1962 *Present :* **Basnayake, C.J., Gunasekara, J., and T. S. Fernando, J.**

ATTORNEY-GENERAL, Appellant, *and* PIYASENA, Respondent

S. C. 545—M. C. Chilaw, 25,279

Autrefois acquit—"*Acquittal*" *on the ground that charge is illegal—Liability of the accused to be prosecuted again for the same offence—*"*Discharge*"—"*Acquittal*"*—Criminal Procedure Code, ss. 2, 151 (2), 187 (1), 190, 191, 194, 195, 290 (5), 330, 336.*

Held (BASNAYAKE, C.J., dissenting) : Where, at the close of the prosecution in a summary trial, the Magistrate purports to acquit the accused person on the ground that the charge was illegally framed, the order of the Magistrate amounts in law to a discharge of the accused under section 191 of the Criminal Procedure Code and not to an acquittal under section 190. In such an event, the accused may be prosecuted again for the same offence in fresh proceedings.

In Case No. 21419 the Magistrate purported, at the close of the evidence for the prosecution, to acquit the accused on the ground that the accused, who had appeared before the Court otherwise than on summons or warrant when he made his first appearance, had been charged without any evidence being led as required by section 187 (1) of the Criminal Procedure Code. No appeal was preferred against this purported acquittal. Subsequently the accused was prosecuted again in the present case for the very same offence.

Held (BASNAYAKE, C.J., dissenting), that the accused was not entitled to raise the plea of *autrefois acquit* under section 330 of the Criminal Procedure Code.

Fernando v. Excise Inspector of Wennapuwa (1958) 60 N. L. R. 227, not followed.

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

D. St. C. B. Jansze, Q.C., Attorney-General, with *Ananda Pereira*, Senior Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for *Attorney-General.*

E. B. Wikramanayake, Q.C., with *M. M. Kumarakulasingham* and *A. K. Premadasa*, for Accused-Respondent.

Cur. adv. vult.

January 24, 1962. BASNAYAKE, C.J.—

This is an appeal by the Attorney-General against the order of the Magistrate of Chilaw acquitting the accused-respondent on a plea of previous acquittal in M. C. Chilaw case No. 21419 raised under the authority of section 330 of the Criminal Procedure Code. The charges in the instant case are as follows :—

" You are hereby charged, that you did within the jurisdiction of this Court at Erunwila on 25th May 1957 manufacture an excisable article to wit arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14(*a*) of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43(*b*) of the Excise Ordinance (Cap. 42).

2. At the same time and place aforesaid did possess and use a still for the purpose of manufacturing an excisable article other than toddy to wit arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14 (*e*) of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43 (*f*) of the Excise Ordinance.

3. At the same time and place aforesaid did without lawful authority have in your possession an excisable article to wit 20 drams of arrack which had been unlawfully manufactured and thereby committed an offence punishable under section 44 of the Excise Ordinance (Cap. 42). "

The charges in M. C. Chilaw 21419 are as follows :—

" You are hereby charged that you did within the jurisdiction of this Court at Nankadawara on 25.5.57 did manufacture an excisable article to wit arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14*a* of the Excise Ordinance (Chapter 42) and thereby committed an offence punishable under section 43*b* of the Excise Ordinance (Chapter 42).

2. At the same time and place aforesaid did possess and use a still for the purpose of manufacturing arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14*e* of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43*f* of the Excise Ord. (Chapter 42).

3. At the same time and place aforesaid did without lawful authority have in his possession about 20 drams of unlawfully manufactured arrack and thereby committed an offence punishable under section 44 of the Excise Ordinance (Chapter 42). "

The acquittal in case No. 21419 was on the ground that the Magistrate had framed a charge against the accused without adopting the procedure prescribed under section 187 (1) of the Criminal Procedure Code. The relevant portion of the learned Magistrate's order is as follows :—

" Learned counsel for the accused at the close of the case for the prosecution did not call any defence but brought to my notice that proceedings were illegal in that the accused who appeared otherwise than on summons or warrant has been charged without any evidence being led as required under section 187 (1) of the Criminal Procedure Code.

