1929.

Present : Maartensz A.J.

DYSON *v.* KHAN.

297—P. C. Anuradhapura, 66,295.

Acquittal—Order of discharge after close of case for prosecution—Summary trial—Tantamount to acquittal—Plea of autrefois acquit—*Criminal Procedure Code, s. 330.*

Where, in a summary trial, the Magistrate at the close of the case for the prosecution made order discharging the accused, as the evidence failed to establish the charge,—

Held, that the order was tantamount to an acquittal under section 190 of the Criminal Procedure Code.

Where a person is charged under section 210 of the Penal Code with accepting a gratification for screening an offender from punishment and acquitted, he cannot be charged again on the same facts under section 158, with accepting a gratification as a motive or reward for rendering a service with a public servant.

APPEAL from an acquittal by the Police Magistrate of Anuradhapura.

Schokman, C.C., for the appellant.

H. V. Perera, for the respondent.

September 18, 1929. MAARTENSZ A.J.—

The accused in this case, a Police Sergeant, was charged in case No. 65,177 of the same Court with accepting for himself a gratification, to wit, Rs. 100, from one Vegodapola in consideration of his screening the said Vegodapola from legal punishment for certain offences specified in the said charge and thereby committing an offence punishable under section 210 of the Penal Code.

At the close of the case for the prosecution accused's Counsel cited certain authorities and the Magistrate made the following order:—

"The Advocate for the defence argues at this stage that a prosecution under section 210, C. P. C., is inapplicable in the present case. He quotes 2 N. L. R. 48 and 8 N. L. R. 114. In the cases quoted the charge was under section 211, C. P. C., but I agree with him that both sections have at least this in common, namely, that they apply only in the case of charges brought in respect of gratifications offered or accepted with the intention of escaping the legal consequences of offences actually committed. The 'offence' in the present case is one of obstruction and insult and it is still pending. It is uncertain at this stage whether the accused in that case is guilty or indeed whether any offence has been committed at all. In view of this I consider the prosecution in the present case premature. I discharge the accused. It is open to the complainant to reopen the case after the charge of obstruction, &c., is disposed of, assuming there is no legal bar to such reopening."

As far as I can make out, Vegodapola was not prosecuted and no application was made to reopen the case.

In the present case the accused was charged with the same offence and with the offence of accepting for himself a gratification other than legal remuneration, to wit, Rs. 100 from Vegodapola as a motive or reward for rendering a service to him with the Sub-Inspector of Police of Anuradhapura, a public servant, an offence punishable under section 158 of the Penal Code.

The learned Police Magistrate upheld the plea of *autrefois acquit* and the appeal is taken from that order.

It was contended in appeal (1) that the order made in case No. 65,177 was an order made under section 191 of the Criminal Procedure Code and that it did not amount to an acquittal under section 190, (2) that in any event the plea was not a good one against the charge made under section 158 of the Penal Code.

1929.

MAARTENSZ A.J.

Dyson v. Khan

Sections 190 and 191 enact as follows:—

Section 190.—" If the Magistrate, after taking the evidence for the prosecution and 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. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence."

Section 191.—" Nothing hereinbefore contained shall be deemed to prevent a Police Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so."

It was argued in support of the first contention that a Magistrate was entitled to make an order under section 191 if no evidence was called for the defence.

I am unable to accept that contention. I am of opinion that an accused is entitled to an order of acquittal if at the close of the case for the prosecution the Magistrate is of opinion the accused is not guilty of the offence with which he is charged.

It would be grossly unfair to an accused to place him in jeopardy of being tried again just because a Magistrate considers the evidence for the prosecution so unreliable that he does not call upon the accused for his defence.

My opinion is confirmed by the dicta of Pereira J. and de Sampayo J. in the cases of *Eliyatamby v. Sinnatamby*[1] and *Senaratne v. Lenohamy.*[2]

In the former case it was held that " where a Magistrate in a summary trial after hearing evidence for the prosecution makes an order discharging the accused, because he disbelieves the evidence, the order of discharge is tantamount to an acquittal under section 190 of the Criminal Procedure Code." It was further held that "the discharge of an accused referred to in section 191 is a discharge as authorized by law, *e.g.*, a discharge in the circumstances mentioned in section 196, or in section 151 (1), or a discharge consequent on acquittal under section 194 or 195."

