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

Y. M. PREMADASA, Appellant, *and* T. E. R. ASSEN (Inspector of Police), Respondent

S. C. 795—M. C. Colombo, 3,554/C

Autrefois acquit—*Ingredients necessary—Is the plea available only if the previous acquittal was on merits?—Criminal Procedure Code, ss. 171, 172, 190, 191, 194, 330 (1).*

To maintain the plea of *autrefois acquit* under section 330 (1) of the Criminal Procedure Code it is not always necessary that the previous acquittal should be based on an adjudication on the merits of the case.

Where a first trial had been held up to the stage of the closure of the prosecution case and the accused was "discharged" solely on the ground that the charge was framed under a wrong statute, the plea of *autrefois acquit* can be maintained if the accused is prosecuted subsequently, under the correct statute, for the same offence.

[1] *(1956) 59 N. L. R. 476.*

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

M. M. Kumarakulasingham, with *Malcolm Perera*, for the accused-appellant.

J. A. D. de Silva, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 19, 1959. H. N. G. FERNANDO, J.—

The appellant was on the 18th of November, 1958, convicted by the Magistrate of Colombo of an offence punishable under the Explosives Act, No. 21 of 1956. The only point argued at the appeal is one of *autrefois acquit*.

On 20th January, 1958, a report was filed in terms of Section 148 (1) (*b*) of the Criminal Procedure Code alleging that this appellant had been in possession of fireworks in contravention of the Explosives Regulations, 1957, and had thereby committed an offence punishable under Section 27 (1) of the Explosives Act, *No. 21 of 1957* ; a charge framed in corresponding terms was read to him by the Magistrate on the same day. The trial took place on 12th March, 1958, on which day the case for the prosecution was closed and the appellant gave evidence in his defence and was also cross-examined. At this stage, the Magistrate noticed that the charge was erroneous, because the Explosives Act is Act No. 21 of *1956* and not No. 21 of 1957, which is a statute upon quite a different subject. The Magistrate then made order, stating that the charge was " absolutely wrong " and " should have been made under Section 27 (1) of the Explosives Act, No. 21 of 1956 ", and discharging the appellant. The present conviction was entered after a second trial which was held after a new (and correct) report had been filed and after the correct charge, i.e., in relation to the Act of 1956, had been framed against the appellant.

The comparatively recent decision of Nagalingam, J., in *Gunaratne v. Hendrick Appuhamy* [1] was given in circumstances very similar to those which existed in the present case. The accused, a pawnbroker, was alleged to have charged an excessive amount as interest or profit upon a loan made by him on the pledge of a gold ring. By error, he was in the first instance charged with an offence punishable under Section 8 of Cap. 75 of the Legislative Enactments. At the time of the alleged offence, Cap. 75 had been repealed and the relevant new statute was Ordinance No. 13 of 1942. After the case for the prosecution had been closed, this error was pointed out to the Magistrate who thereupon discharged the accused.

[1] *(1950) 52 N. L. R. 43.*

The correct charge (i.e., under Section 17 of the new Pawn Brokers Ordinance) was framed in a subsequent prosecution of the accused and on that occasion the plea of *autrefois acquit* was upheld by the Magistrate, who acquitted the accused. The order of acquittal was affirmed on an appeal to this Court taken by the Crown. Nagalingam, J., observed that the conduct alleged did constitute an offence because it was conduct prohibited by Section 17 of Ordinance 13 of 1942 and that the wrong understanding on the part of the prosecutor of the provision of law under which the accused could have been punished did not have any effect on the offence committed. In the second prosecution the act he was alleged to have committed was the same act which was the subject of the first prosecution. Reference was made in the judgment to the principle said to be applicable under the English Law that the plea of *autrefois acquit* is only available if in the earlier proceedings the accused had been in peril of being convicted. With respect to this matter Nagalingam, J., referred to the observation of Basnayake, J., in *Solicitor-General v. Aradiel* [1] that " Section 330 (1) is self contained and the question whether a plea under that section is sound or not had to be determined on an interpretation of that section ".

