1934 *Present :* **Macdonell C.J., Garvin S.P.J., and Dalton J.**

SAMSUDEEN *v.* MARIKAR *et al.*

936—P. C. Colombo, 8,228.

Appeal—Discharge of accused in non-summary case before Police Magistrate—Accused discharged previously in similar proceedings—Complainant's right of appeal—Criminal Procedure Code, s. 157 (3).

Where, in non-summary proceedings before a Police Magistrate, the accused was discharged, before the conclusion of the inquiry, on a plea of previous discharge in similar proceedings,—

***Held,* that the order of discharge was made under section 157 (3) of the Criminal Procedure Code and that no appeal lay from the order to the Supreme Court.**

CASE referred by Akbar J. to a Bench of three Judges. Two accused were charged with theft under section 369 of the Penal Code in P. C. Colombo, 6,361. The proceedings were non-summary and after evidence was taken they were acquitted and discharged. Thereafter the same complainant charged five accused including the two accused in the previous case with theft and criminal breach of trust. When the accused were brought before the Magistrate on non-summary process the point was taken that two of them had been charged with the same offence and acquitted. The Magistrate discharged all of them. The complainant appealed. The question referred was whether the complainant had the right of appeal or whether the order of discharge being one under section 157 (3) of the Criminal Procedure Code the proper remedy was to have moved the Attorney-General to reopen the case.

H. V. Perera (with him *Amarasekera* & *D. W. Fernando*), for complainant, appellant.—The point is whether an order of discharge in a non-summary inquiry is appealable. This is not a discharge under section 157. Under that section a Magistrate can discharge if the complaint is groundless, that is, if it is groundless in point of fact or if in law the various elements that make up the offence do not exist. Sub-section (3) is not a section that gives the Magistrate the power to discharge. It is merely a saving provision. The power is inherent in the Court. There are other reasons for which an accused may be discharged than on the ground that the complaint is groundless. Such an order of discharge is not one under section 157 (3), and an appeal would lie.

[GARVIN J.—Would not the fact of a previous acquittal make a second charge groundless ?]

That would be extending the meaning of the word as used in the section. The language used is not appropriate to cover a case of this kind. The word "groundless" refers to a view taken by a Magistrate which he is competent to take. As an inquirer he is competent to take a view only on the evidence. Section 157 (3) merely indicates that a Magistrate may make such an order at any stage of the proceedings. The expression "further prosecution" in sub-section (2) contemplates not a reopening of the case by the Attorney-General but a fresh prosecution

King v. Haramanis[1]. If the second prosecution is merely an abuse of the process of the Court a Magistrate has an inherent power to refuse to entertain the complaint. Such a discharge is not referable to section 157 (3).

[MACDONELL C.J.—If he did not discharge under section 157, under what section did he discharge ?]

There is no specific section. It is in accordance with the inherent power in the Court. The Code is not exhaustive. There may be cases which are not contemplated by the Code.

[MACDONELL C.J. referred to section 83 of the Courts Ordinance. The powers of the Police Court are limited as contrasted with the powers of the District Court in section 40.]

But section 9 of the Criminal Procedure Code makes these powers wider. The jurisdiction is spoken of as being subject to the provisions of the Code. It is therefore wider than the powers conferred by the specific sections of the Code. A Court which is given jurisdiction by Statute has power to deal with any contingencies that might arise, apart from the powers given by the Statute. (*33 Cal. 927.*) Suppose a Magistrate during the course of the proceedings states that there are good grounds for the complaint but that he has some personal knowledge of the case and discharges the accused. That is not a discharge under section 157. An appeal would lie because it would be a final order so far as the proceedings were concerned. What takes away the finality from the order under section 157 is that under section 391 the Attorney-General can intervene. Any other order of discharge is a final order because it is a discontinuance of criminal proceedings. It is only where an order of discharge is made on the insufficiency of evidence that the Attorney-General is empowered to intervene. (Sohoni's *Criminal Procedure, p. 600.*) Where the discharge is made on any other ground the proper remedy is an appeal. Such a decision is a judicial decision and not an executive act. It may be that a complainant gives himself a right of appeal, where an appeal is barred, by bringing a fresh prosecution. That cannot be prevented. It occurs very frequently in civil cases. All that can be done is to dismiss the appeal on the merits.

