1968 *Present :* **H. N. G. Fernando, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

THE ATTORNEY-GENERAL, Applicant, *and*
W. K. DON SIRISENA and 2 others, Respondents

S. C. 327/67—In the matter of an Application for Revision in M. C. Colombo, 37693/C

Indictable offence—Preliminary inquiry—Opinion of Magistrate that the evidence is not sufficient to put the accused on his trial—Power of Magistrate to discharge the accused—Stage at which it may be exercised—Power of Attorney-General subsequently to direct the Magistrate to commit the accused for trial—Magistrate's refusal to comply with such direction—Right of Attorney-General then to move Supreme Court in revision—Constitutional validity of Attorney-General's power to order committal of accused—" Judicial power "—Principle of Separation of Powers—Criminal Procedure Code, ss. 5, 159 to 164, 191, 337, 356, 391—Courts Ordinance, ss. 19, 37.

At the preliminary inquiry under Chapter XVI of the Criminal Procedure Code, sub-section (1) of section 162 which provides that " if the Magistrate considers that the evidence against the accused is not sufficient to put him on his trial, the Magistrate shall forthwith order him to be discharged " can apply before the stage of compliance with sections 159, 160 and 161. Sub-section (1) of section 162 will apply at the close of the prosecution case if the Magistrate at that stage considers that the evidence is not sufficient to put the accused on his trial. If an order of discharge is then made by the Magistrate for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of section 162. In such a case, the Attorney-General can subsequently give directions to the Magistrate in terms of section 391 to commit the accused for trial.

At the preliminary inquiry into a case of alleged murder by shooting, the Magistrate made order on 18th February, 1967, discharging the 2nd, 3rd and 4th accused (respondents to the present application) without proceeding to read the charge to them and act under sections 159, 160 and 161 of the Criminal Procedure Code. On 8th April, 1967, the Attorney-General directed the Magistrate, in terms of section 391, to comply with the provisions of sections 159, 160 and 161. The Magistrate then complied with the sections but again made order discharging the respondents. On 18th June, 1967, the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August, 1967, the Magistrate refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under his inherent power, and that the Attorney-General was not entitled to give directions under section 391 in a case where an order of discharge is made by a Magistrate under his inherent power. The Attorney-General then made the present application to the Supreme Court for the revision of the Magistrate's order of 14th August, 1967.

The Magistrate's order of 18th February, 1967, showed that he had two main grounds for deciding to discharge the three respondents : firstly, the prosecution witnesses contradicted each other, and their evidence was to some extent contradicted by their previous statements ; secondly, the witnesses had failed or delayed to make statements incriminating the respondents.

Held, (i) that the order of discharge made on 18th February, 1967, was made by the Magistrate in exercise or purported exercise of the power conferred by section 162 (1) of the Criminal Procedure Code. Accordingly, the Attorney-General had the power to give his subsequent directions under section 391. The Magistrate's refusal to comply with those directions was unlawful.

(ii) that the Supreme Court had revisionary power to direct the Magistrate to comply with the Attorney-General's directions. The refusal by the Magistrate to comply with the Attorney-General's directions was an order within the meaning of section 356 of the Criminal Procedure Code and section 37 of the Courts Ordinance. Alternatively, the Magistrate had in substance made order holding that the Attorney-General had no power to give the directions which he did give ; such an order could be reversed or corrected by the Supreme Court. Section 19 of the Courts Ordinance, read with section 5 of the Criminal Procedure Code, is wide enough to confer power of revision in relation to non-summary proceedings.

(iii) that the exercise by the Attorney-General of powers under section 391 of the Criminal Procedure Code is not an interference with the powers of a Court and, therefore, does not constitute an infringement of the principle of the Separation of Powers recognized in the Constitution of Ceylon. A Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial. Moreover, the powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of the system of Criminal Procedure in Ceylon.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

V. S. A. Pullenayegum, Crown Counsel, with *R. Abeysuriya*, Crown Counsel, and *R. Gunatilleke*, Crown Counsel, for the Attorney-General.

