1946 *Present :* **Soertsz A.C.J.**

FERNANDO, Petitioner, *and* RAJASOORIYA, INSPECTOR OF POLICE, Respondent.

Application for revision in M. C. Colombo, 14,240 (185).

Plea of autrefois acquit—*Requirement of a decision upon merits—Criminal Procedure Code, s. 330.*

The accused had been discharged by Court because the prosecuting officer had not led any evidence at the trial owing to the absence of the principal witness. He was subsequently prosecuted again by the same officer for the same offence and on the same facts.

Held, that the plea of *autrefois acquit* was not available to the accused. A decision upon the merits is essential for a valid plea of *autrefois acquit.*

APPLICATION for the revision of an order of the Magistrate s Court, Colombo.

Proceedings were instituted under section 148 (1) (*b*) of the Criminal Procedure Code against the accused in case No. 9,546 charging him under section 158 of the Penal Code with accepting illegal gratification. On the trial date the prosecution moved for a postponement on the ground that the principal witness for the prosecution was absent. The Magistrate refused to grant a postponement and called upon the prosecuting officer to proceed with the case with the available evidence. The prosecuting officer stated that he could not proceed with the case. The Magistrate thereupon discharged the accused.

The same prosecuting officer subsequently filed the present case No. 14,240 against the accused charging him with the same offence and on the same facts. The accused raised the plea of *autrefois acquit*. The learned Magistrate made order that the order of discharge entered in case No. 9,546 could not support the plea of *autrefois acquit* and that the case should proceed to trial on its merits.

H. V. Perera, K.C. (with him *U. A. Jayasundera* and *L. G. Weeramantry*), for the accused, petitioner.

E. L. W. de Zoysa, C.C., for the Attorney-General.

Cur. adv. vult.

August 1, 1946. SOERTSZ A.C.J.—

This application for revision raises a question with which we have had to deal before. To mention two cases, there was *Gabriel v. Soysa* [1] in which Garvin J. appears to have taken the view *obiter* that a Magistrate may enter a verdict of acquittal before hearing all the evidence the prosecution may have to offer in support of its case. He said of a contention to the contrary that " such a view of the section would deprive the Magistrate of the power to control the course of the trial ", because, he observed, the words of section 190 do not " compel a Magistrate to record the evidence of every witness for the prosecution no matter how numerous they may be merely because the prosecution tenders them." In regard to the first of these observations, I ventured to point out in the case of *Sumangala Thero v. Piyatissa Thero* [2] that the Magistrate has the power to control the trial by *discharging* the accused if he is of the opinion that it would serve no useful purpose to proceed any further with the case or, if he prefers to make an order of acquittal, he should be able to rule out any other evidence available to the prosecution for some good reason pertaining to the admissibility or relevancy of evidence. In such a case, there is a decision upon the merits and such a decision is essential for a valid plea of *autrefois acquit*. This view is supported by good authority. Spencer Bower relying upon many decisions of the English Courts, to which he makes reference, observes as follows in his treatise " The Doctrine of *Res Judicata* " at pages 32 and 33 : " Thus the dismissal of a summons, complaint or charge by a Court of summary jurisdiction, if expressly stated by the Court, or shown by evidence properly receivable to have proceeded upon a consideration of the merits, is a judicial decision of the innocence of the alleged offender . . . .

[1] *(1930) 31 N. L. R. 314.* [2] *(1937) 39 N. L. R. 265.*

But where the dismissal did not purport to have been or, was not in fact, founded upon a consideration of 'the merits' even in the largest and most liberal sense of that somewhat elastic expression, it is not deemed to involve, or necessarily to involve, any adjudication of the innocence of the accused. Thus, when the complainant deliberately absented himself from the Court on the hearing of the summons . . . . and the defendant attended at the hearing and made a statement and obtained a dismissal of the summons . . . . it was held that the dismissal . . . . did not have the effect of a judicial decision that no assault had been committed."

In this case too, there was no adjudication upon "the merits" of the charge. The Magistrate expressly discharged the accused and, in reality, there was no more than a discharge of the accused, that is to say, a discontinuance of the proceedings against him. I should wish to make it clear, however, that, if I may respectfully say so, the decision of Garvin J. in *Gabriel v. Soysa (supra)* is unexceptionable, for there was in that case a decision upon the merits for the reason that, the warrant being held to have been defective, no amount of evidence led by the prosecution to show that there was resistance could have been of any avail to the complainant. The accused were, in law, entitled to resist an unlawful arrest. My disagreement is with some of the observations made by Garvin J. I refuse the application for the revision of the Magistrate's order.

Application refused.