COURT OF CRIMINAL APPEAL.

1942 *Present :* **Soertsz, Hearne, and de Kretser JJ.**

THE KING *v.* K. WILLIAM.

*1—M. C. Avissawella, 24,331.*

Autrefois ACQUIT—*Order of acquittal entered before all the evidence for prosecution is called—Order in reality an order of discharge—Criminal Procedure Code, ss. 190 & 191.*

Where a Magistrate after the evidence of four witnesses had been recorded and before the prosecution had called all the witnesses, whose evidence was available, entered an order of "acquittal",—

*Held,* that the order was in reality an order of discharge under section 191 of the Criminal Procedure Code and that such an order could not support a plea of *autrefois acquit.*

APPEAL from a conviction by a Judge and Jury before the Western Circuit, 1942.

*A. Seyed Ahamed,* for accused, appellant.

*E. H. T. Gunesekera, C.C.*, for the Crown.

December 18, 1942. HEARNE J.—

The appellant was found guilty by the unanimous verdict of the Jury of the offences of robbery and of causing grievous hurt at the time of committing the offence of robbery.

The only point of law that was argued was that the presiding Judge was wrong in ruling that the plea of *autrefois acquit* which was raised at the trial failed.

The facts relative to the former trial were these. The appellant had been tried by the Magistrate of Avissawella, who had assumed jurisdiction as District Judge. After the evidence of four witnesses had been recorded but before the prosecution had called all the witnesses whose evidence was available, an order of acquittal was entered. Following this order non-summary proceedings were taken against the appellant, in consequence of which he was committed for trial before the Supreme Court.

The relevant law is set out in section 330 (1) of the Criminal Procedure Code, and the question for our decision is whether the appellant had been previously tried and acquitted within the meaning of that section. It reads thus : "A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182".

In English law an acquittal means an acquittal on the merits but this is not necessarily so under our Code. Under section 194, for instance, if the complainant does not appear on the day fixed for trial the Magistrate shall acquit the accused, unless he thinks proper to adjourn the

hearing of the case. If he acquits, then, subject to the proviso in the section, the accused is entitled to the benefit of section 330. He is deemed to have been tried and acquitted, although no trial in any sense of the word has taken place.

On this view of the section the decision of the majority of the Court in the case of *Senaratna v. Lenohamy*[1] was wrong. An order had been made by the Magistrate under section 194 and the accused, it would appear, was entitled to an acquittal and not to an inconclusive discharge. So strictly has the section been construed in India that even where the accused, against whom process had been issued, was also absent, an order of acquittal was held to entitle him to raïse the plea of *autrefois acquit* (*34 Mad. 253.*).

Again, under section 195, notwithstanding the fact that no trial takes place, the accused is in law deemed to have been tried and acquitted within the meaning and for the purpose of section 330. An attempt, however, is made to preserve the idea of an acquittal on the merits by the use of the words "if the complainant . . . . satisfies the Magistrate . . . .".

An order of acquittal under section 195 which follows the withdrawal of the complainant implies that the Magistrate has addressed himself to the merits of the case and has satisfied himself that the complainant should be permitted to withdraw for the reason that the accused cannot be proved to be guilty.

On the other hand in section 190 the word "acquittal" has no artificial meaning. It means an acquittal on the merits.

Section 191 is an unfortunate section. Under the Indian Code, when an accused is tried summarily, if a Magistrate does not find him guilty he must record an order of acquittal (I am not now dealing with the compounding of offences). No order of discharge can be made. But section 191 gives a Magistrate in Ceylon the power to discharge the accused at any stage. Even if he is unaware of the nature of the evidence of the remaining prosecution witnesses, he may stop the trial and discharge the accused. That such a power may have mischievous results is illustrated by this case. The accused was "acquitted" when all the prosecution evidence had not been led and yet when all the available evidence was placed before a Jury they unanimously found him guilty.

The point in this appeal is whether the order of the Magistrate—it is called an acquittal—was made under section 190 or section 191. If it was made under the latter it was no more than an order of discharge which does not bar the institution of fresh proceedings.

It was argued on behalf of the appellant that, although the case for the prosecution had not been closed, the order that was made was one under section 190. This view is supported by the *obiter dicta* in *Weerasinghe v. Wijeyesinghe*[2], and it is also supported by the decision in *Gabriel v. Soysa*[3]. The latter, however, was not followed in two recent cases reported in *39 N. L. R. at page 265 and 20 C. L. W. at page 77.* We take the view 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.

[1] *(1917) 20 N. L. R. 44.*

[2] *(1927) 29 N. L. R. 208*

[3] *(1930) 31 N. L. R. 314.*

It follows that although the Magistrate of Avissawella purported to make an order under section 190, in reality he made an order under section 191, mistakenly calling it an acquittal, instead of a discharge. Such an order cannot support a plea of *autrefois acquit.*

The appeal is dismissed. The application to appeal on the facts is without merit and is refused.

*Appeal dismissed.*