L. M. D. de Silva, K.C., S.-G (with him *Pulle, C.C.*) as *amicus curiae.*—The Court has no inherent power to make an order of discharge, apart from the power given by section 157. Inherent powers must not be lightly attributed to Courts. Any order of discharge not falling under section 151 of 156 (2) falls under section 157. (*Dias v. Peiris*[2].) This discharge is under section 157 (3). A case is sustained on grounds of fact as well as on grounds of law. The section is wide enough to cover both grounds. A complaint that is not groundless is one that is not without grounds. A complaint is either groundless or there are grounds on which it can be sustained. There are only these two alternatives. Groundless, therefore, means unsustainable. The section gives the Magistrate the widest powers of discharge in a case in which he thinks the complaint must fail. To say that a second prosecution is an abuse of the process of the Court is not to say that it is not groundless. It is the fact of its being groundless that makes it an abuse of the process of the Court. The effect of section

[1] *8 N. L. R. 138.* [2] *31 N. L. R. 437.*

157 (2) is to bar a fresh prosecution by the complainant and leave it to the Attorney-General to reopen the case. Even if the complainant has that right the Magistrate may make an order of discharge, and that order will be under section 157 (3). Even if a different accused is charged on the same material the Magistrate may make an order of discharge under section 157 (3). The Attorney-General is entitled to reopen proceedings at any stage of the inquiry. Non-summary proceedings are merely a preliminary to an indictment by the Attorney-General. In the course of these proceedings the Attorney-General may interfere at any stage. (Section 390.) The policy of the law is to limit the remedies of a complainant to a much greater extent than the rights of an accused. Section 391 limits the right of the Attorney-General to reopen orders under section 157. It has been held that orders made at any stage of the proceedings will fall under section 157. The decision of the Attorney-General is not subject to review (*King v. The Middlesex Justices*[1]).

H. V. Perera, in reply.—Section 157 (2) is not limited to a fresh prosecution by the Attorney-General. It would be open to a complainant to prosecute. The Magistrate can prevent an abuse of the process of the Court, but short of that there is no rule of law which prevents his entertaining a fresh complaint. Under section 157 (3) the Magistrate may purport to act on the ground that the complaint is groundless. If he purports to act on any other ground the order cannot be brought under section 157 (3). The word complaint does not refer to the act of complaining but the substance of the complaint, that is, the allegations supporting it. The mere possibility of the Attorney-General refusing to proceed is no reason why the Supreme Court should not correct the errors of a Magistrate, (*King v. Noordeen*[2]).

H. E. Ameresinghe, for accused, respondents.

Cur. adv. vult.

August 29, 1934. MACDONELL C.J.—

This matter comes to us on a point reserved by Akbar J. for a Bench of three Judges. The facts were these. A complainant had charged certain two accused in P. C. Colombo, 6,361, with theft under section 369 of the Penal Code. The proceedings were non-summary and after evidence was taken the two accused were "acquitted and discharged" on August 4, 1933. Thereafter the same complainant took these proceedings P. C. Colombo, No. 8,228, also non-summary, against certain five accused, charging Nos. 1 to 4 with theft and No. 5 with criminal breach of trust. The third and fourth accused in the present case are identical with the two accused in case No. 6,361.

These five accused appeared before the Magistrate on non-summary process and at once the point was taken for the defence that Nos. 3 and 4 had already been charged before a Magistrate with the same offence and had been discharged. Admittedly, no application had been made to the Attorney-General under section 391 which says that "whenever a Police Court shall have discharged an accused under the provisions of section 157 and the Attorney-General shall be of opinion that such accused should not have been discharged", the Attorney-General may indict or

[1] (1933) *1 K. B. at 80.* [2] *13 N. L. R. 115.*

may order the Magistrate to reopen the inquiry. The Magistrate acceded to the argument and discharged all five accused. It should be noticed that only Nos. 3 and 4 had previously been discharged; Nos. 1, 2, and 5 had not previously been charged at all. The complainant appealed, and urged *inter alia* that in the present case No. 8,228 the charges were different and that three out of the five accused were not charged in the previous case No. 6,361 at all; also that section 157 (2) lays down that a discharge under that section does not bar a further prosecution for the same offence. Akbar J., before whom the appeal came, reserved it for three Judges in the following terms:—

> "The question is whether the complainant has the right to appeal in this case or whether the order (of discharge) being one under section 157 (3) of the Criminal Procedure Code the proper remedy was to have moved the Attorney-General to reopen the case."