G. E. Chitty, Q.C., with *A. S. Vanigasooriar* and *Nihal Jayawickrama*, for the 1st Respondent.

Colvin R. de Silva, with *Nihal Jayawickrama* and *P. Ilayperuma*, for the 2nd Respondent.

K. C. Nadarajah, with *D. T. P. Rajapakse*, for the 3rd Respondent.

Cur. adv. vult.

January 27, 1968. H. N. G. FERNANDO, C.J.—

On 26th October, 1966 proceedings were instituted in the Magistrate's Court, Colombo, against one Premasiri and the three respondents to the present application, on a charge of alleged murder by shooting. At the inquiry under Chapter XVI of the Criminal Procedure Code the learned Magistrate committed Premasiri for trial, but he made order on 18th February 1967 discharging the three respondents without proceeding

to act in respect of them under Sections 159, 160 and 161 of the Code. Thereafter on 8th April 1967 the Attorney-General in purported exercise of powers conferred by s. 391, directed the Magistrate—

(*a*) to record such further evidence as may be adduced on behalf of the prosecution ;

(*b*) to read the charge to the 2nd, 3rd and 4th accused and inform them that they have the right to call witnesses and if they so desire to give evidence on their own behalf ;

(*c*) to comply with the provisions of sections 160 and 161 of the Criminal Procedure Code in regard to the said accused ;

(*d*) to commit the said accused for trial before the Supreme Court on the said charge and to take such other and further steps as are required or authorised by law.

Subsequently, the Attorney-General directed the Magistrate to strike out paragraph (*d*) of his instructions, and directed him instead to " conduct and conclude the inquiry in accordance with law ". On 4th June 1967, Counsel for the Crown stated in Court that he was not calling any further evidence, and it thus became unnecessary for the Magistrate to comply with paragraph (*a*) of the instructions. He then read the charge to the three respondents in terms of s. 159, and proceeded to comply with ss. 160 and 161 ; but thereafter he again made order discharging these respondents.

On 18th June 1967, the Attorney-General again returned the record to the Magistrate, this time with a direction to commit the respondents for trial before the Supreme Court. On 14th August 1967, the learned Magistrate refused to comply with this direction, stating as his ground of refusal that he had made his original order of discharge under inherent powers, and that the Attorney-General has no power to give directions under s. 391 in a case where an order of discharge is made under such power. The present application of the Attorney-General is for the revision by this Court of the Magistrate's order of 14th August 1967.

During the argument of learned Crown Counsel, reference was made to the judgment of a Divisional Bench in the case of *de Silva v. Jayatillake* [1], expressing the opinion that the power of discharge referred to in s. 191 of the Code is an inherent right of the Court. Having regard to the similarity of the language employed in s. 191 and in sub-section (2) of s. 162, that opinion is probably applicable to the last-mentioned section as well. We informed Counsel that for present purposes we would regard the power of discharge referred to in sub-section (2) of s. 162 as being an inherent power, and would hear argument to the contrary only if that course became unavoidable. It turns out that the present case can be decided without the need to rule on the question whether or not s. 162 (2) refers to inherent power.

