1956 *Present :* Gratiaen, J.

J. H. WANIGASEKARA (Food and Price Control Inspector), Appellant, *and* K. SIMON, Respondent

S. C. 934—M. C. Matugama, 21,356

"Acquittal"—"Discharge"—Right of appeal—Criminal Procedure Code, ss. 2, 190, 191, 330, 336—Control of Prices Act, No. 29 of 1950, s. 8 (1).

The inadvertent use by a Magistrate of the word "discharge" in describing an acquittal cannot deprive the accused person of the protection of sections 330 and 336 of the Criminal Procedure Code.

A Magistrate may in certain situations enter a verdict of acquittal under section 190 of the Criminal Procedure Code even before the case for the prosecution has been closed—provided that the Magistrate is 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.

The accused was charged with contravening a price order made under the Control of Prices Act. The Magistrate, without calling for a defence and when the case for the prosecution had been virtually closed, upheld wrongly (but within the scope of his jurisdiction) an objection raised by the defence that the price order was bad in law as it had not received the necessary Ministerial approval. Accordingly, he made order "discharging" the accused.

Held, that the Magistrate recorded in fact a verdict of acquittal on the merits. No appeal could therefore be entertained except upon compliance with the requirements of section 336 of the Criminal Procedure Code.

Held further, that if a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

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

A. C. Alles, Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, for the complainant-appellant.

H. W. Jayewardene, Q.C. with *G. P. J. Kurukulasuriya*, for the accused-respondent.

Cur. adv. vult.

January 16, 1956. GRATIAEN, J.—

This is an appeal by the complainant (a Food and Price Control Inspector) against an order purporting to "discharge" the accused who was tried for an alleged contravention of section 8 (1) of the Control of Prices Act, No. 29 of 1950. Mr. Jayawardene raised a preliminary objection to the maintainability of the appeal, his argument being that the so-called order of "discharge" was in reality "a verdict of acquittal" under section 190 of the Criminal Procedure Code, and that no appeal could be preferred against it except at the instance or with the written sanction of the Attorney-General. The inadvertent use by a Magistrate of the word "discharge" in describing an "acquittal" admittedly cannot deprive an accused person of the protection of section 336.

The charge framed against the accused was to the effect that he had on March 1st, 1955, sold 2 lbs of wheat flour to a bogus customer at a price in excess of the maximum retail price fixed for that commodity in terms of a statutory "price order" applicable to the area in which the transaction took place. This "price order" (P4) had been duly published in the *Government Gazette* No. 10,510 of 20th March, 1953, and was described in the charge with sufficient particularity to comply with the requirements of Chapter 17 of the Code.

The accused having pleaded not guilty, the prosecution led evidence at the trial to prove the alleged sale (for 56 cents) of 2 lbs. of a commodity which the Government Analyst had certified in his report P6 to be wheat

flour. The controlled price was 48 cents, and all that remained to establish *prima facie* the commission of the offence was proof that the wheat flour referred to in the Government Analyst's report was the identical sample taken to him for analysis by a Police constable on the orders of the Magistrate. This witness was not available in Court, however, and a postponement of the trial was asked for in order to lead his evidence on another date. The appellant expressly stated that he would then close the case for the prosecution.

Under normal circumstances a postponement for this limited purpose would probably not have been refused. The defence objected, however, that no useful purpose would be served by putting the trial off for another date in order to record evidence of a fact which (for the purposes of the argument) might be regarded as conceded by the accused. The defence submitted that in any event the case for the prosecution must necessarily fail because (1) food price orders become operative only after they have been approved by the Minister of Agriculture and Food, and (2) the appellant's omission to lead evidence of such approval was therefore fatal to his case; in other words, a verdict of acquittal, without calling for a defence, would inevitably have resulted at the close of the case for the prosecution even if the identification of the sample referred to in the Analyst's certificate was established.

In reply to this submission the appellant conceded that "price orders become valid only after they are approved by the Minister". He claimed, however, that he had in fact sufficiently established the Minister's approval of the price order P4 and, presumably for that reason, offered no further evidence on that particular issue. The learned Magistrate (in my opinion wrongly) upheld the objection raised by the defence and made an order "discharging the accused at this stage".

Mr. Alles cited an unreported decision of this Court in *Food and Price Control Inspector v. Piyasena* S. C. Minutes of 22.11. 55 (594—M. C. Matale, 4,316)[1] where Weerasooriya J. pointed out that "once a price order has been made and signed (and also perhaps duly published) it becomes fully operative independently of any further efficacy it may receive from the subsequent notification of its approval by the Minister". Mr. Jayewardene did not challenge the correctness of this ruling, and was also prepared to concede that the prosecution had already satisfactorily established by admissible evidence the fact that P4 had received Ministerial approval. Nevertheless, he submitted, the order in his client's favour, right or wrong, was a "verdict of acquittal" against which no appeal could be entertained except upon compliance with the requirements of section 336.

