1962 *Present :* **T. S. Fernando, J.**

M. A. PETER and another, Appellants, *and* E. D. COTELINGAM (Range Forest Officer), Respondent

S. C. 200–202 of 1962, with Application in Revision—
M. C. Chilaw, 41769

Criminal Procedure Code—Sections 190 and 191—Stage or point of time at which accused may be acquitted.

Where, in a summary trial, the prosecutor fails, without excuse, to lead any evidence after he has been allowed a reasonable opportunity to do so, the proper order which the Magistrate should make in respect of the accused is one of acquittal and not discharge. In such a case, the accused is not liable to be prosecuted again for the same offence.

The trial of a summary case was postponed three times and, on the fourth "specially fixed" date of trial, neither the prosecuting officer nor the witnesses for the prosecution were present. No explanation was given for their absence. In the circumstances the Magistrate "discharged" the accused.

Held, that the order of the Magistrate was, in fact, one of acquittal and that the accused were not liable to be tried again, in a subsequent case, for the same offence.

APPEAL, with application in revision, from a judgment of the Magistrate's Court, Chilaw.

A. H. C. de Silva, Q.C., with *K. Ratnesar*, for the accused-appellants and petitioners.

V. S. A. Pullenayegum, Crown Counsel, with *F. C. Perera*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 14, 1962. T. S. FERNANDO, J.—

This is yet another of those appeals which have in recent years raised the question of the stage at which an accused person in this country can maintain he has been acquitted of an offence in respect of which a summary trial has commenced or has taken place.

On 3rd September 1960 a public officer reported to court in terms of section 148 (1) (*b*) of the Criminal Procedure Code that the two appellants had committed an offence punishable under the Forest Ordinance. The report was entertained by the court and the proceedings were numbered 38595. The appellants were charged and their trial was fixed for 31st October 1960. The trial was not taken up on the day so fixed and was re-fixed for 12th December 1960. It was again not taken up even on this latter date, nor even on 25th January 1961 which was a new date of trial fixed. The trial was then re-fixed for 15th March 1961 on which day it was again postponed as a result of the 1st appellant being unable to appear in court. Eventually the trial was fixed for 14th June 1961, the Magistrate recording that it was "specially fixed" for that date.

On 14th June 1961 neither the prosecuting officer of the Department interested nor the witnesses for the prosecution were present. The Magistrate recording that fact, and also that this was a specially fixed case, made order "discharging" the appellants.

Nothing daunted, the same public officer who had made the report to court in case No. 38595 presented on the same day (viz., on 14th June 1961) another report in identical terms as the first against the appellants alleging the commission of the identical offence. The proceedings so initiated were numbered 41769. No explanation has been made or attempted even up to today for the refusal or failure of the prosecutor and his witnesses to appear on 14th June 1961 in case No. 38595. When the appellants appeared on summons in connection with case No. 41769, their proctor raised the plea—very properly, so it seems to me—that they were not liable to be tried again as they had been acquitted in the former proceedings. The Magistrate, after hearing argument in the course of which a number of cases of this Court were cited before him, ruled on 18th January 1962 that the order of 14th June 1961 in case No. 38595 amounted only to a discharge of the appellants and therefore was no bar to their being tried in case No. 41769. It is this ruling of 18th January 1962 that is being canvassed before this Court. Not being a final order I do not think an appeal is competent and I would *pro forma* make order rejecting it. A case has however been made out justifying the exercise of the powers of this Court in revision and I shall therefore now proceed to examine the ruling in question.

The learned Magistrate, in reaching the conclusion he did, followed the decision of Sansoni, J. in *The Attorney-General v. Kiri Banda* [1] where he stated that the Court of Criminal Appeal in the case of *The*

[1] *(1959) 61 N. L. R. 227.*

King v. William[1] enunciated two distinct and unequivocal propositions, (1) that an order of acquittal cannot be made at a trial until the case for the prosecution has been closed and (2) that an order of acquittal which purports to have been made under section 190 must be made on the merits and on no other ground. I do not think one can possibly disagree with the learned judge's statement as to what propositions were enunciated in the case of *The King v. William* (*supra*), but the statement appears to leave unexplored the question as to the stage or point at which it can be said that the case for the prosecution has been closed. In the case of *The Attorney-General v. Gunasekera*[2], I ventured to point out that decisions of our Court show that the end of the case for the prosecution can be reached not only when the prosecutor formally closes his case or states that he has led all the evidence he wishes to lead but also at an earlier stage of the proceedings, and instanced by way of example other situations which would show that the end of the case for the prosecution can be reached when the prosecution has no further material evidence to offer.