The argument did not address itself to the case of the three men who, though charged in the present non-summary proceedings No. 8,228, had not been charged in the previous proceedings No. 6,361.

The argument addressed to us, as I understood it, was that the order of discharge appealed from was not an order of discharge under section 157 (3)—confessedly it was not a discharge under section 157 (1)—and that if then it were not an order of discharge under section 157, the explanation to section 338 which says that a discharge under section 157 is not a final order would not apply, therefore this must be a final order and if so an appealable one. If there has been a discharge under section 157, then that discharge is not a judgment or final order. Discharges under section 157 are provided for by section 391 under which the Attorney-General can, so to speak, reverse the discharge by ordering a trial on indictment or a reopening of the non-summary inquiry. This, the discharge in case No. 8,228, was not a discharge under section 157 at all, then it was not provided for by section 391. No special remedy being provided for it, it must be in its nature final, and if final, then appealable under section 338.

The sections of the Criminal Procedure Code which deal with non-summary inquiry are those to be found in chapters XV. and XVI. Chapter XV. explains how proceedings before Police Courts ought to be commenced. The complaint, the basis of those proceedings, may disclose a summary offence or a non-summary one. In either case the Magistrate has to make inquiry; (he did so in this case and issued a warrant under which the five accused were brought before him). Eventually he will be met by the question, Is there or is there not sufficient evidence to justify the issue of process against the person accused, who may or may not be in custody. If he thinks after the inquiry held by him that there is "no sufficient ground for proceedings against the person accused (if any) or against any other person, he shall not issue a summons or warrant" (all criminal process begins either by summons or warrant) "and the accused if in custody shall forthwith be discharged, but in such case the Magistrate shall briefly record the reasons for such discharge and shall in every case record whether in his opinion any offence was in fact committd", section 151 (1). If there is no one in custody, then there is

no one to discharge. If someone is in custody, then the Magistrate is to discharge that someone. In essence, the Magistrate's refusal under section 151 (1) seems to be a refusal to issue process at all, and if that is so, a mistaken refusal by the Magistrate to issue process seems to be provided for by section 337, "where a Police Court has refused to issue process a *mandamus* shall lie to compel such Court to issue such process, but there shall be no appeal against such refusal except at the instance or with the written sanction of the Attorney-General". That section 337 purports to provide the remedy for the Magistrate's refusal, *mandamus,* or, if the Attorney-General gives his written sanction, then appeal. Section 337 would seem to provide that *mandamus* will lie even though no request has been made to the Attorney-General for written leave to appeal. As the present case had got beyond the state of things contemplated by section 151 and process had been issued, the discharge therein can hardly have been under section 151.

Take now the alternative, the inquiry does reveal sufficient ground for issuing process. Then the Magistrate will proceed under section 151 (2) and will issue process, summons or warrant—in this case No. 8,228, a warrant. He then proceeds to act under section 152 ; if the offence is one which he can try summarily, he will follow the procedure laid down in chapter XVIII., if it appears to him to be not triable summarily by him, then he will follow the procedure laid down in chapter XVI. The present proceedings were non-summary, so he had to proceed under chapter XVI.

In chapter XVI., section 155 lays down that the accused when brought before the Magistrate is to be invited to make a statement. The record shows that no use was made of this section 155 in the present case No. 8,228, the accused were discharged on a point of law before any statement was taken from them. After the statement has been taken the Magistrate must then follow the provisions of section 156 (1). He reads over to the accused any evidence already recorded against him and takes any "further evidence" against him that may be produced. Section 156 (2) says : "If such evidence does not establish a *primâ facie* case of guilt the Magistrate shall discharge the accused". That sub-section contemplates a discharge after all the evidence tendered against the accused has been led. The other sub-sections of section 156 provide for cross-examination by the accused of any witness against him, for the Magistrate himself calling at any stage of the proceedings any witness he may think necessary and, if he does find from the prosecution evidence that it discloses a *primâ facie* case, for an examination of the accused under section 295 and for the calling of evidence by the accused himself.

Then follows section 157. It provides for the alternative that must always face a Magistrate at the end of or in the course of a non-summary inquiry, is there or is there not enough evidence to justify committing the accused for trial. Sub-section (1) deals with the alternative as it faces the Magistrate "when the inquiry has been concluded". Then the Magistrate "shall (*a*) if he finds that there are not sufficient grounds for committing the accused for trial discharge him, or (*b*) if he finds that there are sufficient grounds for committing the accused for trial forward the record to the Attorney-General", &c.