[1] *(1965) 67 N. L. R. 169.*

The order discharging the three respondents, which the learned Magistrate made on 18th February 1967, sets out his reasons for the discharge, and in that order the three respondents are referred to respectively as the 2nd, 3rd and 4th accused. A witness, *Wijesuriya*, had testified that the 2nd, 3rd and 4th accused had been present with the 1st accused at the time of the alleged incident, that the 2nd accused had handed a gun to the 1st and instigated him to shoot at the deceased, and that the 3rd and 4th accused had been armed with clubs. Another witness, Wickremapala, testified that he had seen the 2nd accused handing a gun to the 1st and the latter shoot in the direction of a Co-operative Store, and that he then saw the deceased man running from the steps of the same Store crying out that he had been shot. This witness stated that he did not hear any instigation by the 2nd accused, and that he did not see the 3rd and 4th accused at the scene. The learned Magistrate was of opinion that these two witnesses " contradicted each other hopelessly ". He relied also on the fact that *Wijesuriya*, in his statement to the Police, had stated that the 3rd and 4th accused did not have anything in their hands, and on the further fact that all the prosecution witnesses had apparently failed or delayed to inform the Police of the names of the alleged assailants. The Magistrate further stated his opinion that the Police had conducted their investigations in an unorthodox and irregular manner, and had built up a false case implicating the 2nd, 3rd and 4th accused. On these and other grounds, the learned Magistrate took the view that the evidence of the principal prosecution witness was totally unworthy of credit, and reached the conclusion that " the evidence does not justify the committal of the 2nd, 3rd and 4th accused ".

Sub-section (1) of s. 162 of the Code provides that " if the Magistrate considers that *the evidence against the accused is not sufficient to put him on his trial*, the Magistrate shall forthwith order him to be discharged " ; s. 163 provides that " if the Magistrate considers *the evidence sufficient to put the accused on his trial*, the Magistrate shall commit the accused for trial ". One of the main arguments urged for the respondents is that both these provisions of the Code come into operation only after an accused has been charged in terms of s. 159 and after ss. 160 and 161 have been complied with. This argument is manifestly correct in relation to s. 163, because a Magistrate can only commit for trial after ss. 160 and 161 have been followed. But, for reasons which I am about to state, sub-section (1) of s. 162 can apply before the stage of compliance with ss. 159, 160 and 161.

Section 159 quite clearly applies at the stage when the prosecution has led all its evidence and imposes a particular duty to be performed by the Magistrate at that stage. This duty is to consider whether " the case should be dealt with in accordance with the provisions of s. 162 ". If the Magistrate gives an answer in the affirmative to the question which he is thus directed to consider, he must discharge the accused.

In terms then, s. 159 directs the Magistrate's attention to s. 162 at the stage when the prosecution's case is closed. Sub-section (1) of s. 162 provides for discharge if *the evidence is not sufficient to put the accused on his trial*, and the most common ground for discharges in non-summary cases is stated in this sub-section. There is literally nothing in the terms of the sub-section to exclude its application at the stage when the prosecution has led all its evidence, and no grounds of law or common-sense were urged in favour of the contrary contention. Indeed, the contention was that a discharge at this stage is referable only to sub-section (2) of s. 162, which means in effect that the Legislature, in directing the Magistrate by s. 159 to consider whether the case should be dealt with " in accordance with the provisions of s. 162 ", intended to refer the Magistrate only to sub-section (2) of s. 162. Moreover, if the assumption on which we are acting for present purposes be correct, namely that sub-section (2) of s. 162 refers only to an inherent power of discharge, then the contention means that the Legislature failed to provide a statutory power to discharge in the clear and eminently fit case where the prosecution evidence is insufficient to put the accused on his trial.

I must note here that learned Crown Counsel himself appeared to support this same contention. That support was apparently based on the judgment of Macdonell, C.J. in *Samsudeen v. Marikar* [1] in a case decided before the 1938 amendments of the Criminal Procedure Code. The Code formerly contained 3 provisions relating to discharges in non-summary proceedings :—1. *s. 156 (2)* provided that when all the prosecution evidence had been adduced, the Magistrate shall discharge the accused if the evidence does not establish a prima facie case of guilt ; 2. *s. 157 (1)* provided that " *when the inquiry has been concluded*, the Magistrate shall discharge the accused if there are not sufficient grounds for committing the accused for trial " ; and 3. *s. 157 (3)* was the same as the present s. 162 (2). In that context, it was perfectly clear that s. 157 (1) applied only when the whole inquiry was concluded. But the present Code has no section like the former s. 156 (2). In place of that Section and of Section 157 (1), there is the present s. 162 (1) providing for discharge when the Magistrate considers that the evidence is not sufficient. Unlike the former s. 157 (1), this present s. 162 (1) is not prefaced by the words " when the inquiry has been concluded " ; the omission of these words was quite clearly intentional, and its only apparent purpose was to provide that the statutory power or duty to discharge is to be exercised when the evidence is considered insufficient, whether at the stage when the prosecution evidence has been led or at the later stage after the accused has made his statement and/or led evidence.