I find upon a perusal of the record that the accused did not appear before this Court on summons or a warrant. The accused has been charged without any evidence being recorded. In view of a recent decision of the Supreme Court in S. C. 1345/M. C. Colombo No. 19682 the proceedings are illegal. I therefore acquit the accused. "

The plea of *autrefois acquit* is founded on section 330 of the Criminal Procedure Code. The relevant portion of that section reads—

" (1) 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 nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 181 or for which he might have been convicted under section 182. "

The question that arises for decision is whether the accused was " tried by a Court of competent jurisdiction for an offence and acquitted of such offence and the acquittal remains in force. " To decide that question it is necessary to look at what happened at the trial. The charges were read to the accused, he pleaded not guilty, the prosecution called its witnesses, they were cross-examined by the defence and re-examined by the prosecution, and the prosecution case was closed. When the accused was called upon for his defence his pleader stated that he was not calling any evidence on the accused's behalf and made the submission that the charge was defective, in that the provisions of section 187 (1) had not been complied with, as the requirements of section 151 (2) of the Code had not been observed. The learned Magistrate upheld this contention.

In my opinion the accused had been tried by a Court of competent jurisdiction and acquitted, and his plea of *autrefois acquit* has been rightly upheld. In *Mohideen v. Inspector of Police, Pettah* [1], it was held that non-compliance with the requirements of section 151 (2) of the Criminal Procedure Code renders the proceedings void and that such non-compliance

[1] *(1957) 59 N. L. R. 217.*

was not curable under section 425. The fact that the proceedings are void does not render an order of acquittal made by a Court of competent jurisdiction not an order of acquittal, while the order remains unreversed by the Appellate Court. The cases on the meaning of " acquittal " and " discharge " in regard to other sections of the Code, such as sections 191 and 336 in my opinion have no application to section 330. My view would apply equally to a case in which an accused person is committed and punished without the requirements of section 151 (2) being observed. While the conviction remains unreversed the accused will have to undergo the punishment imposed by the Court and if he is charged for the same offence while the conviction remains in force he is entitled to plead the previous conviction in bar. I understand the words " remains in force " in this context to mean unreversed by an appellate Court.

I am of opinion that the appeal should be dismissed.

GUNASEKARA, J.—

The facts are set out fully in the judgment of my brother Fernando.

The question for decision is whether the order terminating the proceedings in Case No. 21419 was an order of acquittal or an order under section 191 of the Criminal Procedure Code, discharging the accused. The magistrate made this order holding that the proceedings were illegal " as the accused appeared in Court otherwise than on summons or warrant and was charged without any evidence being led against him ". He went on to say " I therefore make order acquitting the accused ". The question is whether, notwithstanding the use of this language, the order was an order of discharge merely. The question is not whether it was a right order or a wrong order of acquittal, but whether it was an order of acquittal at all. If it was an order of acquittal it seems to me that it is immaterial whether it was right or wrong : it was an order that was within the magistrates' jurisdiction and had not been set aside by the Supreme Court and it would therefore bar a fresh prosecution of the same offences. If it was an order of discharge merely, the magistrate was in error when he upheld the plea of *autrefois acquit* in the present case.

As my brother has pointed out, the words in which an order has been expressed are not conclusive of the question whether it is an order of acquittal or of discharge, but it must be interpreted in the light of the context.

The order that is in question was made after the close of the case for the prosecution. It has been contended that it was too late at that stage for an order to be made under section 191 of the Code. I do not agree. Section 190 provides for the recording of an appropriate verdict immediately after the magistrate arrives at a finding of not guilty or of guilty, as the case may be. In terms of section 191 it is open to the magistrate

to discharge the accused " at any previous stage of the case ". He is therefore not prevented from making such an order after the close of the case for the prosecution, so long as he makes it before he arrives at a verdict.

A verdict connotes a charge of an offence. A conviction or acquittal of an accused person can have no meaning except in reference to a charge. The ground of the order which terminated the proceedings in Case No. 21419 was that those proceedings (which purported to be a trial of a charge) were illegal for the reason that there was no valid charge. There can be no difference that is material to the present purpose between the absence of a charge and the absence of a valid charge. Therefore, when the magistrate, having held in effect that there was no charge upon which the accused could be acquitted or convicted, declared that he was making an order " acquitting " the accused, he must be taken to have used this word inadvertently. Construed in the light of the context, the order was in reality an order discharging the accused, although it did in terms purport to be an order acquitting him.

