195 of the Code provides that when the magistrate permits a complainant to withdraw a case he shall acquit the accused.

I set aside the conviction of the appellant and the sentence passed on him.

Appeal allowed.

[1] *(1953) 55 N. L. R. 92.* [2] *(1953) 55 N. L. R. 135.*
[3] *(1942) 44 N. L. R. 73.*