1965 *Present :* **T. S. Fernando, Sri Skanda Rajah and G. P. A. Silva, JJ.**

L. I. C. DE SILVA, Appellant, *and* V. M. P. JAYATILLAKE (Inspector of Police), Respondent

S. C. 746 of 1961—J. M. C. Colombo, 21053

Criminal procedure—Summary trial—Stages at which the accused person may be convicted or acquitted or discharged—" Acquittal "—Plea of autrefois acquit—*Criminal Procedure Code, ss. 190, 191, 194, 195, 290, 330.*

On 25th January 1960, which was the date fixed for the retrial of a summary case, a material witness for the prosecution was absent, and the Magistrate directed that the " case be called " on 9th February 1960. On the latter date the Magistrate made order discharging the accused when he was informed by the complainant that the witness would not be available for another year for his evidence to be taken. On 19th February 1961 the same complainant instituted the present case against the same accused for the same offence.

Held, that the accused was not entitled to raise the plea of *autrefois acquit.*

The earliest stage at which a Magistrate can convict an accused in a summary trial is after he has taken the evidence for the prosecution, the evidence for the defence (where tendered) and the evidence (if any) which he (the Magistrate) may of his own motion cause to be produced.

The earliest stage at which a Magistrate can acquit an accused in terms of section 190 is the same stage at which he can convict him.

While it is open to a Magistrate for reasons stated to discharge an accused in terms of section 191, such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal.

An acquittal under section 190 means an acquittal on the merits.

Don Abraham v. Christoffelsz (55 N. L. R. 92), *Adrian Dias v. Weerasingham* (55 N. L. R. 135), *Edwin Singho v. Nanayakkara* (61 N. L. R. 22) and *Peter v. Cotelingam* (66 N. L. R. 468) overruled.

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

Colvin R. de Silva, with *M. L. de Silva, Miss Manouri de Silva* and *T. Edirisuriya,* for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya,* Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 11, 1965. T. S. FERNANDO, J.—

The interpretation of sections 190 and 191 of the Criminal Procedure Code has received the attention of this Court on several occasions in recent years and, on the appeal now before us, our attention has been

invited to a number of decisions which seem to take different views on the question as to the stage when a prosecution in a summary trial under the Code can be said to have ended.

Before examining these decisions, it is necessary to set down the following material facts :—

The accused-appellant was charged in case No. 14038 with attempting to cheat, an offence punishable under section 403 read with section 490 of the Penal Code. He was convicted in the Magistrate's Court but, on an appeal preferred by him, the Supreme Court quashed that conviction and remitted the case to the Magistrate's Court for retrial. The retrial was fixed by the Magistrate for 25.1.1960. On this date a material witness for the prosecution was absent, and the Magistrate directed that the " case be called " on 9.2.1960. On this latter date, the complainant informed the Magistrate that the witness will not be available for another year for his evidence to be taken. The Magistrate, recording that it would not be fair to keep the charge hanging over the accused for another year made an order discharging him.

The same complainant on 19.2.1961 presented to the Magistrate's Court a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code alleging the commission by the accused of the same charge as was the subject of case No. 14038. This was the commencement of the proceedings in case No. 21053 from which the present appeal arises. When the accused appeared on summons, his proctor raised a plea of *autrefois acquit*. The learned Magistrate, after hearing argument, made order rejecting the plea. The accused filed this appeal against that order, and the Magistrate directed that the trial do await the decision of the appeal.

Counsel for the appellant relied on the decisions of this Court in *Don Abraham v. Christoffelsz*[1], *Adrian Dias v. Weerasingham*[2] and *Edwin Singho v. Nanayakkara*[3]. Crown Counsel argued that the old Divisional Bench case of *Senaratna v. Lenohamy*[4] was applicable to the facts of the case we were called upon to decide and that the recent decision in *The Attorney-General v. Kiri Banda*[5] in which the first two of the three cases relied on for the appellant were not followed sets out the correct interpretation to be placed on section 190. In this last named case, Sansoni, J. (as he then was), analysing the decision of the Court of Criminal Appeal in *R. v. William*[6], stated that two distinct and unequivocal propositions were there enunciated—viz. (1) that an order of acquittal cannot be made at a trial until the case for the prosecution has been closed and (2) that an order of acquittal which purports to have been made under section 190 must be made on the merits and on no other ground.

