

1953

Present : Nagalingam A.C.J.

R. A. DON ABRAHAM, Petitioner, and T. H. CHRISTOFFELSZ
(Inspector of Police), Respondent

S. C. 171—Application in Revision in M. C., Kanadulla, 524

Autrefois acquit—Failure of prosecutor to lead evidence—“Discharge” of accused—
Right of prosecutor to institute fresh proceedings—Criminal Procedure Code,
ss. 190, 330.

On the date of trial of a summary case the chief witness for the prosecution was absent although summons had been served on him. The prosecuting officer did not apply for a warrant on the witness, but stated that he was not prepared to go on with the case. Thereupon, the Court “discharged” the accused.

Held, that the order of discharge was tantamount to an acquittal under section 190 of the Criminal Procedure Code and that the accused could not be prosecuted again in respect of the same charge.

APPPLICATION to revise a judgment of the Magistrate's Court, Kanadulla.

W. D. Gunasekera, for the accused petitioner.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

September 15, 1953. NAGALINGAM A.C.J.—

This is an application in revision by the accused who has been convicted of having committed criminal breach of trust of estate tools valued at Rs. 188·50. He was found guilty and ordered to enter into a personal bond to be of good behaviour for a period of one year in a sum of Rs. 100 and to pay Rs. 50 as Crown costs. The point taken on his behalf is that an earlier prosecution against him operates as *autrefois acquit*. In fact, there were two earlier prosecutions against the same accused person. In case No. 8889 of the Magistrate's Court of Kanadulla the accused was charged with having committed criminal breach of trust in respect of machinery, &c., valued at Rs. 3,528·50. The machinery, &c., as stated in the charge were all deposited to by the witness Sugden and included items of tools which form the subject-matter of the present case and the present application. After the principal witness had given evidence, it was discovered that a number of articles enumerated by him and which formed the subject-matter of the plaint had not in fact been entrusted to the accused. The prosecution, therefore, at that stage moved to withdraw the case and the learned Magistrate allowed the application and discharged the accused. Following on the heels of that discharge another case bearing No. 9598 of the same court was filed against the accused person in relation to the identical tools that formed the subject-matter of the present proceedings. That case was fixed for trial on the 14th of July, 1952. The accused was present in court; the prosecuting Police Officer was present in court, but the chief witness, Sugden, was absent in spite of summons having been served on him. The prosecuting officer did not apply for a warrant on the witness who was absent but stated that "the Police are not prepared to go on without him (Sugden)." "Accused discharged".

The question is, what is the effect of this order. Is it an order of discharge as specifically laid down in the Code, or does it amount to an order of acquittal. It has been contended on behalf of the accused that it is an order of acquittal while the contrary is contended for by learned Crown Counsel.

I do not think that where a prosecution is unable on the day fixed for trial to adduce evidence in court and states that it is not prepared to go on with the case, the order is one which must be treated as an order of discharge. I should say that it partakes of the character of an order under section 190 of the Criminal Procedure Code whereunder if a Magistrate after taking the evidence for the prosecution finds that the accused is not guilty he must enter an order of acquittal. There was no evidence before the Magistrate to show that the accused was guilty. In

these circumstances the order of discharge was improperly made and must be regarded as an order of acquittal. In that view of the matter the present prosecution is completely barred. I, therefore, set aside the order of the learned Magistrate and the order directing the accused to enter into a bond and to pay Crown costs.

The accused would appear to have been noticed to produce the tools, the subject-matter of the prosecution, in Court. They will be returned to him in view of the order of acquittal, or even otherwise, for even if the Magistrate's order stood, under section 413 of the Criminal Procedure Code the Magistrate had no jurisdiction to make an order directing the accused to return the tools. The articles will be returned to the accused person.

Application allowed.
