1957 *Present :* Sinnetamby, J.

DAHANAYAKE, Appellant, *and* P. B. RATNAYAKE (Inspector of Police), Respondent

S. C. 1155—M. C. Colombo South, 75,484

Autrefois acquit—"*Discharge*"—"*Acquittal*"—*Criminal Procedure Code, ss. 190, 191, 320.*

In case No. 72,835 the accused was charged with certain offences. On the last date of hearing the prosecuting Inspector applied for a postponement and, when it was refused, asked for a warrant on an absent witness. The accused was thereupon "discharged". He was subsequently charged in the present case in respect of the same offences.

Held, that the order of discharge in case No. 72835 must be regarded as an order made under section 190 of the Criminal Procedure Code and one which amounted to an order of acquittal. The accused was therefore entitled to plead "*autrefois acquit*" in the present case.

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

Neville Wijeratne, for the accused-appellant.

S. Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 20, 1957. SINNETAMBY, J.—

The accused in this case was charged with committing certain offences made punishable under the Motor Traffic Act. When the case was taken up for trial on 13/9/56 the accused-appellant pleaded "autrefois acquit" in as much as he had earlier been charged in respect of the same offences in M. C. Case No. 72835 and discharged. The learned magistrate held that the provisions of section 330 of the Criminal Procedure Code did not apply to the facts of this case and that the plea failed. The accused was tried and convicted and he appeals against the order of the learned magistrate.

The question that arises for consideration is whether on the facts of this case the order of discharge made by the learned magistrate in M. C. Case No. 72,835 is an order under section 190 of the Criminal Procedure Code and therefore amounts to an acquittal although the word used is "discharged". The fact that the magistrate used the word "discharged" is not conclusive of the matter and does not *per se* make it an order under section 191. One has to consider the facts to decide whether the order is made under section 190 in which event the plea of "autrefois acquit" is available irrespective of the word used in terminating the proceedings or whether it comes under section 191 in which event the plea is not available.

A distinction was sought to be drawn by learned Crown Counsel between the present case and the cases of *Don Abraham v. Christoffelsz* [1], *Adrian Dias v. Weerasingham* [2] and *K. Edwin Singho v. P. S. Nanayakkara* [3]. In all these cases on the magistrate refusing a postponement the prosecuting officer stated that he could not go on with the case or made a statement to that effect. In the present case the inspector asked for a date and when it was refused asked for a warrant on an absent witness. Twice previously the case had been postponed because of the absence of this same witness who was a sergeant in the Police Force and the magistrate refused the application, but there is nothing on record to indicate that the prosecuting inspector had stated that he was unable to proceed without the evidence of the absent witness.

In my view it makes no difference whether the record contains an entry to the effect that the prosecution offers no evidence in support of the charge or not. If from the facts it is clear that the prosecution is unable to go on with the case the order terminating the proceedings must be deemed to be an order of acquittal.

[1] *(1953) 55 N. L. R. 52.* [2] *(1953) 55 N. L. R. 135.*
[3] *(1956) 53 C. L. W. 95.*

If the prosecuting inspector was able to go on I have no doubt he would have expressed his willingness to do so and the magistrate would then have been obliged to hear the evidence: the fact that he even applied for a warrant on the absent witness who was a member of the Police Force shows what importance he placed on this witness's evidence. On the facts it is reasonable to infer that the proceedings on the last date of hearing in M. C. Case No. 72,835 were terminated because the prosecution had no evidence to offer or felt that the evidence available was insufficient to substantiate the charge. The order of discharge must therefore be regarded as an order made under section 190 of the Criminal Procedure Code and one which amounts to an order of acquittal. The plea of "autrefois acquit" should therefore be upheld. I set aside the order of the learned magistrate and acquit the accused.

Appeal allowed.