[1] *(1953) 55 N. L. R. 92.*
[2] *(1953) 55 N. L. R. 135.*
[3] *(1956) 61 N. L. R. 22.*
[4] *(1917) 20 N. L. R. 44.*
[5] *(1959) 61 N. L. R. 227.*
[6] *(1943) 44 N. L. R. 73.*

In the course of an able and very helpful argument, Crown Counsel contended for the correctness of four propositions which he enunciated as follows :—

(i) The earliest stage at which a Magistrate can convict an accused in a summary trial is after he has taken the evidence for the prosecution, the evidence for the defence (where tendered) and the evidence (if any) which he (the Magistrate) may of his own motion cause to be produced ;

(ii) The earliest stage at which a Magistrate can acquit an accused in terms of section 190 is the same stage at which he can convict him ;

(iii) While it is open to a Magistrate for reasons stated to discharge an accused in terms of section 191, such discharge can amount only to a discontinuance of the proceedings against that accused and does not have the effect of an acquittal ;

(iv) An acquittal under section 190 means an acquittal on the merits.

In regard to contentions (i), (ii) and (iii) above, on a consideration of the numerous authorities cited to us and of the arguments of counsel, I am satisfied of their soundness for reasons which I shall now proceed to discuss.

In *Senaratna v. Lenohamy* (*supra*), Wood Renton C.J. and De Sampayo J. (with Ennis J. dissenting) held that the discharge of an accused without trial under section 191 in no bar to the institution of fresh proceedings against that accused in respect of the same charge. In that case the discharge had been made as the complainant's witnesses were absent on the day fixed for the trial and the complainant was not ready to go on without them. The discharge of the present appellant in case No. 14038 referred to earlier by me took place, therefore, on a ground substantially similar to that which the Divisional Bench in *Senaratna's* case held could not give rise to a successful plea of *autrefois acquit*. Although it is a decision only of the majority of the Bench constituting the Court, it has to be regarded by us as the decision of the Bench of three Judges, and, constituted as we are, we have no power to review it even if we had disagreed with it. It is right to add here, however, that on an analysis of the facts of that case and of the reasoning in the judgments of the majority and after considering subsequent cases in which reference has been made thereto I am in respectful agreement with the reasoning of the majority.

The decision in *Senaratna v. Lenonamy* (*supra*) appears to have been followed for over a third of a century by this Court until 1953 when Nagalingam A.C.J. in *Don Abraham v. Christoffelsz* (*supra*) and *Adrian Dias v. Weerasingnam* (*supra*) expressed views which appear to be different from those that formed the ratio decidendi in *Senaratna's case*. In the first of these two cases, i.e. *Don Abraham's case*, Nagalingam A.C.J.'s

attention does not appear to have been drawn either to *Senaratna's case* or to two other cases where a similar view had been taken by Soertsz J. In the second case, i.e. *Adrian Dias's case*, the attention of the Court had been invited to *Senaratna's case*, but Nagalingam A.C.J. observed that the majority of the Court there took the view that the order was one of discharge because " the facts tend to show that the prosecutor had not been given a fair opportunity of placing his evidence before Court ". This observation has been criticized by learned Crown Counsel as one not borne out by an analysis of the judgments of the two judges who formed the majority of the Court. The question before the Court in *Senaratna's case* was whether the discharge of an accused person without trial under section 191 can amount to an acquittal. It appears to me that the majority of the Court held the order there in question to be one merely of discharge because the stage at which the order was made was a " previous stage of the case " within the meaning of section 191, that is to say, the stage when all the prosecution evidence as contemplated by section 190 has been taken had not been reached. That being the ratio decidendi of *Senaratna's case*, it is apposite to quote the words of Lord Devlin in *Jones v. Director of Public Prosecutions* [1] that " it is well established that what is binding in an authority is the ratio decidendi and a court that is bound by the decision cannot escape the ratio by discovering some new factor mentioned in the judgment and using it to justify the result." It will be seen from a perusal of *Adrian Dias's case* that, having made the observation which Crown Counsel criticized, the learned judge went on to found his own decision on the appeal before him on an obiter dictum of De Sampayo J.