Sub-section (3) of section 157 deals with the alternative as it faces the Magistrate when the inquiry has not been concluded, saying "Nothing in this section shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case if for reasons (to be recorded by him) he considers the complaint to be groundless". The Magistrate acting under chapter XVI. discharges the accused, if he does discharge him, either when "the inquiry has been concluded", section 157 (1), or, "at a previous stage of the case", that is, when the inquiry has not been concluded, section 157 (3).

What of the power of discharge given by section 156 (2), when the evidence against the accused "does not establish a *primâ facie* case of guilt"? Is it yet a third power of discharge, additional to those given by section 157, or is it 'caught up'—to use the phrase of Maartensz J., in *Fernando v. Fernando*[1]—by section 157? In answering this we are faced by the dilemma raised by section 157 (1) and section 157 (3). Either the inquiry has been concluded or it has not. If the case provided for by section 156 (2) be considered to occur after the conclusion of the inquiry, then it is a discharge under section 157 (1), if at some stage other than after the conclusion of the inquiry, then it is a discharge under section 157 (3). As section 156 (3), (4), and (5) contemplate the possibility of other evidence being led, additional to that given in support of the prosecution, it seems more consistent with the language of section 157, to hold that it is a discharge under sub-section (3) of that section. It is not necessary, it seems to me, to suppose that the legislature intended by section 156 (2) to create yet a third power of discharge, when the case supposed by that sub-section (2) of section 156 is completely provided for by one or other of the sub-sections, (1) or (3), of section 157. Putting it another way, section 157 (3) provides in the widest terms for a discharge at any stage of the proceedings other than that of the inquiry being concluded, but one of those stages is reached when all the evidence for the prosecution has been adduced and "does not establish a *prima facie* case of guilt", the position stated in section 156 (2). Then section 157 (3) provides for that stage of the proceedings, and a discharge at that stage will, it seems to me, be a discharge under section 157 (3).

The discharge in the present case was not under section 151, for process has been issued. It was not a discharge under section 157 (1) for the inquiry had not been "concluded" since no evidence at all had been led. Was it a discharge under section 157 (3)?

Now it was strenuously argued to us that the course which was taken by the Magistrate in this case, namely, discharging the accused on a point of law before any evidence had been led and before he had even taken a statement from them under section 155 (2), could not be said to be a discharge because he "considered the complaint to be groundless", and if so could not be a discharge under section 157 (3). Personally I think this would be giving too narrow a meaning to the word "groundless". That word is thus defined in the Imperial Dictionary: "Wanting ground or foundation; Wanting cause or reason for support; Not authorized; False". The Concise Oxford Dictionary seems to define groundless as being the contrary of something having "base, foundation, motive, valid

[1] *32 N. L. R. 152.*

reason". In the present case the Magistrate took cognizance of the fact that there had already been a discharge in the case No. 6,361 and that there had been no intervention by the Attorney-General under section 391. Then he could clearly say that his reason for discharging the accused was because the present non-summary proceedings were "not authorized" or that they were lacking in "valid reason". In either case, according to dictionary definition, the proceedings would be "groundless". Then it would seem that his discharge of these accused was one under section 157 (3).

It was argued, as I understood, that to constitute a discharge under section 157 (3), the Magistrate "must find that there was no ground for holding that the accused had committed an offence", but this again seems to me unnecessarily to narrow the meaning of the word "groundless" and the scope of the section. The evidence might give ground for thinking that the accused had committed an offence but it might also show that he did so outside the Magistrate's jurisdiction. If so, then the complaint would be, as far as concerned the Magistrate, "groundless". Again, though the evidence showed that the accused had committed an offence, it might also show it to be one which could not be prosecuted without the sanction of the Attorney-General which had not been obtained. If so, then the complaint would equally, it seems, be "groundless". Section 157 (3) is widely expressed and I doubt a Court should be astute to narrow its scope. A complaint that for any reason is unsustainable may without violence to language, be described as groundless, and in the present case No. 8,228 the Magistrate certainly considered the complaint unsustainable—he described it as something that was not "allowed". Then in discharging the accused he seems to me to have been acting under section 157 (3), and if so, then an appeal is not possible.

