1958 *Present :* **T. S. Fernando, J.**

THE ATTORNEY-GENERAL, Appellant, *and* L. GUNASEKERA and another, Respondents

S. C. 1,184—M. C. Kandy, 2,517

Autrefois acquit—*Summary trial—Discharge of accused—Fresh prosecution—Can the earlier case operate as bar ?—Criminal Procedure Code, ss. 190, 330.*

An order abruptly terminating a summary trial without allowing the complainant to lead any evidence is an order of discharge, and not one of acquittal, of the accused. In such a case, when a fresh prosecution is instituted the accused is not entitled to raise a plea of *autrefois acquit* under section 330 of the Criminal Procedure Code.

APPEAL from a judgment of the Magistrate's Court, Kandy.

Ananda Pereira, Crown Counsel, for the Attorney-General.

P. Somatillekam, for the accused-respondents.

Cur. adv. vult.

June 16, 1958. T. S. FERNANDO, J.—

The two accused-respondents and three others were charged in the Magistrate's Court of Kandy in case No. 69—on a complaint made by the Police—with committing the offences of house-trespass (section 434), using criminal force (section 343) and mischief (section 410). On their pleading not guilty, the evidence of a doctor was recorded and the trial was put off for another day. On the day for which the trial had been adjourned the learned Magistrate, without recording any further evidence, made an order which he has described as an order " acquitting and discharging " the accused. It would appear from the record of the proceedings that the Magistrate listened to certain submissions addressed to him by counsel for the parties. There is no record of the nature of these submissions, but they appear to have related to the facts. In spite of an express request by counsel for the complainant that he be permitted to call his evidence, the Magistrate refused to permit any evidence to be led, but permitted himself the observation that to allow the complainant to lead evidence would amount to granting of the court's assistance to the furtherance of a family dispute. Counsel have not shown nor have I been able to discover any provision of our law of criminal procedure which sanctions the course of action which appealed to the Magistrate. The proceedings taken in the Magistrate's court on the adjourned date are irregular, and the order itself appears to be quite arbitrary. The evidence of the doctor recorded on the first day only tended to show that the virtual complainant did in fact bear injuries on her person. In regard to this the Magistrate has observed that " what was done on the

day in question may very well have been done under considerable provocation". This observation probably resulted from paying heed to a submission of counsel devoid of any evidence to support it at the stage it was made.

Nearly two months afterwards, the Police instituted case No. 2,517 charging the two accused-respondents with committing the offences of criminal trespass (section 433), mischief (section 410) and causing hurt (section 314) in respect of the same incident as that which had been the subject of proceedings in case No. 69. In spite of certain slight differences in the charges, it may be assumed for the purposes of this appeal that the charges in case No. 2,517 are for all practical purposes the same as those that were the subject of case No. 69. After the accused-respondents had pleaded not guilty, a plea of *autrefois acquit* was raised on their behalf by counsel appearing for them, and the learned Magistrate—not the Magistrate who had taken proceedings in case No. 69—holding that the order made in the earlier case amounted to an acquittal made order on November 1st, 1957 declaring that by virtue of section 330 (1) of the Criminal Procedure Code the respondents are not liable to be tried again.

The Attorney-General has appealed against this order of November 1st, and the appeal must depend on the correct interpretation of the order made by the Magistrate who heard case No. 69. A Magistrate's description of his order as a "discharge" or an "acquittal" is, of course, not conclusive of the matter which necessitates an examination of the proceedings taken up to the moment of the order. The Magistrate who heard case No. 2,517 has stated that the remedy any person aggrieved by the order made in case No. 69 had was to have appealed therefrom as that order unless reversed must stand. This statement appears to me—with respect—to beg the real question that has to be answered, viz. whether the order was in law an order of discharge or one of acquittal. If it is tantamount to an acquittal, no doubt a fresh prosecution is barred so long as that order has not been reversed. On the other hand, if that order amounted to no more than a discharge of the present accused-respondents, they cannot invoke in their aid the principle embodied in section 330 of the Criminal Procedure Code.

In the case of *King v. William*[1] the Court of Criminal Appeal observed that the wording of section 190 of the Criminal Procedure Code means that a Magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution. Certain fairly recent decisions of the Supreme Court have tended to emphasize that by "the end of the case for the prosecution" is meant not the formal or technical end of the prosecution but the virtual end of the prosecution which may be brought about, for instance, (*a*) by calling the main witnesses for the prosecution or (*b*) by the prosecution finding itself unable to lead its evidence on the trial date by reason of its failure to secure the attendance of its witnesses. Counsel for the respondents tried to find support for the order made in case No. 2,517 in some of these recent

[1] *(1942) 44 N. L. R. 73.*

decisions like *Solicitor-General v. Aradiel*[1] and *Adrian Dias v. Weerasingham*[2]. These authorities are clearly inapplicable to the case before me as in the first of them the prosecution had closed its case at the time the Magistrate made his order, while in the second the order was made after the prosecution found itself unable to go on with the case in the absence of certain witnesses whose presence the prosecution had failed to secure in spite of reasonable opportunity afforded to it for the purpose. Nor do I think that another case relied on by the respondents—*Wanigasekera v. Simon*[3] is of any assistance to them hero. In that case the prosecution had virtually closed its case at the time the Magistrate made his order which was held by the Supreme Court to be an order of acquittal. It is true that Gratiaen J. observes that a verdict of acquittal in terms of section 190 of the Criminal Procedure Code could be entered even before the prosecution has been closed, but it is important to note that he observes also that in order to render the order an acquittal the Magistrate should be satisfied that any further evidence which the complainant proposes to lead would not suffice to establish a *prima facie* case of guilt against the accused. In case No. 69 the Magistrate in express words refused to hear the complainant's evidence in spite of every appeal of her counsel. This was not unlike the situation in *Silva v. Rahiman*[4] where Jayewardene J. observed that an order abruptly terminating a summary trial without allowing the complainant to lead any evidence amounted only to an order of discharge. I am therefore of opinion that the order made in case No. 69 amounted to nothing more than an " inconclusive " order of discharge which is insufficient to form the foundation of a plea of *autrefois acquit*. I would accordingly allow the appeal and remit case No. 2,517 back to the Magistrate's Court for the trial to be held at an early date.

Appeal allowed.

[1] *(1948) 50 N. L. R. 233.*
[2] *(1953) 55 N. L. R. 135.*
[3] *(1956) 57 N. L. R. 378.*
[4] *(1924) 26 N. L. R. 463.*