I agree with Fernando J. that the appeal must be allowed.

T. S. FERNANDO, J.—

The question that arises upon this appeal is whether an order purporting to acquit an accused person at the close of the prosecution in a summary trial in a Magistrate's Court on the ground that the charge was illegally framed amounts in law to an acquittal or only to a discharge of the accused.

It is necessary to state some facts relevant to the consideration of this question :—

V. Appapillai, Inspector of Excise, reported to the Magistrate's Court on June 5, 1957 in terms of section 148 (1) (*b*) of the Criminal Procedure Code that the accused G. S. Piyasena had on or about May 25, 1957, in the course of one and the same transaction committed three offences punishable under sections 42, 43 and 44 respectively of the Excise Ordinance The proceedings that commenced in the Magistrate's Court on presentation of this report were numbered 21419. At the close of the evidence for the prosecution the pleader for the accused submitted to the Magistrate that the proceedings had were illegal inasmuch as the accused who had appeared before the court otherwise than on summons or warrant when he made his first appearance there had been charged without any evidence being led as required by section 187 (1) of the Criminal Procedure Code. The Magistrate on February 5, 1958, holding that he was bound by the decision of the Supreme Court in *Mohideen v. Inspector of Police, Pettah* [1], stated that the proceedings held were illegal and purported to acquit the accused. No appeal was preferred against this purported acquittal. Instead, Inspector Appapillai on February 26, 1958, presented another report, also under section 148 (1) (*b*) of the Code, to the same Magistrate's

[1] *(1957) 59 N. L. R. 217.*

Court in respect of the alleged commission by the accused of the very same offences specified in his earlier report in Case No. 21419. Proceedings had on the subsequent report were numbered 25279.

Summons issued on the accused, and when he appeared on summons he pleaded not guilty upon being charged by the Magistrate with the commission of the three offences alleged in the report. The pleader for the accused contended that his client had already been acquitted on these identical charges in case No. 21419., and that that acquittal was a bar to his being prosecuted in the present case No. 25279. This plea of *autrefois acquit* was tried as a preliminary issue and, after the production of certain court records and after he had heard argument, the learned Magistrate (who incidentally was the same Magistrate who had made the order in case No. 21419) on April 27, 1959 upheld the plea. The appeal now before us is one preferred by the Attorney-General who has a right under section 338 (2) of the Code to prefer an appeal to this Court against any judgment or final order pronounced by a Magistrate's Court.

The Attorney-General contended (1) that if the charge in case No. 21419 was bad in that it was illegally framed, then there could have been no valid trial at all, and that neither a conviction nor an acquittal could have followed on such a charge ; and (2) that to maintain successfully a plea of *autrefois acquit* there must have been a previous acquittal on the merits.

In considering the first of these contentions, it is necessary to advert to the decision of this Court in *Mohideen v. Inspector of Police, Pettah (supra)*. That was a decision on an appeal referred to a bench of three judges in terms of section 48 of the Courts Ordinance, and, although the headnote of the report of that case appearing in the New Law Reports summarises the decision as being that a charge framed in the circumstances that existed in that case was an irregularity that cannot be cured by applying the provisions of section 425 of the Code, it would be more accurate to state that the main judgment of the majority which was delivered by De Silva J. held that the charge was illegal. In the judgment of the Chief Justice too the procedure followed was characterised as being more than a mere irregularity and, as he expressed the opinion that the case of *Vargheese v. Perera* [1] (where it was held that the absence of a valid charge was not merely a curable irregularity but an illegality) was rightly decided it would be proper to assume that he too held that the charge was illegal. I find that Pulle J. who was the dissenting judge in *Mohideen's case* states that he agrees with the other two Judges that, if the Code ordains a procedural step to be taken preliminary to the framing of a charge, the failure to take that step would vitiate the charge. Mr. Wikramanayake submitted that the charge in case No. 21419 was defective only, and not illegal. I am unable to agree. The view of the majority of the bench in *Mohideen's case* was that the charge was illegal, and for that reason alone the proceedings had to be quashed and the case remitted for trial upon a legally framed charge.

