1959 *Present :* **H. N. G. Fernando, J.**

THE ATTORNEY-GENERAL, Appellant, *and* M. D. J. SILVA, Respondent

S. C. 453—M. C. Kurunegala, 32206

Charge—Summary procedure—Failure to frame charge properly—Discovery of it after closure of defence—Resulting position—Criminal Procedure Code, ss. 187, 190.

Where, in a summary trial, after the closure of the case for the prosecution and the announcement by the defence not to lead evidence, it was discovered that the so-called " charge sheet " was a mere blank form which contained no charge but only the record of the accused's plea of not guilty—

Held, that the proper order which the Magistrate could have lawfully made at that stage was one of acquittal under section 190 of the Criminal Procedure Code.

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

Ananda Pereira, Crown Counsel, for the Attorney-General.

A. H. C. de Silva, Q.C., with *M. M. Kumarakulasingham,* for the Accused-Respondent.

Cur. adv. vult.

April 24, 1959. H. N. G. FERNANDO, J.—

The accused in this case was alleged to have committed certain offences against the Betting on Horse-Racing Ordinance. A report in that behalf under Section 148 (1) (*b*) of the Criminal Procedure Code was made to the then Magistrate of Kurunegala on 18th June 1957, and a

[1] *(1941) 42 N. L. R. 411.*

charge was framed on the same day, but the trial was postponed more than once, apparently upon application made by the prosecution. On 31st January 1958, the prosecution successfully moved to amend their plaint and a fresh report under Section 148 (1) (*b*) was filed. The same Magistrate then recorded the evidence of the Police Officer (who filed the report), and thereafter made the following entry on the record :—" The accused is now charged from the amended charge sheet. He states ' I am not guilty '. Trial on 24.3. " On that date, the trial was again postponed for 12th May 1958, also upon an application by Crown Counsel. The evidence for the prosecution was heard on 12th May and on 18th June by the new Magistrate and the case for the prosecution was closed.

The accused was then called upon for a defence, but no evidence was led on his behalf, and the accused's counsel addressed the Magistrate on the facts. The learned Magistrate thereafter discovered that the so-called " amended charge sheet " was a mere blank form which contained no charge, but only the record of the accused's plea of not guilty, and invited the assistance of Crown Counsel in the situation that had arisen. Crown Counsel apparently argued that Section 187 of the Code does not require a charge to be written, that although in this case the Magistrate was bound to frame a charge himself and not merely to read particulars from the police report, he could nevertheless have framed it " mentally ", and that (having so framed it) he had in reciting such a charge to the accused complied with his duty (Section 187 (3)) to *read* the charge to the accused. This argument was properly rejected by the Magistrate. It is quite ridiculous to suggest that anything can be *read* which is not already in writing or in print. In the result, no charge was framed and read to the accused and Section 425 (also relied on by the Crown Counsel) does not assist to cure the omission—*Ebert v. Perera*[1]. Indeed the Attorney-General on his present appeal does not adopt any of these arguments.

In these circumstances, the learned Magistrate decided that he had no alternative but to make an order of discharge, and this appeal is against that order. The position for the Crown now is that when the Magistrate who tried the case discovered his predecessor's failure duly to frame and read the charge he should himself have treated the proceedings as null, have framed and read a charge to the accused and then proceeded to hold a fresh trial. The reported case to which I have referred above appears indirectly to support this contention. There, there had been a trial and a conviction in a case where the Magistrate had, instead of framing the charge himself, irregularly read a statement of the offence from the police report. This Court quashed the conviction but remitted the case for further proceedings ; so that in effect this Court sanctioned the framing of a fresh charge and a subsequent trial. The correctness of such a course is however rendered doubtful by reason of the fact 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 and the leading of defence evidence or the announcement of the defence not to lead evidence.

[1] *(1922) 23 N. L. R. 362.*

I have referred in a recent judgment in the case of *Premadasa v. Assen* [1] (Unreported) to other decisions of this Court which have taken note of the consequences of the absence from the Code of such express provision. I agree that the question whether an order of discharge, *and not of acquittal* could properly be made in the circumstances of the present case is one which would merit consideration by a fuller bench. But the history of this case as outlined in the opening paragraph of this judgment will show that a charge of a comparatively minor nature has been pending against the accused for nearly two years. Considering also the Magistrate was not himself invited by the Crown to take fresh proceedings I am not disposed to order that the accused be again put in peril of conviction. In accordance therefore with the view I have expressed in the unreported judgment I shall regard the Magistrate's order of discharge as entered under Section 190 and as being the only lawful order that could have been made. I therefore dismiss this appeal.

I feel compelled in conclusion to condemn most severely the practice (I do hope it has been rare), the existence of which has been revealed in this case. Ennis, J., pointed out in *Ebert v. Perera* (supra) that " the formulation of the charge or statement in a summons or warrant on a review of the facts by an independent person is, in my opinion, a fundamental principle in our criminal procedure . . . . ". It is in consonance with that fundamental principle that Section 187 (1) directs the *Magistrate himself* to frame a charge in a case where the accused appears otherwise than on summons or warrant. The Proviso to Section 187 (3), in permitting the use of the particulars stated in the police report in a case of minor importance, lends emphasis to the earlier substantive requirement that the Magistrate must bring an independent mind to bear on the matter of the formulation of the charge and not rely on a report drafted by some other person. Such a requirement was surely disregarded when the Magistrate in this case hastily stated some particulars to the accused without troubling to make any contemporaneous record of what he stated or was about to state. One has no means of ascertaining what was stated to the accused by the Magistrate when he purported to read a charge to the accused. If his intention was that the blank form would be filled up later, what guarantee was there that the particulars filled in subsequently would be identical with the particulars which he read to the accused ? It is fortunate that the Magistrate or his clerk failed to carry out the illegal intention to rectify in chambers or in the office the slipshod procedure which had been adopted on the bench. But for that failure the illegality might well have passed unnoticed.

Appeal dismissed.

[1] *S.C. 795/58, M.C. Colombo No. 3554/c, (S. C. Minute of 19.3.59) [60 N. L. R. 451]*