1948 *Present :* **Basnayake J.**

SOLICITOR-GENERAL, Appellant, *and* ARADIEL, Respondent

S. C. 395—M. C. Panadure 46 (Labour)

Criminal Procedure Code—Discharge of accused at close of prosecution—Subsequent trial for same offence—Autrefois acquit—Section 330 (1)—Shops Ordinance—Production of closing order—Court cannot take judicial notice—Ordinance No. 66 of 1938, section 18.

Where at the close of the case for the prosecution the accused called no evidence but took objection to the validity of the summons and the Magistrate thereupon " discharged " the accused—

Held, that the accused had been acquitted within the meaning of section 330 (1) of the Criminal Prodecure Code and could not be tried again for the same offence.

Held, further, that in a prosecution under section 18 of the Shops Ordinance, No. 66 of 1938, the relevant closing order should be produced. It does not come within the class of documents enumerated in section 57 of the Evidence Ordinance and a court is not bound to take judicial notice of it.

Fernando v. Rajasooriya (1946) 47 N. L. R. 339, dissented from.

APPEAL from a judgment of the Magistrate, Panadure.

T. S. Fernando, Crown Counsel, with *A. E. Keuneman, Crown Counsel*, for Solicitor-General, appellant.

B. Senaratne, for accused respondent.

Cur. adv. vult.

November 12, 1948. BASNAYAKE J.—

The accused-respondent, K. Aradiel, was on November 1, 1947, tried on a charge under the Shops Ordinance, No. 66 of 1938. The accused was charged from a summons which reads :

" Whereas complaint hath this day been . . . . that you did on the 20th day of July, 1947, at Moratuwa, within the division aforesaid being the occupier of a shop, to wit, premises bearing No. 36 and situated at Galle Road, Digarolla, Moratuwa . . . . keep the said shop open at 11.30 a.m. for the serving of customers and thereby committed an offence punishable under section 23 (1) read with section 18 of the said Ordinance and that you did permit a customer to enter the said shop on a Sunday and thereby committed an offence punishable under section 23 (1) read with section 18 of the said Ordinance."

The only evidence against the accused was that of one Eric de Silva, Inspector of Labour, who made the report under section 148 (1) (*b*) of the Criminal Procedure Code. His evidence is to the effect that while proceeding on patrol duty on Sunday, July 20, 1947, at 11.30 a.m. at Moratuwa, observing that shop No. 36, Galle Road, Moratuwa, which is owned by the accused, was kept partially open, he entered it and saw the accused hand a bottle of balm to a person who enquired for its price. The witness says he was accompanied by one Rajasooriya, another Inspector of Labour. The accused neither gave nor called any evidence on his behalf, but at the close of the prosecution his proctor took the objection that the summons served on him made no reference to the Ordinance under which he was charged. The learned Magistrate thereupon discharged the accused.

On December 6, 1947, a fresh summons was taken out on the accused and on February 14, 1948, the date fixed for the trial, his proctor took the plea that the accused had already been acquitted of the same charge. The learned Magistrate upheld the objection and discharged the accused. The present appeal is from that order.

In acceding to the submission of the proctor for the accused and in discharging the accused on that ground, the learned Magistrate appears to have overlooked not only the provisions of section 172 of the Code but also of section 425.

The summons is a document issued by the Court (section 44, Criminal Procedure Code). It must be signed by the Magistrate or by any other officer of the Court specially authorised in that behalf. In cases where the accused appears on summons the Magistrate is not bound to frame a charge against the accused (section 187 (2) Criminal Procedure Code), but he may instead of doing so read to him the statement of particulars of the offence contained in the summons, which is deemed to be the charge. That statement can be amended or altered in the same way as a charge. So that even if the Magistrate has not at the time of issuing the summons given his mind to the statement of particulars therein he should bring his mind to bear on it at the time when he reads it to the accused under section 187 (3) of the Criminal Procedure Code and correct any defects that appear in it. Even thereafter it is open to the Magistrate to amend the statement at any time before judgment is pronounced (section 172, Criminal Procedure Code).

Although section 44 (1) of the Criminal Procedure Code provides that a summons may be signed by an officer specially authorised in that behalf the Magistrate is not relieved of the responsibility for the statement of particulars of the offence contained in the summons because of the importance attached to it by the Code. This fact is emphasised both by Ennis J. and De Sampayo J. in *Ebert v. Perera* [1] (3 judges). Ennis J. states at page 366 : " I would add that the formulation of the charge or statement in a summons or warrant on a review of the facts by an independent person is, in my opinion, a fundamental principle in our criminal procedure as now laid down in the Code of 1898, and the proviso in section 187 was necessary to make the slightest departure from it lawful."

De Sampayo J. observes at the same page in discussing the reason for the distinction drawn in section 187 between a summons and warrant on the one hand and a report under section 148 (1) (*b*) on the other : " The distinction is, I think, based on the fact that it is the Magistrate himself who states the charge in the summons or warrant, and there is, therefore, no practical object in requiring the Magistrate to record the charge over again."

The question is whether the second prosecution lay so long as the learned Magistrate's order discharging the accused stood unreversed. The answer to it is to be found in section 330 (1) of the Code. That section states :

" 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."

[1] *(1922) 23 N. L. R. 362.*

Now the immediate question that arises for decision is whether the accused has been tried by a court of competent jurisdiction for an offence and acquitted of such offence. Clearly the accused has been tried by a court of competent jurisdiction for an offence. Has he been acquitted ? Learned Crown Counsel submits that he has not.