[1] *(1942) 43 N. L. R. 564.*

The correctness of the decision in *Mohideen v. Inspector of Police, Pettah (supra)* was not raised before us, and I may say that in any event it is not competent for us sitting as a bench of three judges to review a decision also of a bench of three judges. We must therefore on this appeal proceed on the basis that the decision in *Mohideen's case* is binding on us. It is right, however, to take note here of the fact that the court that decided *Mohideen's* appeal ordered the accused to be tried on a validly framed charge. If, as Mr. Wikramanayake contended before us, the only order a Magistrate can make after the case for the prosecution has ended is one of acquittal, whether the charge has been legally framed or not, then an examination of the facts of *Mohideen's case* will show that it would not have been competent even for the Supreme Court, section 347 of the Criminal Procedure Code notwithstanding, to have directed a retrial.

The learned Magistrate in upholding the plea of *autrefois acquit* felt himself bound, as indeed he was in law, by the decision of this Court in *Fernando v. Excise Inspector of Wennappuwa* [1], a case where the circumstances were exactly the same as those in the appeal now before us. Weerasooriya J. there upheld a plea of *autrefois acquit*. If this last-mentioned appeal has been correctly decided, this appeal must be dismissed. The contentions pressed before us by the learned Attorney-General were substantially the same as were considered by Weerasooriya J. With great respect to the latter, I am, however, of opinion for reasons which I shall endeavour to set out below that the first contention of the Attorney-General is sound and must be upheld. If a conviction on a particular charge cannot be sustained because that charge has been illegally framed, I am frankly unable to understand how an acquittal on a charge framed in similar circumstances can be upheld. If the one is unsupportable, the other must be equally unsupportable.

I must also refer to the circumstance that the Magistrate in making his order in case No. 21419 purported to acquit the accused. It has been held by this Court in many cases spread over a long number of years that the phraseology used by a judge is not conclusive of the question of the nature of the order he intended to make. In all cases it is a question of interpreting the nature of the order made after an examination of the relevant proceedings. To take any other view could involve, among other surprising results, depriving an accused person of the benefit of an order of a Magistrate acquitting him merely because the Magistrate has described that order as a discharge. It is therefore competent for us to examine the nature of the order of February 5, 1958 and to decide whether it is an order of discharge or one of acquittal.

A view has sometimes been expressed, and this view has been submitted to us by Mr. Wikramanayake as being a correct view, that after the prosecution evidence has been taken a verdict of guilty or not guilty has to be entered by the Magistrate who tried the case summarily, and that after that stage it is not competent for him to make an order of

[1] *(1958) 60 N. L. R. 227.*

discharge. This view has been based on the wording of section 191 of the Code which permits a " discharging (of) the accused at any previous stage of the case ", and the expression " previous stage " has been taken as meaning, in the context, previous to the close of the prosecution case. One can however, for example, think of cases where some inadmissible evidence is elicited in the course of the taking of evidence for the defence. As the Attorney-General argued, could it be said that in those circumstances the accused has to be acquitted because it is too late to make an order discharging him ? I am inclined to take the view that " at any previous stage of the case " contemplates a stage previous to the entering of the verdict of guilty or not guilty and not merely a stage previous to the closing of the case for the prosecution.

