1953 *Present:* **Nagalingam A.C.J.**

ADRIAN DIAS, Appellant, *and* WEERASINGHAM (Excise Inspector), Respondent

S. C. 37—M. C. Colombo South, 40,646

Autrefois acquit—*Failure of prosecutor to lead evidence*—"*Discharge*" *of accused*—*Right of prosecutor to institute fresh proceedings*—*Criminal Procedure Code, ss. 190, 191, 289 (5), 330.*

When, in a summary case, the prosecutor is not ready to proceed with his case on the date of trial, even after he has been given ample opportunity to place his evidence, an order of Court refusing postponement and "discharging" the accused operates as an acquittal. It is not open then to the prosecutor to institute fresh proceedings upon the same charge.

Senaratne v. Lenohamy (1917) 20 N. L. R. 44, distinguished.

[1] *(1951) 53 N. L. R. 472.*

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

E. R. S. R. Coomaraswamy, for the accused appellant.

S. S. Wijesinha, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 25, 1953. NAGALINGAM A.C.J.—

A plea of autrefois acquit is urged against the conviction of the appellant, who has been found guilty under section 17 of the Excise Ordinance with having illicitly sold arrack and of having been in possession of arrack in excess of the quantity allowed by law. The plea arises on these facts : In case No. 35,759 of the Magistrate's Court of Colombo South the appellant was charged on 27th April, 1951, with having committed the offence of which he has been subsequently found guilty. That case was duly fixed for trial, and there were no less than five postponements. It would appear that two of those dates were granted, one on the application of the accused on the ground that he was not ready on the very first date of trial, and the second as the accused had not appeared in Court, but on the other three occasions the prosecution was not ready. On 11th January, 1952, which was the last trial date fixed in the case, the prosecutor applied for a postponement on the ground that one of his witnesses was not present, but the learned Magistrate acting under section 289 (5) of the Criminal Procedure Code, refused the postponement, and as the prosecutor said he could not proceed with the case, discharged the accused. Thereafter, on 22nd February, 1952, the present proceedings were initiated against the accused on the identical charges, and he has been found guilty after trial.

It has been urged on behalf of the appellant that though the learned Magistrate used the term " discharge " in connection with the previous proceedings that term should correctly be regarded as an order of acquittal.

Sections 190 and 191 are the two relevant sections of the Criminal Procedure Code that need consideration for the purpose of adjudicating upon the contention put forward. These sections have been the subject of several decisions in our Courts. In fact there is one case which is referred to as a Full Bench Case, and that is the case of *Senaratne v. Lenohamy*[1]. In that case the facts were that on the accused person appearing in Court and on the charge being read out to him and on his being called upon to plead, he said he was not guilty and the trial was immediately thereafter taken up, but the prosecutor was not ready and the learned Magistrate made order of discharge. It will be noticed that the facts tend to show that the prosecutor had not been given a fair opportunity of placing his evidence before Court, and in those circumstances the majority of the Court took the view that the order was an order of discharge and not of acquittal. But one of the Judges who expressed the majority view in regard to the case expressed himself in

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

language which quite clearly and completely expresses the view I had formed on a reading of these sections. I venture to cite the relevant extract from the judgment of de Sampayo J. The learned Judge said :—

> " The words ' at any previous stage of the case ' to my mind import that all the evidence of 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 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."

A similar view seems to have been entertained by Garvin J. See the cases of *Weerasinghe v. Wijeysinghe* [1] and *Gabriel v. Soysa* [2].

In this case no less than five dates of trial were fixed in the earlier proceedings, and I would hold that the Magistrate made his order of discharge not under any power vested in him under section 191 but under section 190, under which he had jurisdiction either to make an order of acquittal or of conviction.

The Magistrate was prepared to take all the evidence that the prosecution and defence were prepared to place before him. The prosecution had no evidence to place before him, so that as there was no evidence placed before the Magistrate he had no option but to find the accused not guilty and enter a verdict accordingly. In my opinion, an order under section 191 can only be justified when, for instance, before the prosecutor has led all the evidence that is available to him and which he is ready and willing to place before the court, the court for some reason stops the proceedings and enters an order of discharge of the accused person. Where, on the other hand, the prosecutor has closed his case and led all the evidence, and objection in law is raised by the defence without calling any evidence, it will not be open to the Magistrate to make order of discharge under section 191, and any such order made would have the effect of an order of acquittal under section 190—see the case of *Solicitor-General v. Aradiel* [3]. On the other hand if the view were adopted that whenever a prosecutor is not ready to proceed with the case even after he has been given ample opportunity to placing his evidence before court, the Magistrate should enter an order of discharge, leaving it open to the prosecutor to institute fresh proceedings upon the same charge, it would be, as Ennis J. stated in the case of *Senaratne v. Lenohamy* (*supra*), to allow the prosecutor " an indefinite postponement " while refusing a postponement of a few weeks.

I am of opinion that the order entered by the learned Magistrate in the earlier proceedings has the effect of an order of acquittal and that the present proceedings are therefore barred by that order. I therefore set aside the conviction and acquit the accused.

Appeal allowed.

[1] *(1927) 39 N. L. R. 208.* [2] *(1930) 31 N. L. R. 314.*
[3] *(1948) 50 N. L. R. 233.*