1937 *Present :* **Soertsz J.**

SUMANGALA THERO *v.* PIYATISSA THERO.

749—P. C. Galle, 15,437.

Appeal—Order of discharge—Final order—When order of acquittal should be made—Sanction of Attorney-General—Time limit—Criminal Procedure Code, ss. 190, 191 and 338.

Where a Police Magistrate discharges an accused before the complainant has led all his evidence, the order is one of discharge under section 191 of the Criminal Procedure Code and is appealable without the sanction of the Attorney-General.

A Police Magistrate has no power to enter an order of acquittal under section 190 of the Criminal Procedure Code before the conclusion of the case for prosecution.

Gabriel v. Soysa (31 N. L. R. 314) not followed.

Where an appeal for which the sanction of the Attorney-General is unnecessary is lodged with such sanction the appeal would be out of time, if it is not filed within the period of ten days.

Police Sergeant Banda v. Dalpadadu (1 C. L. W. 2) followed.

APPEAL from an order of the Police Magistrate of Galle.

A. H. C. de Silva, for complainant, appellant.

Siri Perera, for accused, respondent.

Cur. adv. vult.

December 21, 1937. SOERTSZ J.—

A preliminary objection was taken to this appeal on the ground that it is out of time. It is out of time if an appeal lay without the sanction of the Attorney-General. It is contended that the order made by the Magistrate in this case is not an order of acquittal under section 190 of the Criminal Procedure Code but a final order under section 191, and, therefore, appealable under section 338 of the Criminal Procedure Code, without the sanction of the Attorney-General. I agree that the order must be regarded as one made under section 191 of the Code although the Magistrate uses the word " acquit ". In my view, the words of section 190 of the Criminal Procedure Code are very clear. They do not enable me to take the view taken by Garvin J. in the case of *Gabriel v. Soysa* [1] that it is open to the Magistrate to acquit an accused under section 190 at any stage of the proceedings. The words of the section are : " if the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any), as he may of his own motion cause to be produced, finds the accused not guilty, he shall forthwith record a verdict of acquittal ". These words postulate that the end of the case for the prosecution is the earliest stage at which an order of acquittal may be entered. I do agree with the opinion expressed by Garvin J. that these words were not intended to place the Court under a duty to record the evidence offered by the defence before entering an order (of an acquittal), if he disbelieve the evidence for the prosecution or if that evidence fails

[1] *31 N. L. R. 314.*

to establish the charge against the accused. Obviously the words "evidence . . . . for the defence" in section 190 apply to those cases in which the Court calls upon the accused for his defence. But the Magistrate cannot enter an order of acquittal before the conclusion of the case for the prosecution. This does not result, however, as Garvin J. thought it did "in depriving the Magistrate of the power to control the course of the trial", for the Magistrate is entitled to *discharge* the accused at any stage of the case. But he cannot *acquit* at any stage of the case. He must hear the evidence for the prosecution before he can do that. See *Keshri v. Muhamed Baksh*[1]. If therefore, the Magistrate puts an end to the proceedings before the complainant had led all his evidence, the order by which he does so is an order of discharge and no more. Section 3 of the Criminal Procedure Code defines "discharge" for the purpose of the Code, as meaning the discontinuance of criminal proceedings against an accused, but does not include an acquittal.

An order of discharge made under section 191 of the Criminal Procedure Code is a final order. If authority is required for this proposition I would refer to the case reported at page 116 of the 7th volume of the New Law Report. Being a final order a right of appeal from it lies under section 338 without the sanction of the Attorney-General. Such an appeal must be preferred within ten days of the order. In this instance the order was made on July 2. The appeal was lodged on July 19. It is therefore out of time.

The fact that the appeal has been sanctioned by the Attorney-General does not make the longer period allowed in appeals by or at the instance of the Attorney-General, available to the appellant because a sanction that is not necessary cannot regularize an appeal that is out of time. See *Police Sergeant Banda v. Dalpadadu*[2].

I, therefore, sustain the preliminary objection and reject the appeal, but I am clearly of opinion that the Magistrate should not have discontinued proceedings in this case at the stage at which he did. His order was not an order made under section 190 because at that stage he could not act under that section. The order is, as I have observed, to be regarded as one under section 191 and such an order will not support a plea of *autrefois acquit*. An order under section 191, in a case like the present, appears to be dubious advantage to an accused person. If the Magistrate had heard all the complainant's evidence and then made his order, there would have been an end of the matter satisfactorily to all parties. These short cuts which some Magistrates appear to be so enamoured of invariably result in an expenditure, or perhaps, I should say, in a waste of more time than would have been required for a proper treatment of the case by the Magistrate. As the Chief Justice has had occasion to point out recently in several cases, this kind of shirking—for it is nothing less—of their duties by Magistrates result in a great deal of the more valuable time of Appeal Courts being unprofitably consumed. Section 191 appears to be meant to apply in cases in which it is obvious that an offence has not been committed or where a previous prosecution has ended in an acquittal or in some such clear case. In the present case, the Magistrate made an order acquitting the accused because it was conceded that the

[1] *18 Allahabad 221.*

[2] *1 C. L. W. 2.*

accused who is a Buddhist monk has a right as such to reside in this temple. The Magistrate holds that for that reason the accused's entry cannot amount to criminal trespass. But that is to overlook the fact that a person who has a limited right may *mala fide* exceed that right and enter upon premises in such a manner as to make his entry amount to a criminal trespass. It must be clearly understood that I am not saying that that is the case here. All I am saying is that there is a case for investigation.

The appellant's failure to appeal in time was due to the fact that the order of the Magistrate was construed literally as an order of acquittal. The Magistrate himself used the word acquit.

The case *Gabriel v. Soysa,* to which I have referred, supports the view appellant took. I, therefore, deal with this case in revision, set aside the order of the Magistrate, and send the case back for trial.

Sent back.