To return to the first contention of the Attorney-General specified already, the Code has made provision for a trial taking place upon a charge framed in accordance with the procedure laid down, that is to say, upon a charge framed in accordance therewith, and not illegally framed. In *Abeysekera v. Goonewardene* [1] Abrahams C.J. in quashing proceedings that had ended in a conviction of the accused persons, observed " There is then the absence of a charge and there is ample authority that the absence of a charge vitiates the proceedings ". The charge in that case was held not to have been framed as required by the provisions of section 187 (1) of the Code, and in that sense it was concluded that there was no valid charge. The trial was declared to be illegal *ab initio*. Weerasooriya J. in *Fernando v. Excise Inspector of Wennappuwa* (*supra*) took the view that the observations of Abrahams C.J. in that case did not imply that a trial taking place on a defectively framed charge, or without any charge at all, is a proceeding entirely outside the scope of the Magistrate's jurisdiction. With great respect, I am unable to agree. As I understand it, the charge is the very foundation of a criminal case, and our Courts have consistently taken the view that where the charge is defective in the sense that it is illegal, and *a fortiori* where no charge has been framed at all, a conviction cannot be maintained. I am quite unable to see how a distinction can be made when the question to be considered is whether an order can be maintained as an acquittal where it flows from an illegal charge or without any charge at all. The question cannot, in my opinion, be approached one way when the validity of a conviction is under consideration and in a different way when the validity of an acquittal is being examined.

More to the point than *Abeysekera v. Goonewardene* (*supra*) is the earlier case of *Rosemalecocq v. Kaluwa* [2] which is also a decision of Abrahams C.J. where the learned Chief Justice, in setting aside a conviction because a charge was illegal on account of misjoinder of accused and charges, observed :—

> " I can no doubt order a new trial. On the other hand, if I do not make any order for a new trial, can I prevent the prosecution of the appellant on the same facts ? If I have the power to make an order of

[1] *(1938) 39 N. L. R. 525.* [2] *(1936) 38 N. L. R. 373.*

acquittal, that would prevent the appellant being put upon his trial again. Counsel for the appellant argues that I can make an order of acquittal. He cites to me the case of *Mendis v. Kaithan Appuhamy* [1] where Drieberg J., following MacDonell C.J. in *Marambe v. Kiriappu* [2], allowed an appeal and acquitted the appellant on the ground that to send the case back for retrial in such circumstances as those which existed in the case in question would encourage slackness and inexactitude on the part of prosecutors. I have not examined either of those cases very closely, because if the learned judges who tried those cases are to be taken to have implied that an Appellate Court would acquit in a case where a trial was void I should respectfully differ from them as, in my opinion, any illegal trial is no trial at all, and, therefore, an acquittal either by the trial Court or an Appellate Court would be ineffective ".

This case does not appear to have been brought to the notice of Weerasooriya J.

I might also refer to certain observations made by Gratiaen J. in *Wanigasekera v. Simon* [3] which have some relevance to the contention that I am now examining. Said that learned judge :—" As at present advised, I take the view that under our Code, as in England, a plea of *autrefois acquit* presupposes that the indictment or accusation in the earlier proceedings was sufficient in law to sustain a conviction for the offence charged on the second trial. Similarly, an order " discontinuing " the proceedings against an accused person on the ground that the charge is defective operates only as a " discharge " under section 191. In such an event, the purport of the Magistrate's decision is that there is no charge upon which a verdict (either of conviction or acquittal) under section 190 can properly be based ".

I am in respectful agreement with the observations of both these learned judges and, rightly appreciated, they provide the correct manner in which the question I am now considering is to be approached. I might here also draw attention to the definition of the expression " discharge " contained in the interpretation section (section 2) of the Criminal Procedure Code. " Discharge ", with its grammatical variations and cognate expressions, means the discontinuance of criminal proceedings against an accused, but does not include an acquittal. This interpretation was stressed by Wood Renton C.J. in the Divisional Bench decision in *Senaratne v. Lenohamy* [4] where a majority of the Court held that the discharge of an accused without trial under section 191 of the Code is no bar to the institution of fresh proceedings against the accused.

Then again, in the case of *Perera v. Johoran* [5], where after the Appeal Court had quashed a conviction of an accused person on the ground that he had been charged under a Regulation which had been repealed, the accused was charged subsequently under the proper Regulation in respect of the same act, the Supreme Court held that the plea of *autrefois*

[1] *(1935) 37 N. L. R. 285.*
[2] *(1932) 2 C. L. W. 122.*
[3] *(1956) 57 N. L. R. 377 at 381.*
[4] *(1917) 20 N. L. R. 44.*
[5] *(1946) 47 N. L. R. 568.*

acquit was not available to the accused. Dias J. stated that " in the earlier trial the accused was never in peril of conviction because, as was judicially declared by Canekeratne J., it was a nullity. Therefore the accused did not stand in jeopardy of conviction in that case ". He cited, apparently with approval, the observation of Abrahams C.J. in *Rosemalecocq v. Kaluwa* (*supra*) that an illegal trial is no trial at all, and, therefore an acquittal either by the trial Court or an Appellate Court would be ineffective.

