1930

Present : **Maartensz A.J.**

FERNANDO *v.* FERNANDO.

399—*P. C. Balapitiya*, 13,602.

Attorney-General—Power to re-open inquiry—Discharge of accused by Magistrate under s. 156 (2) of the Criminal Procedure Code—Direction by Attorney-General—Criminal Procedure Code, s. 391.

Where, in a non-summary inquiry, an accused person has been discharged by the Police Magistrate under section 156 (2) of the Criminal Procedure Code, the Attorney-General has the right to direct the Magistrate to re-open the inquiry.

APPEAL from an order of the Police Magistrate of Balapitiya.

R. L. Pereira, K.C. (with him *Amerasekera* and *Abeyewardena*), for appellant.

Hayley, K.C. (with him *Gnanaprakasam*), for respondent.

Crossette Thambiah, C.C., for Crown.

October 28, 1930. MAARTENSZ A.J.—

The accused-appellant in this case was charged with having forged the signature of the complainant and with having attempted to cheat him, offences punishable under sections 454 and 400 and 490 of the Ceylon Penal Code.

The facts on which the accused was charged are not relevant to the appeal.

Forgery punishable under section 454 is an indictable offence, and the Magistrate after examining the complainant on oath under section 149, sub-section (1), of the Criminal Procedure Code issued a summons for the attendance of the accused.

When the accused appeared the nature of the offence was explained to him with the necessary particulars and his statement was recorded. Thereafter certain evidence was recorded by the Police Magistrate, Colombo, on a commission issued to him.

After the return of the commission the complainant was recalled to the witness box, the evidence already recorded was read over to the accused and he was cross-examined. Another witness was examined and cross-examined on a subsequent date and, according to the note on the record, the case for the prosecution was closed.

The note on the record is as follows : " There is no further evidence in the case. Case for prosecution closed. "

The Magistrate immediately after the case for the prosecution was closed made an order which he concluded with these words: " There is no case made out against the accused. I discharge him. "

The Magistrate stated his reasons for making his order but they do not touch the question for decision in this appeal.

The order does not specify the section of the Criminal Procedure Code under which it was made, but there can be no doubt that it was made under the provision of section 156 (2) of the Criminal Procedure Code.

This order was made on December 31, 1929.

The Solicitor-General in April, 1930, made the following order :—

> I do hereby under section 391 of the Criminal Procedure Code order you to re-open the inquiry against the accused in P. C. Balapitiya, case No. 13,602, record all evidence available and send the case to me in the ordinary course for instructions.

This order was sent to the Magistrate with a covering letter dated April 30, 1930.

The accused appeared on notice on May 26 and took the objection that the Attorney-General had no power to re-open proceedings under sections 391 of the Criminal Procedure Code where the Police Magistrate has discharged the accused under section 156 (2) of the Criminal Procedure Code.

The Magistrate made the following order :—

> I have no discretion in the matter. I have only to carry out instructions.

The appeal is from this order.

Section 391 of the Criminal Procedure Code enacts as follows :—

> Whenever a Police Court shall have discharged an accused under the provisions of section 157 and the Attorney-General shall be of opinion that such accused should not have been discharged the Attorney-General may forward to it an indictment and direct it to commit such accused to the court nominated by the Attorney-General or order a Police Magistrate of such court to re-open the inquiry and may give such instructions with regard thereto as to him shall appear requisite ; and thereupon it shall be the duty of such Police Magistrate to carry into effect such instructions.

The question for decision is " whether the Attorney-General is empowered by section 391 of the Criminal Procedure Code to order a Police Magistrate to re-open an inquiry in a case where the Police Magistrate has discharged the accused under the provisions of section 156 (2) of the Criminal Procedure Code ".

Counsel for the appellant relied on the terms of section 391 in support of his argument that the section limited the power of the Attorney-General to re-open an inquiry to cases where the accused has been discharged under the provisions of section 157 of the Code and cited the case of *Dias v. Peries.*[1]

I do not think the case cited is an authority for the question I have to decide. In that case Akbar J. held that the accused had been discharged under the provisions of section 157 (3) and that the Attorney-General had power under section 391 to order the Magistrate to re-open the inquiry. The argument of Counsel for accused that the accused had been discharged under the provisions of section 156 was not accepted.