My own view of the matter is that if in any particular situation some provision of the Code requires an order of acquittal to be made, then the order has necessarily to be made. Neither the consideration that there has not been an adjudication on the merits, nor the circumstance that Section 330 will apply consequent upon acquittal, can in my opinion afford any justification for construing the word " acquit " or " acquittal " to mean a discharge. For present purposes I am content to point out that the judgments of the majority of the Court in *Senaratna v. Lenohamy et al.* [2] make no reference whatever to Section 194. The effect of that section is that if a Magistrate having properly declined to adjourn a hearing when the complainant does not appear makes an order of acquittal and thereafter properly declines to cancel his order (if cancellation is sought), then the order of acquittal will be a bar to a subsequent prosecution. Section 194 affords to my mind a perfect example of what may (to use the language of Wood Renton C.J.) " be entirely contrary to the public interest that an accused person should be absolved for ever from all further proceedings against him in respect of the offence that formed the subject of the original charge ".

Nevertheless that is the law under our Criminal Procedure Code, and it would not seem strange to me to find that other situations similar to that envisaged in Section 194 should also result in orders of acquittal having the effect declared by Section 330.

Nagalingam, J., thought fit to distinguish the decision in *Perera v. Johoran* [3]. That was a case of a prosecution for a contravention of a price control regulation. The accused had originally been charged for an offence alleged to have been committed in breach of a regulation which had been repealed prior to the date of the alleged offence. On appeal

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

[2] *(1917) 20 N. L. R. 44.*

[3] *(1946) 47 N. L. R. 568.*

against this conviction (vide *Perera v. Johoran* [1]). Canekeratne, J., held that because the regulation had been repealed the proceedings were a nullity and therefore quashed the conviction. In doing so he said " I quash the conviction and leave it to the authorities, if so advised, to take any action against the accused ". Subsequently the accused was again charged, on this occasion with a breach of the relevant new regulation which had been in force at the relevant time. The accused was again convicted, and on appeal, Dias, J., rejected the plea of *autrefois acquit*, relying to some extent on the English principle that there must be an acquittal on the merits. He interpreted the earlier order of Canekeratne, J., to be mere discharge and not an acquittal. With great respect it seems to me that the circumstances with which Dias, J., had to deal were no different from the circumstances in the case before Nagalingam, J. In each case the error of the prosecution was to frame the charge as under a repealed law, and in each case a first trial had been held up to the stage of the closure of the prosecution case. In neither case could there have been a " discharge " properly so called because there is no provision in the Code which enables a Magistrate to make an order of discharge after the closure of the case for the prosecution. Section 190 provides for a verdict either of acquittal or of guilty after the evidence for the prosecution has been taken, and in my opinion the accused is by law entitled to such a verdict. Section 191 only preserves the right of a Magistrate, for reasons given, to discharge an accused at *any previous stage of the case.*

Accordingly, as was pointed out by Basnayake, J., in *Solicitor-General v. Aradiel* [2], there is no power for a Magistrate to make an order of discharge *simpliciter* where the case for the prosecution has been closed and the defence has either called evidence or announced that no evidence is being called.

It seems to me that, in the case of the first prosecution instituted against this appellant, recourse might well have been had to Section 171 or to Section 172, either to disregard or else to correct an error in the charge which appears to have been quite innocuous to the defence ; but since no attempt was made at the proper time to utilize the provisions of law which might have been available, the question of their applicability does not now arise.

For these reasons I am of opinion that the order made at the first trial amounted to an order of acquittal under Section 190, despite the fact that the Magistrate purported to " discharge the accused " (*J. H. Wanigasekera v. K. Simon* [3]). The plea of previous acquittal has therefore to be upheld. I accordingly quash the conviction and acquit the accused.

Appeal allowed.

[1] *(1945) 46 N. L. R. 333.*

[2] *(1948) 50 N. L. R. 233.*

[3] *(1956) 57 N. L. R. 377.*