It is not always easy to distinguish between an "acquittal" under section 190 and a "discharge" under section 191, and the apparent conflict of authority in some earlier rulings of this Court has perhaps added to the confusion. We are bound by the majority decision of the Full Bench in *Senaratne v. Lenohamy*[2] to the effect that a "discharge"

[1] *See 57 N. L. R. 310—Ed.* [2] *(1917) 20 N. L. R. 41.*

under section 191 signifies " the discontinuance of criminal proceedings " but " does not include an acquittal ". (Section 2). In other words, a discharge under section 191 connotes an " *inconclusive order* " which falls short of a decision resulting in " *a definite verdict* " (per De Sampayo J.). The distinction between a judgment upon the evidence in a civil action and the vexatious " non-suit " sanctioned by the procedure of former times seems to suggest a helpful analogy.

In *Silva v. Rahiman* [1] Jayawardene J. held that an order abruptly terminating a summary trial " without allowing the prosecution to lead any evidence " amounted only to an order of " discharge ". In *Gabriel v. Soysa* [2] Garvin J. decided, by way of contrast, that an accused person who was charged with unlawfully obstructing arrest under a warrant had in truth been " acquitted " when the Magistrate, without calling for a defence, upheld an objection that (in view of the evidence led by the prosecution) the warrant was bad in law. Garvin J. explained that " the Magistrate *intended to acquit* because in his view the whole prosecution failed " with the result that the continuation of the trial was purposeless.

Some of the dicta in *Gabriel v. Soysa* (supra) were later criticised by Soertsz J. in *Sumangala Thero v. Piyatissa Thero* [3] but, with great respect to the doubts expressed on that occasion, I would adopt Garvin J.'s ruling that it is unobjectionable in certain situations to enter a verdict of acquittal under section 190 even before the case for the prosecution has been closed—provided that the Magistrate is 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 person. In such an event, the verdict is based on a judicial decision (be it right or wrong) that the case for the prosecution has (for one reason or another) already collapsed irreparably—so much so that, as in the well-known precedent of *Humpty Dumpty's case*, no amount of ingenuity could " put it together again ". Indeed, Soertsz J. himself agreed in *Fernando v. Rajasooriar* [4] that an " acquittal " at this earlier stage would be justified where, in the view taken by the Magistrate, any further evidence would be of no avail ; see also the more recent judgments of Nagalingam A.C.J. in *Don Abraham v. Christoffelsz* [5] and *Dias v. Weerasingham* [6]. It stands to reason, however, that premature acquittals of this kind are generally inadvisable : if based on misdirection, they might well result in a re-trial being ordered on appeal, thereby putting the accused person to further expense and anxiety.

Much confusion is likely to arise if the issue " *acquittal* or *discharge* ? " is allowed to be complicated by irrelevant considerations as to whether, upon the merits of the particular case, the Magistrate's decision was wrong or premature. 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*. If that was clearly the intention, no appeal lies

[1] *(1924) 26 N. L. R. 463.*
[2] *(1930) 31 N. L. R. 314.*
[3] *(1937) 39 N. L. R. 265.*
[4] *(1946) 47 N. L. R. 399.*
[5] *(1953) 55 N. L. R. 92.*
[6] *(1953) 55 N. L. R. 135.*

except at the instance or with the written sanction of the Attorney-General, and the acquittal, unless reversed, is a bar to a fresh prosecution to the extent indicated in section 330.

It has been suggested in *Solicitor-General v. Aradiel* [1] that our Code makes "no distinction between an acquittal on the merits and an acquittal on any other ground." On the other hand, Soertsz J. in *Fernando v. Rajasooriar* (supra) held that, *as far as section 190 is concerned*, a verdict on the merits is essential to support a plea of *autrefois acquit*; see also the judgment of the Court of Criminal Appeal in *The King v. William* [2]. 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. *Archbold (Edn. 33rd.) p. 153.* 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 of acquittal) under section 190 can properly be based.

We are now in a position to analyse the order which the learned Magistrate intended to make in the present case. The charge itself was unexceptionable and was admittedly sufficient in form and content to sustain a conviction. When the case for the prosecution was virtually closed, the Magistrate decided wrongly (but within the scope of his jurisdiction) that the prosecution had failed to establish one of the assumed elements of the offence charged—namely, that the "price order" alleged to have been contravened had come into operation at the relevant date by virtue of Ministerial approval. Accordingly, he upheld the submission raised by the defence that the only additional evidence which the prosecution proposed to lead (for the purpose of establishing a different element of the defence) would be of no avail. It is therefore clear that the learned Magistrate intended to record a verdict of acquittal on the merits, and not merely to make "an inconclusive order of dis-discharge" which would expose the respondent to the risk of a fresh trial (for the same offence) at which the prosecution would be given another opportunity to supply the assumed gaps in the earlier evidence.

For these reasons, I reject the petition of appeal for non-compliance with the requirements of section 336. Although the order of acquittal was wrong, I am not disposed to quash it in the exercise of my revisionary powers. If a prosecuting officer, by making incorrect concessions on the law, has contributed towards an erroneous verdict of acquittal, the accused person should not, as a general rule, be placed in jeopardy a second time.

Appeal rejected.

[1] *(1918) 20 N. L. R. 233.*

[2] *(1942) 44 N. L. R. 73.*