In the latter case, de Sampayo J. said (at page 50): " The mere use of the word 'discharge,' however, will not necessarily amount to an order under that section. Where, for instance, the proceedings are such as to require the Magistrate to record a verdict of acquittal under section 190, an order purporting to be a discharge will in effect be a verdict of acquittal, and will bar further prosecution for the same offence. It will be noticed that section 191 provides that the Magistrate shall record his reasons for discharging the accused, and this, I take it, means that the Magistrate should give his reasons for not deciding on the evidence and arriving

[1] *(1905) 2 Bal. Reports 20.*

[2] *(1917) 20 N L. R. 44.*

at a definite verdict. The words ' at any previous stage of the case ' to my mind import that all the evidence for the prosecution, as contemplated by section 190, have not been taken. But if the prosecutor has put before the Court all the evidence which is available to him, or which he is allowed a reasonable opportunity to produce, the accused will be entitled to demand a verdict at the hands of the Magistrate instead of an inconclusive order of discharge, so that he may not be vexed again."

I therefore hold that the order made in case No. 65,177 was in effect an order of acquittal. The Magistrate rightly or wrongly was of opinion that the evidence led by the prosecution did not in law establish that the accused committed the offence with which he was charged. He was therefore entitled to demand a verdict of acquittal at the hands of the Magistrate instead of an order of discharge.

The next question is whether the accused is liable to be tried on the charge of committing an offence under section 158 of the Penal Code.

This question is a difficult one. Section 330 of the Criminal Procedure Code enacts that—

(1) " 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."

(2) "A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sub-section (1) of section 180."

Section 181 deals with an act or a series of acts constituting one offence, but it is doubtful which of several sections is applicable.

Sub-section (1) of section 180 applies to cases where on some of the facts so connected together as to form the same transaction one offence may be charged against an accused person, and on other facts being part of the series of acts another offence may be charged against him.

Sub-section (2) of section 330 does not extend the exception to sub-section (2) of section 180, which deals with acts constituting an offence falling within two or more separate definitions of any law in force by which offences are defined and punished.

Section 330 prohibits a second trial not merely for the same offence but also on the same facts for another offence. It has been held in India that where on the same facts a person has been

1929.

MAARTENSZ A.J.

Dyson v. Khan

tried and acquitted under section 182 of the Indian Penal Code he cannot be tried again on a charge under section 211 of the Penal Code after obtaining a fresh sanction. [36 Madras 308.]

So long as the previous order is in force, irregularity of proceedings is of no consequence.

" It is not necessary that the judgment of acquittal should be, in fact, correct and proper, for, while unreversed, it will support a plea of *autrefois acquit* in bar of a second trial. Thus a judgment for the defendant, though consequent on a misdirection or erroneously given on a special verdict, or on an insufficient indictment, so long as it stands unreserved, is a bar to a new indictment. (Russell on Crimes, p. 1983.) If the offence is the same, the former conviction or acquittal is a bar to the second trial, whether the second Court considers that the former conviction or acquittal was warranted by the evidence given in the first trial or not. (7 W. R. 15.) Even if the judgment of acquittal was passed under a misapprehension of the law, it would still operate as a bar. When a Sessions Judge considering that two charges under sections 302 and 201, I. P. C., could not be combined, separated the charges and tried the accused on a charge of murder only and acquitted her, it was held that the accused could not be tried again for the offence under section 201, I. P. C. as the two charges might have been combined in the former trial and though he clearly intended that the accused should thereafter be tried on a charge under section 201, 4 S. L. R. 174; 11 Cr. L.J. 131. See also 9 N. L. R. 26; 14 Cr. L.J. 135, where the accused was acquitted of a charge under section 203, I. P. C., on a withdrawal of the case under a misapprehension, and it was held he could not be tried again under section 177, I. P. C., on the same facts. Even if the acquittal had been obtained by a trick on the part of the accused, the acquittal would operate as a bar." [Sohoni, pages 970, 971.]

It was contended that the evidence necessary to establish the offences was different, as under section 210 the offender need not be a public servant and it must be proved that the person screened committed an offence, whereas under section 158 it must be proved that the accused was a public servant, that he received a gratification other than legal remuneration and that he received it for the purpose set out in the section.

This contention is fallacious for the facts are the same, the difference of offence results from looking at the facts through different aspects.

I accordingly dismiss the appeal.

Appeal dismissed.