I have called for and examined the proceedings in M. C. Anuradhapura case No. 8232 referred to in the decision of Sansoni J. in *The Attorney-General v. Kiri Banda* (*supra*). The accused in that case were charged with the unlawful possession of parts of a hemp plant, an offence in contravention of the Poisons, Opium and Dangerous Drugs Ordinance. They were charged on 4th July 1957 and the trial was then fixed for 16th October 1957. On the 13th August 1957 at the instance of the prosecution the Magistrate forwarded to the Government Analyst a specimen of the substance produced before him for examination and report as to whether the specimen belongs to the variety of the hemp plant known as *Cannabis Sativa L.* For the reason that the Government Analyst had not reported to Court the results of his examination or analysis the trial was postponed from 16th October to 27th November, then to 22nd January 1958 and again to 12th March 1958. On this last mentioned date—the report of the Government Analyst not having been received by the court even then—the Magistrate, observing that " four dates of trial are enough punishment to the accused who are husband and wife and who have to come a distance of 14 miles to court " made order " discharging " the accused. It is this order that Sansoni J. held to be a discharge only and not amounting to an acquittal, and I would like to say that I am in respectful agreement with his decision. The forwarding of substances produced in court to the Government Analyst or other public officer for examination or analysis and report is contemplated by the Code, and where as in *Kiri Banda's case* the Magistrate had agreed to and did in fact forward a specimen of the production himself there was some duty in him to secure the obtaining of the report and/or the evidence of the Government Analyst. The prosecution was not responsible for the failure of the Analyst to send the report to court, a report which was called for by the Magistrate, although at the instance of the prosecution. In the circumstances of that case I do not think

[1] *(1942) 44 N. L. R. 73.* [2] *(1958) 60 N. L. R. at 335.*

it could seriously have been contended that the end of the prosecution case had been reached. The Magistrate had not even called upon the prosecution to lead its other evidence, i.e., evidence in regard to possession on the part of the accused. The delay in obtaining reports from the Department of the Government Analyst is well known, but the causes of that are often beyond the control of the staff of that Department. I venture to express the suggestion that, as these reports are considered essential for the purposes of a prosecution, it would not be against the interests of justice to fix the date of trial only after the report has been received by the court.

The rule to be applied in circumstances similar to those met with in *Kiri Banda's case* in deciding whether a particular order is a discharge under section 191 or an acquittal under section 190 appears to me to be well expressed in the words of De Sampayo, J. in *Senaratne v. Lenohamy*[1] :—

> "The words 'at any previous stage of the case' (in section 191) to my mind import that all the evidence for the prosecution, as contemplated by section 190, had not been taken. But if the prosecutor has put before the court all the evidence which is available to him, or, which he is allowed a reasonable opportunity to produce, the accused will be entitled to demand a verdict at the hands of the Magistrate instead of an inconclusive order of discharge, so that he may not be vexed again."

The observations I have reproduced above were cited with approval by Nagalingam, A.C.J. in *Adrian Dias v. Weerasingham*[2], a summary case where the prosecutor was not ready to proceed with his case on the date of trial even after he had been given ample opportunity to place his evidence. In principle, the case of *Don Abraham v. Christoffelsz*[3], a decision by the same judge, is no different. Gunasekara, J. in *Edwin Singho v. Nanayakkara*[4], in following these last-mentioned two cases, observed in the course of his judgment that "the end of the case for the prosecution" referred to in *The King v. William* (*supra*) may, then, be reached without any evidence being taken, in a case where the prosecution informs the court that it offers no evidence. He found no conflict between the decision of the Court of Criminal Appeal and the decisions of Nagalingam, A.C.J. in the two cases he followed, a view with which I respectfully agree.

The case before me is a stronger one than any of the reported cases. Here on the fourth date of trial, a specially fixed date, by which is ordinarily meant a date on which the case will be given priority over other cases in the order of hearing, the prosecuting officer and the witnesses for the prosecution all chose to be absent without any attempt at excuse or explanation for their conduct. In these circumstances the prosecutor can not unfairly be said to have been given reasonable opportunity to

[1] *(1917) 20 N. L. R. at 50.*
[2] *(1953) 55 N. L. R. 135.*
[3] *(1953) 55 N. L. R. 92.*
[4] *(1956) 61 N. L. R. 22.*

produce his evidence and had failed to do so. If so, there is no reason why the appellants should be precluded from maintaining that they are not liable to be vexed again.

Learned Crown Counsel contended that an order of acquittal within the meaning of section 190 can be recorded only after taking the evidence for the prosecution and the defence (if any evidence is tendered by the defence). While I am free to concur in the proposition contended for, I must add that when the section refers to taking the evidence for the prosecution it must mean taking such evidence as is tendered by the prosecution.

I do not think it is necessary to enter on this judgment into a discussion as to whether an acquittal to form the basis of a successful plea of " autrefois acquit " must be an acquittal on the merits. In a recent case, *Attorney-General v. Piyasena* [1] I made some observations *obiter* on that question, but it is right to add that Mr. De Silva in this case was content to assume for the purpose of his argument here that an acquittal implies an acquittal on the merits. The question can be left to be authoritatively decided, if it arises, on a suitable occasion in the future.

In my opinion the order of 14th June 1961 made in case No. 38595 amounted to an acquittal of the accused. Acting in revision, I set aside the order made on 18th January 1962 and direct that the plea of " autrefois acquit " raised be upheld.

Order set aside.