1940 *Present :* **Hearne J.**

DIAS *v.* IYASAMY.

293—M. C. Panadure, 5,447.

Order of discharge—Defective charge—Withdrawal of complainant—Discharge of accused—Plea of Autrefois acquit—*Criminal Procedure Code, ss. 191,195.*

The accused was charged with being in "possession" of certain weights and measures which had not been stamped in breach of section 16 of the Weights and Measures Ordinance, while the section requires that such unstamped weights and measures shall be proved to have been found in premises used for trading.

On the day of trial the complainant realizing that the charge was defective withdrew and the accused was discharged.

Held,* that the order made by the Magistrate was an order of discharge under section 191 of the Criminal Procedure Code and that it was not open to the accused to plead *autrefois acquit.

The scope of section 195 of the Criminal Procedure Code explained.

APPEAL from a conviction by the Magistrate of Panadure.

C. V. Ranawake, for accused, appellant.

A. C. Z. Wijeratne, for complainant, respondent.

Cur. adv. vult.

November 26, 1940. HEARNE J.—

The complainant, the Examiner of Weights and Measures of the Urban Council, Panadure, purported to charge the appellant with an offence under section 16 of the Weights and Measures Ordinance (Cap. 127). I use the word "purported" advisedly, for while he alleged that the appellant had contravened the provisions of section 16, the facts disclosed did not amount to a breach of that section. The plaint stated that the appellant was "in possession" of certain weights and measures which had not been stamped as provided by law, while section 16 requires that such unstamped weights and measures shall be proved to have been found in premises used for trading. The appellant pleaded not guilty and on the day fixed for trial the complainant, who had by then realized the defectiveness of the charge, withdrew and the appellant was discharged. Thereafter the complainant filed a fresh plaint in which the facts necessary to constitute the offence were set out and, after trial, the appellant was convicted. The short point for decision is whether the plea of *autrefois acquit* which was raised in the latter proceedings should have been sustained.

Under section 330 of the Criminal Procedure Code "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 . . . ." Was the appellant tried a second time for an offence of which he had been previously tried and acquitted ?

"Under English law unless an acquittal is on the merits, *i.e.*, by verdict on the trial, or in summary cases by dismissal on the merits followed by a judgment of acquittal, it does not operate as a bar."

The position is different under our Code in which acquittal is given an artificially wide meaning. For instance, under section 194 if the complainant does not appear on the day fixed for trial the Magistrate shall acquit the accused, unless he thinks proper to adjourn the hearing of the case. If he acquits then, subject to the proviso in the section, the accused is entitled to the benefit of section 330. He is deemed to have been tried and acquitted, although no trial in any sense of the word had taken place. So strictly has this section been construed that even where the accused, against whom process had been issued, was also absent, an order of acquittal was held to entitle him to raise the plea of *autrefois acquit* [1].

[1] *34 Mad. 253.*

Again under section 195, if the complainant satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw, the Magistrate may permit him to do so and shall thereupon acquit the accused. Notwithstanding the fact that no trial takes place the accused in law has been tried and acquitted with the meaning and for the purposes of section 330.

If, therefore, the Magistrate's order in the present case was made under section 195, it is in effect an order of acquittal and must be so construed, even though he has used the word "discharge".

A source of much confusion and not a little trouble in Ceylon is section 191. Under the Indian Code, when an accused person is tried summarily, if a Magistrate does not find him guilty he must record an order of acquittal. No order of discharge can be made. Section 191 of our Code, however, gives the Magistrate the power to "discharge the accused". It happens, therefore, that when a Magistrate makes an order of discharge under section 191, the point is frequently taken on appeal that he acted under section 194 or section 195 and should have entered an acquittal.

The position in this appeal ultimately comes to this—Did the Magistrate properly discharge the appellant under section 191 or did he in effect make an order of acquittal under section 195 which he improperly called a discharge? An order under the former section is not a bar to further proceedings: an order under the latter section is.

The construction that has been placed on the section which, in other Codes, corresponds to section 195 has been largely influenced by the word "satisfies". A complainant who initiates a prosecution is ordinarily expected (I am not now dealing with the compounding of offences) to continue with it till the accused has been convicted or acquitted. If he withdraws the accused is entitled to an acquittal and not an inconclusive discharge. But before he is permitted to withdraw he must satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw finally from the prosecution of the accused. I stress the word finally. By it I mean once and for all time on the facts alleged. For an order of acquittal which follows the withdrawal of the complainant implies that, although there has been no trial, the Magistrate has addressed his mind to the merits of the case and has satisfied himself that the complainant should be permitted to withdraw.

That was not the position in the present case. No attempt was made to satisfy the Magistrate, that either because the appellant had been wrongly charged or because of any other sufficient reason, *e.g.*, an inadequacy of available proof of the charge, he should be permitted to withdraw. As the subsequent trial proved the complainant had no reason to think the appellant had not, or could not be proved to have, committed an offence under section 16 (Cap. 127). What happened was that the complainant belatedly realized that the facts necessary to obtain a conviction had not been set out, this was also no doubt apparent to the Magistrate, and the latter properly and competently made an order of discharge under section 191. The fact that the appellant had pleaded to the charge does not in itself necessarily mean—contrary to the

argument of his Counsel—that he was entitled to be regarded as having been acquitted, *Senaratne v. Lenohamy* [1]. The circumstances of the case entitled him to no more than an order of discharge, and such an order does not bar the institution of fresh proceedings.

The appeal is dismissed.

Appeal dismissed.