In *Gunaratne v. Hendrick Appuhamy*[1], where an accused person who had been acquitted on the ground that the charge against him was laid under a repealed Ordinance was subsequently charged, upon the same facts, with the commission of an offence under the proper enactment, Nagalingam J., in spite of the decision in *Perera v. Johoran* (*supra*), upheld a plea of *autrefois acquit* although he observed that *Perera v. Johoran* was, having regard to its particular facts, correctly decided. He sought to distinguish that case as being inapplicable to the case he had to decide because the Supreme Court in *Perera v. Johoran* (*supra*) had quashed the conviction at the first trial and the authorities were left, if so advised, to take any action against the accused. In regard to the distinction so sought to be made, it seems to me that any observations of the Appellate Court regarding what proceedings were available to the prosecution after the conviction at the first trial had been quashed cannot affect the interpretation of the nature of the order in that first trial. That order was one of discharge and not of acquittal.

Section 330 of our Criminal Procedure Code seeks to embody the English law doctrine of *autrefois convict* and *autrefois acquit*. In spite of observations to be found in some of the decisions of our Courts that the doctrine so embodied in section 330 is not precisely the same as that obtaining in England, I must confess that I do not appreciate that any real distinction exists. I am in agreement with the view expressed by Dias J. in *Perera v. Johoran* (*supra*) that the English law principle is also the law of Ceylon. He there expressly rejected an argument that because the Magistrate in the earlier case might by amending the charge have convicted the appellant and because the judge in appeal might have done the same thing, therefore the doctrine of *autrefois acquit* applies as a bar to the subsequent charge. Nagalingam J. in *Guneratne v. Hendrick Appuhamy* (*supra*), although he approved of one part of the decision in *Perera v. Johoran* (*supra*), does not say whether he approves or disapproves of the rejection by Dias J. of the argument referred to above. His reference to the English decision in *Halsted v. Clark*[2] appears to indicate that he would not have approved of the rejection of that argument. But the observations of Lawrence J. in the English case will show that the decision there rested on the view taken that at the earlier trial, having regard to the evidence given for the prosecution, it was useless to have amended the summons as no offence appeared to have been committed.

[1] *(1950) 52 N. L. R. 43.* [2] *(1914) 1 A. E. R. 270.*

Nagalingam J. held that in both cases the accused was charged with the commission of the same offence. An offence is defined by our Code (section 2) as meaning any act or omission made punishable by any law for the time being in force in Ceylon. If this definition is kept in mind, it seems to me that, where a person is first charged with the commission of an act or an omission constituting an offence under a repealed law, and is charged at a second trial in respect of the commission of the same act or omission constituting an offence under the existing law, he is not charged with the commission of the same offence.

Mr. Wikramanayake referred us to the case of *Solicitor-General v. Aradiel* [1] where my Lord, the Chief Justice (when he was a Puisne Justice) took the view that, where at the close of the case for the prosecution the accused called no defence but took objection to the validity of the summons and the Magistrate " discharged " the accused, the order amounted in reality to an acquittal. This view appears to have been taken because the Magistrate made the order after the prosecution was closed, a stage after which, according to the learned judge, it was not open to the Magistrate to make an order merely of discharge. I have already indicated earlier in this judgment my opinion that at whatever stage the discovery is made, if a charge is found to be illegal, neither a conviction nor an acquittal can result in that proceeding unless the charge is subsequently rendered legal, and do not therefore find it necessary to add to the reasons which induce me to uphold the first of the Attorney-General's contentions.

