1930

Present: Garvin S.P.J.

GABRIEL *v.* SOYSA *et al.*

708—P. C. Negombo, 66,300

Appeal—Acquittal of accused by Magistrate after recording complainant's evidence—Effect of order—Appeal by complainant—Sanction of Attorney-General.

Where, in a summary trial, the Magistrate, after hearing the evidence of the complainant, discharged an accused on a legal objection raised on his behalf,—

Held, the order was tantamount to an acquittal under section 190 of the Criminal Procedure Code and that no appeal lay from the order without the sanction of the Attorney-General.

The Court is not bound to record the evidence offered by the defence before entering a verdict of acquittal under section 190 if the Court disbelieves the evidence for the prosecution or if that evidence fails to establish the charge against the accused.

APPEAL by the complainant from an order of acquittal entered by the Police Magistrate of Negombo.

E. V. R. Samarawickrema, for complainant, appellant.

N. E. Weerasooriya (with *L. A. Rajapakse*), for accused respondents.

March 25, 1930. GARVIN S.P.J.—

A preliminary objection has been taken to this appeal on the ground that it is an appeal by the complainant from a judgment of acquital and has not received the sanction of the Attorney-General. It is urged by Counsel for the appellant that no sanction is necessary as the order though in form an acquittal is in effect an order of discharge under section 191. The complainant is a Fiscal's peon who was deputed to arrest the first accused upon a warrant issued in case No. 770 of the District Court of Negombo. The charge he makes is that the first accused offered resistance and illegal obstruction to his apprehension on the said warrant and that the second accused—the wife of the first accused—rescued her husband from custody and offered illegal obstruction to the apprehension of her husband.

The persons accused were duly charged and severally pleaded "not guilty." The complainant was examined and cross-examined at considerable length. The Proctor for the accused then submitted that the warrant was bad and was therefore not a sufficient authority for the arrest of the first accused.

After argument the Magistrate delivered a judgment holding that the warrant was defective and that the prosecution therefore failed. He accordingly acquitted the accused. This is not a case of the inadvertent use of the word acquittal where what was meant was a discharge. It is quite clear that the Magistrate intended to acquit the accused because in his view the whole prosecution failed. If therefore the contention for the appellant is to succeed it can only be because the judgment of acquittal is one which it was manifestly not in the power of the Magistrate to have passed. It is urged that once a summary trial has commenced a Magistarte may only enter a verdict of acquittal or conviction " 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" (section 190), and that any order terminating the proceeding at any earlier stage must be treated as, and can only have the effect of, an order of discharge under section 191.

Section 190 requires the Magistrate at the conclusion of a summary trial forthwith to record a verdict of acquittal, or if he finds the accused guilty forthwith to record a verdict of guilty and pass sentence. There undoubtedly are cases in, which a trial is only concluded after " the evidence for the prosecution and defence and such further evidence (if any) as he (the Magistrate) may of his own motion cause to be produced" has been taken.

The words quoted by me were not in my opinion intended to place the Court under a duty to record the evidence offered by the defence before entering a verdict of acquittal if disbelieves the evidence for the prosecution or if that evidence fails to establish the charge against the accused, nor do I think they compel a Magistrate to record the evidence of every witness for the prosecution no matter how numerous they may be merely because the prosecution tenders them. Such a view of the section would deprive the Magistrate of the power to control the course of the trial.

The failure or refusal to record the evidence of a material witness may in certain circumstances be of itself a sufficient reason for setting aside a judgment of acquittal and directing a new trial. but does not entitle the complainant to treat a judgment of acquittal as an order of discharge under section 190. He is not without a remedy since the Code enables him to appeal with the sanction of the Attorney-General.

In this case the prosecutor does not even complain that he had evidence to offer which would have influenced the judgment of the Magistrate, or which should have been considered by him before he acquitted the accused.

The objection to this appeal is well founded and must be upheld The appeal is dismissed.

Appeal dismissed.