It was argued by Crown Counsel that a discharge at an earlier stage than the stage referred to in section 157 (1) was caught up by the provisions of section 157 (3) of the Criminal Procedure Code.

Section 157 enacts as follows :—

> (1) When the inquiry has been concluded the Magistrate shall (*a*) if he finds that there are not sufficient grounds for committing the accused for trial discharge him, or (*b*) if he finds that there are sufficient grounds for committing the accused for trial forward the record to the Attorney-General, remanding the accused to custody or admitting him to bail as he thinks proper.
>
> (2) A discharge under this section does not bar a further prosecution for the same offence.
>
> (3) Nothing in this section shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case if for reasons (to be recorded by him) he considers the complaint to be groundless.

Section 157 corresponds to section 168 of the Code of 1883, as amended by section 5 of Ordinance No. 22 of 1890, and section 209 of the Indian Criminal Procedure Code, Act 5 of 1898.

There is, however, no provision in either the Code of 1883 or the Indian Code which specifically empowers a Magistrate to discharge an accused at an earlier stage of the proceedings like section 151 (1) and section 156 (2) of the Ceylon Criminal Procedure Code of 1898.

[1] 31 *N. L. R.* 487.

Under section 151 if, in the opinion of the Magistrate, there is, after the examination held under the provisions of section 149, " no sufficient ground for proceeding against the person accused, if any, he shall refuse to issue process and shall discharge the accused if in custody ".

Under section 156 (2) the Magistrate is empowered to and is bound to discharge the accused after taking all the evidence in support of the prosecution " if such evidence does not establish a *Prima facie* case of guilt ". This section is adopted from section 25 of chapter 42 of 11 & 12 Vict. (1848).

It is these two sections that create difficulty. But for them every order of discharge made at a stage earlier than that referred to in section 157 (1) would be made in pursuance of the provisions of section 157 (3) of the Criminal Procedure Code, and the Attorney-General would have power under section 391 to direct the Magistrate to re-open the inquiry.

I have not been able to find any authority to assist me in coming to a decision whether an order of discharge made under section 156 (2) is caught up by the provisions of section 157 (3) of the Code.

In the case of *Eliyatamby v. Sinnatamby et al.*[1] Pereira J. was of opinion that section 191 of the Code which corresponds to section 157 (3) does not give the power to a Magistrate to discharge an accused capriciously, especially after the trial has commenced, and that the discharge under it must be a discharge authorized by law, as for example a discharge in the circumstances mentioned in section 196 or in section 151 (1) or a discharge consequent on acquittal in the circumstances mentioned in section 194 or in section 195. On the principle laid down in this case a discharge under section 156 (2) would be caught up by the provisions of section 157 (3).

Apart from the principle laid down in this case the policy of the law is to give the Attorney-General very wide powers to issue directions to a Magistrate regarding cases into which he is inquiring non-summarily.

Under section 254 of the old Code which corresponds to section 391 of the present Code the Attorney-General had power to file an information in the Supreme or District Court whenever a Police Court shall have discharged an accused person under the provisions of Chapter 16 of that Code if the Attorney-General was of opinion that the accused person should not have been discharged.

The provisons of the Code of 1898 do not indicate any intention to curtail the powers of the Attorney-General in cases being inquired into non-summarily.

It would certainly give rise to a very extraordinary state of affairs if the Attorney-General was entitled to direct a Police Magistrate to re-open an inquiry where the accused has been discharged at certain stages of the inquiry and not at others.

As pointed out by Crown Counsel, it is inconceivable that the legislature intended to empower the Attorney-General to re-open an inquiry after the evidence of the prosecution and defence had been recorded and not to give him that power where the accused has been discharged at an earlier stage of the proceedings, when the order of discharge might be less justifiable on the ground that the Magistrate had not all the evidence before him at the time the order was made.

I have therefore no doubt that section 391 was intended to apply whenever a Police Court shall have discharged an accused in a non-summary inquiry, and I am of opinion that the provisions of subsection (3) of section 157 are wide enough to catch up a discharge made at any stage of the proceedings whether under section 151 (1), 156 (2), or at any other stage.

I accordingly dismiss the appeal.

Appeal dismissed.

[1] 2 *Bal.* 20.