1934 *Present :* **Akbar J.**

HERATHHAMY *v.* MUHAMMADU *et al.*

830—P. C. Kegalla, 22,199.

Appeal—Charge of obstruction to Fiscal's Officer—Charge fails owing to defect of warrant—Penal Code s. 220A, Criminal Procedure Code s. 191.

Where in a charge, under section 220A of the Penal Code, of offering obstruction to a Fiscal's Officer, the Magistrate, after examining the complaint and another witness, made order that the charge failed owing to a defect in the warrant,—

Held, that the order was one of discharge under section 191 of the Criminal Procedure Code.

APPEAL from an order of the Police Magistrate of Kegalla, discharging the accused on a charge under section 220A of the Penal Code.

E. Navaratnam (with him *J. R. Jayewardene*), for complainant, appellant.

H. V. Perera, for accused, respondents.

January 24, 1934. AKBAR J.—

This is an appeal, with the sanction of the Solicitor-General, against an order of the Police Magistrate discharging the accused on a charge under section 220A of the Ceylon Penal Code. Mr. Perera took the preliminary objection that the appeal was out of time. It is admitted by Mr. Navaratnam that if the order by the Police Magistrate was one under section 191 of the Criminal Procedure Code the appeal would be out of time, but his contention was that the verdict of the Magistrate was one equivalent to an acquittal under section 190 of the Criminal Procedure Code and that the appeal was rightly preferred.

The only question I have to decide is whether the order is one under section 191 or section 190 of the Criminal Procedure Code. The Magistrate himself, a Magistrate of considerable experience has used the word "discharge" in his order, and the proceedings seem to show that he decided the preliminary point whether the civil warrant under which the arrest was made was valid before he tried the case on the facts.

The plaint is signed by the process-server who was obstructed and gives the names of two witnesses. After the complainant was examined, the Magistrate records as follows: "I adjourn the inquiry to enable the defence to find out whether an endorsement by the Fiscal to his subordinate officer who executes the warrant is not essential". On the adjourned date a new witness (not named in the plaint), viz., the Additional Deputy Fiscal, was called, and after argument of counsel the Police Magistrate recorded as follows: "I shall make my order regarding the validity of the warrant before I try the case on the facts". He begins his order by saying that " it is useless proceeding further with this case. In the first place the warrant is *ex facie* defective in that the warrant was made returnable at the Fiscal's Office on May 30, 1933, while the arrest was made on the 31st of May, and secondly the complainant is not an officer duly appointed under section 8 of the Fiscal's Ordinance, No. 4 of 1867".

It will thus be seen from the record that the order was an order of discharge under section 191 of the Code and not an adjudication on the merits of the case after the close of the case for the prosecution. The converse case of *Gabriel v. Soysa*[1] does not help the appellant, because in that case after the complainant was examined and cross-examined the proctor for the accused submitted that the warrant was bad; or in other words the accused's proctor did not deny the facts but based his whole defence on the illegality of the warrant. Garvin J. was of opinion "that the Magistrate intended to acquit the accused because in his view the whole prosecution failed". The judgment ends as follows: "In this case the prosecutor does not even complain that he had evidence to offer which would have influenced the judgment of the Magistrate or which should have been considered by him before he acquitted the accused".

In the case before me, the Magistrate adjourned the case for a decision on a point of law and it is clear that if he had held the point of law in favour of the complainant the case would have to proceed further on the facts.

[1] *30 N. L. R. 314.*

My own judgment in 928, P. C. Point Pedro, 1,574 (*S. C. Minutes 17.2.1932*) in which I followed *Gabriel v. Soysa* (*supra*) is to the same effect. The following is an extract from my judgment:—" So that it will be seen that in this case the complainant's case had been closed in the sense that had it not been for the legal objection the case would have been closed." In *Dyson v. Khan* [1] and 934, P.C. Colombo, 26,978 (*S. C. Minutes, 3.2.1932*), the prosecution had closed its case and the order was held to be an order under section 190 of the Criminal Procedure Code. In the case now before me the order was an order of discharge under section 191 of the Criminal Procedure Code and the complainant could have appealed without the sanction of the Attorney-General. The appeal is out of time and must be dismissed (*Banda v. Dalpadado* [2]). If the Magistrate was wrong in his law when he made his order discharging the accused (on which I offer no opinion) perhaps the procedure indicated in *Senaratne v. Lenohamy* [3] and *Davidson v. Appuhamy* [4] can still be followed.

Appeal dismissed.