The contention that the operation of sub-section (1) of s. 162 must be restricted to a case in which a non-summary inquiry has been concluded, although propounded on behalf of the respondents in this case, is clearly unfavourable to accused persons ; it means that although a

[1] *36 N. L. R. 89.*

Magistrate may consider the evidence to be insufficient at the close of the prosecution case, he has no statutory power to make the obvious order of discharge, which the operation of the presumption of innocence demands in such a situation.

The contention also involves the proposition that s. 164, which refers to " a conflict of evidence ", only applies in a case where evidence has been led on behalf of an accused, and not also where (as stated in the order of the Magistrate in the instant case) a conflict is thought to arise upon the evidence led for the prosecution. But the language of s. 164 does not admit of a construction so unfavourable to accused persons. This Section permits a Magistrate to rely on evidence " *in favour of the accused* " in case of a conflict, and is not in terms limited to a contradiction between prosecution evidence on the one hand, and defence evidence or evidence *on behalf of* the accused on the other.

Let me take a charge of stabbing, in which a witness called by the prosecution gives evidence that he saw the complainant being stabbed, not by the accused, but by some other person. Surely such evidence is " evidence in favour of the accused " which contradicts other prosecution testimony on a material point. Hence s. 164 will permit the Magistrate on this ground to consider that the evidence is not " sufficient to put the accused on trial ". If such is the opinion of the Magistrate when the prosecution case is closed, it would be absurd that he cannot give effect to his opinion at that stage and must instead defer the making of an order of discharge.

Section 164 echoes the language of s. 162 (1) in using the words " consider the evidence sufficient to put the accused on his trial ". When, therefore, there is a conflict of testimony on material points, whether on the prosecution evidence alone, or else between that evidence and evidence for the defence, the discretion to discharge is statutory (s. 164) and the power to make the order of discharge is also statutory (s. 162 (1)).

For these reasons, I would hold that sub-section (1) of s. 162 will apply at the close of the prosecution case if the Magistrate at that stage considers the evidence not sufficient to put the accused on his trial. If an order of discharge is then made for the reason stated in the sub-section, it is made in exercise of the statutory power conferred by the sub-section, and not by virtue of the inherent or other power referred to in sub-section (2) of s. 162.

The summary which I have earlier made of the learned Magistrate's order of 18th February 1967 shows that he had two main grounds for deciding to discharge the three respondents : *firstly* the prosecution witnesses contradicated each other, and their evidence was to some extent contradicted by their previous statements ; *secondly*, the witnesses had failed or delayed to make statements incriminating the respondents. The first ground is that which is expressly stated in s. 164, and I have already shown that a discharge on that ground is one made in exercise of the statutory power conferred by s. 162 (1). I do not propose to

consider whether it is lawful for a Magistrate to take any account of the second ground ; but even if a discharge on that ground is lawful, I hold that the power to make the order of discharge is again that conferred by sub-section (1) of s. 162. Where, as in such a case, the Magistrate's opinion is based on a consideration of the evidence and on the probability that a Jury would not believe it, the reason for the order of discharge (if lawful) would be that the evidence is insufficient. I am quite unable to accept the submission that, if the Legislature did intend to permit a discharge for such a reason, it left the validity of the discharge to rest on inherent power.