The only provision of the Code that provides for a discharge of an accused person in a summary trial by the Magistrate is section 191, which says :

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

The instant case does not come within that section, for the learned Magistrate "discharged" the accused after the close of the prosecution case and after the proctor for the defence had announced that he was not calling any evidence. The mere use of the word "discharge" does not necessarily indicate that the order comes under section 191 [1], nor does the fact that the order of "discharge" has been made by the learned Magistrate on a technical objection make it a discharge [2] and not an acquittal. I am therefore of opinion that the accused has in the present case been acquitted within the meaning of that expression in section 330 (1) of the Code. A plea under section 330 is available even though the order is one that would have been set aside in appeal had an appeal been taken. So long as it stands unreversed it is a bar to a second trial for the same offence [3].

Our section does not make any distinction between an acquittal on the merits and an acquittal on any other ground. It is therefore unsafe to resort to the principles appearing in text books and cases on the English law doctrine of *autrefois acquit.* Section 330 (1) is self-contained and the question whether a plea under that section is sound or not has to be determined on an interpretation of its language. The decision of *Ukkurala v. David Singho* [4] appears to proceed on this footing. This is the view taken under the Indian Criminal Procedure Code too. It is sufficient if I refer to just one case on the point. I have in mind the case of *Purnananda Das Gupta and others v. Emperor* [5]. The Full Court states its view thus at page 71 :

> "We think the principles underlying the English Common Law pleas of *autrefois convict* and *autrefois acquit* have been embodied so far as this country is concerned within the limits, however narrow they may be or have been stated to be, of the language of the statute itself. In our view, it would be bewildering and, indeed, might result in great injustice to the community at large were we to endeavour to stretch the language or extend the principles in the way we have been invited to do by Mr. Dinesh Ch. Roy."

[1] *Ukkurala v. David Sinho (1895) 1 N. L. R. 339.*
Senaratna v. Lenohamy et al. (1917) 20 N. L. R. 44 at 50.
[2] *Gabriel v. Soysa (1930) 31 N. L. R. 314.*
[3] *Dyson v. Khan (1929) 31 N. L. R. 136 at 140.*
[4] *(1895) 1 N. L. R. 339.*
[5] *(1939) A. I. R. Calcutta 65 (Full Bench).*

I find myself unable to agree with the view taken by Soertsz A.C.J. in the case of *Fernando v. Rajasooriya* [1] to which learned Crown Counsel invited my attention, that the plea is of no avail in a case where there has been no adjudication upon " the merits ". With great respect, I find nothing in section 330 (1) to support the view taken by the learned judge. I am of opinion that the learned Magistrate was right in upholding the plea of *autrefois acquit*.

Although the Solicitor-General has not appealed against the earlier order of the learned Magistrate and learned Crown Counsel has not asked me to deal with that order in revision, I have nevertheless examined the proceedings with a view to setting aside that order in the exercise of my powers under section 357 of the Criminal Procedure Code if apart from the defect in the summons the prosecution was one that could be maintained, but I am not satisfied that the evidence placed before the Magistrate by the prosecution establishes the charge.

The portion of section 18 of the Shops Ordinance, No. 66 of 1938, relevant to the charge declares that no shop shall be or remain open for the serving of customers in contravention of any provision of any closing order duly made under that Ordinance. The evidence is that the " shop " was " kept partly open ". It is not clear whether the extent of the opening was such as to create the impression that it was open for the serving of customers, for the evidence is that the accused is the owner and occupier of the premises. I think the prosecution must, in a charge under section 18, place before the Court such evidence as will enable it to infer therefrom that the shop was open for the serving of customers [2]. The mere fact that the front door of a building which the owner uses both as a shop and as a dwelling is kept partially open does not establish that the shop was open for the serving of customers[2]. The evidence in this case does not necessarily lead to such an inference. The prosecution must establish beyond reasonable doubt all the ingredients of the offence.

The closing order is neither in evidence nor filed of record. Although section 17 (4) declares that a closing order shall upon notification in the *Gazette* be as valid and effectual as if it had been enacted in the Ordinance, it does not come within the classes of documents enumerated in section 57 of the Evidence Ordinance. A Court is therefore not bound to take judicial notice of a closing order.

The prosecution should therefore have produced the closing order recited in the report under section 148 (1) (*b*) made by the Inspector of Labour. Sections 167 and 168 of the Criminal Procedure Code require that the accused should be given such particulars as are reasonably sufficient to give the accused notice of the matter with which he is charged. The reference to a number of *Gazettes* which are not readily available for reference even by the Judge cannot give the accused any idea of the charge against him. I realise the practical difficulties in the way of those entrusted with these prosecutions, but those practical difficulties cannot prevail over the interests of justice, which require that the accused should be acquainted with the particulars of the charge against him.

[1] *(1946) 47 N. L. R. 399.* [2] *Ratnayake v. de Silva (1941) 21 C. L. W. 39.*

I should like to say a word about the charge itself. Section 18 makes the following acts an offence thereunder :—

(*a*) No shop shall be or remain open for the serving of customers in contravention of any provision of any closing order ; and

(*b*) No customer shall on any day be permitted to enter any shop after the hour specified in any such order as the hour at and after which that shop shall be closed on that day.

Now the charge as disclosed even in the report to the Court under section 148 (1) (*b*) of the Criminal Procedure Code does not allege which of the two acts was committed by the accused. It merely states that the accused kept the shop open at 11.30 a.m. for the serving of customers. The mere act of keeping a shop open for the serving of customers is not the offence created by section 18. It is the act of keeping a shop open in contravention of any provision of any closing order. The charge goes on to allege that the accused did permit a customer to enter the said shop on a Sunday. Section 18 does not create such an offence. It prohibits the permitting of customers to enter any shop on any day after the closing hour prescribed for that day.

For these reasons I do not think I should interfere with even the earlier order.

The appeal is dismissed.

Appeal dismissed.