Perhaps the argument that the Magistrate did not discharge these accused under section 157 (3) because he could not, in the absence of evidence have held the complaint groundless, contains a concealed fallacy. The question is, not, were the Magistrate's reasons for holding the complaint groundless adequate ones, but, did the Magistrate give reasons which show that he considered the complaint groundless, or reasons which are best interpreted as showing that he considered it so. If his reasons for holding the complaint groundless were inadequate or erroneous, then section 391 exists to correct that error. But it is not, it seems to me, open to the Court to say, the Magistrate cannot have had adequate reason for holding the complaint to be groundless, therefore it cannot be a discharge under section 157 (3), therefore the explanation to section 338 does not apply, and the order of discharge is final and so subject to appeal. If the reasons for discharge are best interpreted as showing that the Magistrate thought the complaint groundless, then the sufficiency of those reasons is for the Attorney-General to decide upon under the powers given him by section 391, but not for a Court of law by way of appeal.

The argument for the appellant did not profess to assign any section of the Criminal Procedure Code as that under which the Magistrate ordered the discharge in this case. It was not under section 157, it could not be under section 156 (2) or section 151, and no other section was

suggested. Then, it was argued, the Magistrate must be held to have discharged them under an inherent power. The question whether a Magistrate has an inherent power to discharge an accused can be decided when it arises. If it is correct that the discharge in this case was one under section 157 (3), then the question of an inherent power to discharge does not arise.

Several cases were cited to us in the course of argument. I have referred to one of them, *Fernando v. Fernando* (*supra*). Another, *Rex v. Haramanis*[1], may also be mentioned. The facts there were unusual. Accused had been discharged under section 157, and later another Magistrate held a fresh inquiry into the charge against them and "committed" them for trial in the District Court. The report does not say so, but presumably this committal was with the sanction of the Attorney-General under section 158. When they appeared in the District Court to be tried, objection was taken that the second Magistrate had had no right to hold a fresh inquiry, and that therefore the committal was bad. The District Judge acceded to this objection and discharged the accused. On appeal it was held that this was wrong and that he should have tried the accused and his attention was drawn to section 157 (2) which says that a discharge under the section does not bar a further prosecution for the same offence.

For the reasons given above, I would answer the question reserved thus, that this was a discharge under section 157 (3) and that by the very words of the explanation to section 338, no appeal would lie, but the proper remedy for the complainant was to have moved the Attorney-General under section 391. It may be, however, that outside the point reserved there is a further difficulty. If so, it is this. Section 157 (2) reads as follows:—"A discharge under this section does not bar a further prosecution for the same offence".—The sub-section is in wide terms. A man having been brought up on non-summary proceedings under chapter XVI. and discharged, may yet be charged again, a further or fresh prosecution, for the same offence. When a man has been charged non-summarily under chapter XVI. and has been discharged under that chapter, which discharge must, it seems to me, be under section 157 if at all, and when that man has again been brought up for the same offence, ought the Magistrate, if he is aware of the previous discharge, to say to the complainant, "you have not availed yourself of your only remedy, to request the Attorney-General to intervene under section 391, therefore I have no power in the matter", or is it open to him, relying on the provisions of section 157 (2), to entertain the complaint and inquire into it *de novo*? The words of section 157 (2) are wide, and the judgment in *Rex v. Haramanis* (*supra*), does not contain anything negativing the power of a Magistrate to entertain a complaint which another Magistrate has discharged. Perhaps section 391 gives the answer to this difficulty. Even if the second Magistrate found sufficient grounds for committing where the first Magistrate had not, still it would lie with the Attorney-General to say whether the accused was to be put on his trial or not. But I do not think the point arises on the question reserved to us, which for the reasons already given, I would answer as above.

GARVIN S.P.J.—I agree.

[1] *8 N. L. R. 138.*

DALTON J.—

I agree with the judgment of my lord the Chief Justice, which I have had the benefit of reading, that the order appealed against was a discharge made under the provisions of section 157 (3) of the Criminal Procedure Code, and therefore no appeal lies.

I wish, however, lest it be assumed from one's silence that one agreed with the grounds upon which the order of discharge proceeded, to stress the fact that the correctness or otherwise of those grounds did not arise on this appeal. On that question, and on the question whether, if the reasons were not well founded, the only remedy for correcting the error lies in applying the provisions of section 391 of the Code, I would reserve my opinion.