I accordingly hold that in law, the only power which the Magistrate had to make his order of 18th February 1967 was the power conferred by sub-section (1) of s. 162. Indeed a reading of the order itself leaves no room for doubt that the learned Magistrate had in mind the provisions of that sub-section and of s. 164. Even in the order of 4th June 1967, the learned Magistrate stated : " I have already held that *there is no prima facie case* made out against the 2nd, 3rd and 4th accused ". Although this is not the precise language of s. 162 (*1*), it conveys much the same idea : if the evidence is not sufficient, then there is no prima facie case. At the end of the order of 4th June, the Magistrate stated his " considered view that *the evidence is not sufficient to warrant a committal* " ; here he actually employed the language of s. 162 (*1*) with only an immaterial variation. It is only in the last order, that of 14th August 1967, that the Magistrate claims to have made the first order of discharge under inherent power referred to in sub-section (2) of s. 162. I regret that, in the face of the reasons stated in the two earlier orders, I have to declare that claim to be untenable.

In the result, I hold that the first order of discharge was in exercise or purported exercise of the power conferred by s. 162 (1). Accordingly the Attorney-General clearly had the power to give his subsequent directions under s. 391. It was not and could not be argued that a Magistrate may in any circumstances refuse to comply with such directions, and I must hold that the Magistrate's refusal so to comply was unlawful.

Even on the basis that the directions of the Attorney-General in this case were in due exercise of the powers conferred by s. 391 of the Code, Counsel for the respondents contended that this Court has no power, in the present application, to direct the Magistrate to comply with the Attorney-General's directions in this case.

It was argued that the powers of this Court in revision are not exercisable in the present case because there is not within the meaning of s. 356 of the Code *any sentence or order* which may now be examined by this Court. The Magistrate (it was submitted) was directed to make an order of committal ; but he made no such order, and therefore there does not exist any order which we may now reverse or correct under s. 37 of the Courts Ordinance. A simple answer to this argument, it seems to me,

is that in law the Magistrate in this case has made an order refusing to make the order of committal which the Attorney-General directed him to make, and that such an order of refusal is an order within the meaning of s. 356 of the Code and s. 37 of the Courts Ordinance. Alternatively, the Magistrate has in substance made order holding that the Attorney-General had no power to give the directions which he did give, and that is an order which this Court can reverse or correct.

Counsel for the 1st respondent drew an analogy between the omission or refusal of a Magistrate to comply with directions under s. 391 and a refusal to issue process. He urged that if the cases are analogous, then in each case the only remedy open to the Attorney-General would be by way of mandamus. The unsoundness of this argument is demonstrated by s. 337 of the Code ; although the section provides that a Mandamus shall lie to compel a Court to issue process, it expressly contemplates that an appeal will also lie against a refusal of process, though only at the instance or with the sanction of the Attorney-General. If, therefore, the cases are in truth analogous, s. 337 might even afford ground for the contention that the Attorney-General had a right of appeal in the present case.

It was also argued that s. 356 is limited to cases already tried or pending trial, and that proceedings under Chapter XVI of the Code do not involve the trial of any case. This same submission was rejected in *Attorney-General v. Kanagaratnam* [1], following previous decisions, and I am in agreement with the judgment in the cited case holding that s. 19 of the Courts Ordinance, read with s. 5 of the Criminal Procedure Code, are wide enough to confer powers of revision in relation to non-summary proceedings.

There was also a further argument of a nature which in my opinion is being adduced in our Courts far too frequently. Relying on recent decisions holding that the principle of the Separation of Powers is recognised in the Constitution of Ceylon, it was argued that an order of discharge in non-summary proceedings is a judicial order, and that the purported exercise by the Attorney-General of powers under s. 391 is an interference with the powers of a Court and is therefore illegal. Counsel for the 1st respondent emphatically urged that the order of a Magistrate, to commit an accused for trial or else to discharge him, " satisfied every test " requisite for holding it to be a judicial order. The fallacy of this argument is exposed in the judgment of Griffith, C.J. in *Appleton v. Moorehead* [2], which has been recognised by many Courts in other Commonwealth countries as being the most acceptable explanation of the words " judicial power ".