Gunasekara J. in *Edwin Singho v. Nanayakkara* (*supra*) followed *Don Abraham's case* and *Adrian Dias's case*, and thought there was no conflict between these two decisions and that of the Court of Criminal Appeal in *R. v. William* (*supra*). Quite recently, in *Peter v. Cotelingam* [2], I myself agreed with this view of Gunasekara J. that there was no such conflict. On reconsideration, however, of the judgments in *The Attorney-General v. Kiri Banda* and *R. v. William*, I am free to say that I respectfully agree with the opinion of Sansoni J. that the view taken by Nagalingam A.C.J. in the two cases already referred to cannot be reconciled with the decision of *R. v. William*. I am fortified in the view I now take by a consideration also of the two judgments of Soertsz J. adverted to already. That learned judge in *Sumangala Thera v. Piyatissa Thera* [3] stated that (*a*) he could not agree that it is open to a Magistrate to acquit an accused under section 190 at any stage of the proceedings and (*b*) the end of the case for the prosecution is the earliest stage at which an order of acquittal may be entered. This judgment was impliedly approved by the Court of Criminal Appeal in *R. v. William*. In the later case of *Fernando v. Rajasooriya* [4], where a Magistrate had discharged an accused person because the prosecuting officer had not led any evidence at the trial

[1] *(1962) A. C. 635 at 705.*
[2] *(1962) 66 N. L. R. 468.*
[3] *(1937) 39 N. L. R. 265.*
[4] *(1946) 47 N. L. R. 399.*

owing to the absence of the principal witness, the Court held that there was merely a discontinuance of the proceedings against the accused and not any adjudication upon the merits, and therefore the order did not amount to an acquittal.

In regard to contentions (ii) and (iii), I agree with Crown Counsel that section 191 does not confer on the Magistrate a *power* to discharge an accused but merely recognizes a *right* to discharge, a right which is inherent in the Court. As he put it, where a power to hear is given, there is an implied power to discontinue hearing. Therefore, while " at any previous stage " (section 191), i.e. at a stage previous to that at which all the prosecution evidence can be said to have been taken, a Magistrate can discharge an accused, the earliest stage at which he can acquit is the stage when the prosecution case has ended.

It remains now only to consider contention (iv) of Crown Counsel. The Court of Criminal Appeal decision in *R. v. William* (*supra*) is direct authority for the proposition that in section 190 the word " acquittal " has no artificial meaning and that it means an acquittal on the merits. A similar view has been expressed by Soertsz J. in *Fernando v. Rajasooriya* (*supra*), by Gratiaen J. in *Wanigasekera v. Simon* [1], by Sansoni J. in *The Attorney-Genral v. Kiri Banda* (*supra*) and, by way of an obiter dictum, by me in *The Attorney-General v. Piyasena* [2]. The proposition may therefore be now taken as fairly well settled. There are, of course, acquittals other than on the merits that are recognized by the Code, i.e. those referred to in sections 194, 195 and 290. These, to use a phrase suggested to us by Crown Counsel, may be conveniently referred to as " statutory " acquittals, the term " acquittal " being employed in those three sections in order to attract the provisions of section 330 of the Code and thereby avoid a person accused being twice vexed. In regard to the decision in *Edwin Singho v. Nanayakkara* (*supra*), our attention was further drawn to the circumstances that Gunasekara J. had made an attempt to reconcile the decisions in *Don Abraham's* and *Adrian Dias's* cases only with one of the rationes decidendi in *R v. William* (*supra*). Crown Counsel pointed out that the learned judge had not addressed his mind to the decision that an acquittal under section 190 must be made on the merits of the case. This criticism, I must add, is now available in respect of the decision in *Peter v. Cotelingam* (*supra*) as well. He invoked in support of his criticism the observations of Lord Simonds in *Jacobs v. London County Council* [3] that " there is no justification for regarding as obiter dictum a reason given by a judge for his decision because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing." I am of opinion that Crown Counsel's criticism is well founded and that his contention (iv) is also sound.

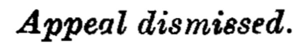
[1] *(1956) 57 N. L. R. 377.*
[2] *(1962) 63 N. L. R. 489.*
[3] *(1950) A. C. at 369.*

In view of all that I have stated above, I am of opinion that the cases of *Don Abraham v. Christoffelsz* (*supra*), *Adrian Dias v. Weerasingham* (*supra*), *Edwin Singho v. Nanayakkara* (*supra*) and *Peter v. Cotelingam* (*supra*) have been wrongly decided and should be overruled.

The learned Magistrate was, in my opinion, right in rejecting the plea of *autrefois acquit*. This appeal is accordingly dismissed.

SRI SKANDA RAJAH, J.—I agree.

G. P. A. SILVA, J.—I agree.



Appeal dismissed.