There is, however, one other case to which I must refer, and that is *Attorney-General v. Silva* [2], where H. N. G. Fernando J., taking the view that there is no express provision in the Code empowering an order of discharge to be made at a stage subsequent to the closure of the case for the prosecution, upheld a plea of *autrefois acquit* based on an order of " discharge " made by a Magistrate who discovered at the end of the prosecution case and after the accused had stated that he was offering no evidence that no charge had been framed at all in spite of an entry in the record that the accused was charged " from an amended charge sheet ". It must however be mentioned that the learned judge treated the case as one involving a charge of a comparatively minor nature which had been pending against the accused for nearly two years and expressly stated that the question whether an order of discharge and not of acquittal could properly be made in circumstances such as those in the case before him merited consideration by a fuller Bench.

In regard to the second of the Attorney-General's contentions, that to put forward successfully a plea of *autrefois acquit* there should have been an acquittal on the merits, as it has been termed, in view of the opinion I have formed on the first contention that the proceedings had subsequent to the illegally framed charge are bad in law and that therefore the order made by the Magistrate on February 5, 1958 amounts to no more than an inconclusive order of discharge and that the appeal must be allowed on

[1] *(1948) 50 N. L. R. 233.*

[2] *(1959) 61 N. L. R. 454.*

that ground, I do not feel called upon to consider at any length this second contention. As the matter has, however, been argued before us, it may be useful if I set down very shortly what appears to me to be a tenable position under our law of criminal procedure.

In *Fernando v. Rajasooriya, Inspector of Police* [1], Soertsz J. did observe that a decision upon the merits is essential for a valid plea of *autrefois acquit*. Gratiaen J. in *Wanigasekera v. Simon* (*supra*) also remarked that the true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record a verdict of acquittal on the merits. And quite recently, Sansoni J. in *The Attorney-General v. Kiri Banda* [2] himself favoured the view that an acquittal to operate as one made under section 190 of our Criminal Procedure Code must be one made on the merits and on no other ground. I am aware that certain other judgments of this Court have taken the view that an acquittal under our Criminal Procedure Code does not necessarily mean an acquittal on the merits. This view appears to have been influenced largely by the consideration that sections 194 and 195 of the Code contemplate orders which are termed acquittals and which certainly are not made after the merits of the case have been adjudicated upon by the Court. But an examination of those two sections will demonstrate that the orders there termed acquittals follow upon (1) the absence of the complainant at the hearing of the case (section 194) and (2) the withdrawal of the charge by the complainant (section 195). In both circumstances the legislature can be said to have contemplated a situation equivalent to an absence of merits in the complaint. The only other case where an acquittal otherwise than on the merits may be said to be sanctioned by the Code is to be discovered in section 290 relating to the compounding of offences. Sub-section (5) of that section declares that the compounding of an offence thereunder shall have the effect of an acquittal. The compounding of an offence cannot ordinarily be looked upon as an acquittal, but the law deems it an acquittal in the sense that it carries with it the consequences attaching at law to an acquittal. It is in the nature of an exception to the principle that an acquittal must involve a decision on the merits. The case of compounding apart, the instances of acquittals under sections 194 and 195 and even the cases in which orders, although described indiscriminately sometimes as a discharge and at other times as an acquittal, have been held to operate as acquittals where the prosecution found itself unable to proceed with a case on account of its inability to secure the attendance of necessary witnesses in spite of reasonable opportunity afforded by the court to do so can not unfairly be described as examples of cases where at the time the proceedings end or are taken to have ended the prosecution has been unable to establish to the satisfaction of the court that there are merits in its case. I do not, however, consider it necessary to elaborate on this idea as the opinion I have reached on the question of the legality of the proceedings in case No. 21419 is a sufficient answer to the question we are here called upon to decide.

[1] *(1944) 47 N. L. R. 399.*

[2] *(1959) 61 N. L. R. 227 at 229.*

As the charge in case No. 21419 was, in my opinion, illegally framed, the order made by the Magistrate on February 5, 1958 operates merely as a discharge and not as an acquittal. I would allow the appeal and remit case No. 25279 to the Magistrate's Court for trial according to law. As nearly five years have elapsed since the date of the commission of the offences alleged, and as the question of law has now been decided, the prosecution should consider whether it is necessary to go on with this proceeding.

Appeal allowed.