[1] *(1950) 52 N. L. R. 121.* [2] *(1908) 8 Commonwealth Law Reports, 330.*

The learned Chief Justice gave to the words " judicial power " the meaning " the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property ". Decisions in other jurisdictions, including Ceylon, have in adopting the dictum of Griffith, C.J., laid down as an essential feature of the exercise of judicial power the requisite that there must be a determination of rights as between citizen and citizen, or citizen and the State. In the case of an order committing a person for trial before a Court or discharging him from liability to trial, there is no determination of any right of a citizen or of the State.

Any order may of course be called a " judicial order ", if and on the ground that it is made by a Judge ; but it does not follow that therefore the order is made in the exercise of the judicial power of the State. The Magistrate conducting an inquiry under Chapter XVI of the Code makes no determination whether or not the accused person has committed an offence ; all that he decides is whether or not the evidence is sufficient to put the accused on his trial. Nor do I see anything in the argument that, because a committal for trial may be followed by a remand, the committal thus interferes with the accused person's right to liberty and is therefore the exercise of judicial power. A committal need not in law be followed by a remand, and even when it is, the committing Magistrate, does not in his capacity as such, make any determination as to whether or not the accused person is to be deprived of his liberty. Purely administrative orders are daily made which deprive citizens of their rights, while not at the same time determining or deciding any controversy as to such rights. A common and simple example is the case of an order for the compulsory acquisition of land or movable property whether with or without the payment of compensation.

The judgment of Griffith, C.J. in itself deals at some length with the nature of the power of Magistrates to commit for trial or discharge in pre-trial proceedings. I see no reason whatsoever to disagree with the grounds stated in that judgment for the conclusion that a Magistrate does not exercise a judicial function when he conducts a preliminary inquiry for the purpose of deciding whether or not a person is to be committed for trial.

There is also I think another answer to the argument invoking the doctrine of the Separation of Powers in this case. Our law has, since 1883 if not earlier, conferred on the Attorney-General in Ceylon powers, directly to bring an alleged offender to trial before a Court, to direct a

Magistrate who has discharged an alleged offender to commit him for trial, and to direct a Magistrate to discharge an offender whom he has committed for trial. These powers of the Attorney-General which have commonly been described as quasi-judicial, have traditionally formed an integral part of our system of Criminal Procedure, and it would be quite unrealistic to hold that there was any intention in our Constitution to render invalid and illegal the continued exercise of those powers. This Court has, upon similar considerations, upheld the validity of Statutes conferring criminal jurisdiction on Courts Martial and conferring on revenue authorities the power to impose penalties for the breach of revenue restrictions.

I should add lastly that the instant case appears to have taken the turn it did, only because of some idea in the mind of the learned Magistrate that the Attorney-General was attempting improperly to interfere with judicial proceedings, and that the directions given by the Attorney-General were a reflection on the correctness of views formed by the Magistrate on the evidence in this case. It is well to remember that, just as much as Chapter XVI of the Code confers a certain measure of discretion on a Magistrate before whom non-summary proceedings are taken, other provisions of the Code equally confer on the Attorney-General a measure of discretion which is rendered effective by his statutory power to secure that inquiries under Chapter XVI will terminate in a manner determined in the exercise of that discretion. Indeed, the arguments of Counsel who appeared in this case for the respondents actually involved the alarming proposition (which I am certain none of them would concede in a different situation) that the Attorney-General may not lawfully direct the discharge of a person whom a Magistrate commits for trial.

For these reasons, I would, in exercise of the powers of revision of this Court, set aside the order of discharge made by the Magistrate on 14th August 1967, and remit the record to the Magistrate's Court for compliance by that Court with the direction given by the Attorney-General on 18th June 1967 to commit the three respondents for trial before the Supreme Court on the charge specified in that direction and to take further steps according to law.

ABEYESUNDERE, J.—I agree.

SILVA, J.—I agree.

Application allowed.