

Present: De Sampayo J.

1916.

DAVIDSON v. APPUHAMY.

245—P. C. Badulla-Haldummulla, 8,290.

Order of discharge under Criminal Procedure Code, s. 191—May Magistrate re-open proceedings?—Autrefois acquit.

A discharge under section 191 of the Criminal Procedure Code does not amount to an acquittal. Although the order of discharge cannot be availed of for the plea of *autre fois acquit* in the event of a fresh prosecution, it is final, and determines the prosecution in which it is made; the Magistrate has no power to re-open the proceedings in the same case.

THE facts are set out in the judgment.

E. W. Jayewardene, for accused, appellant.

Dias, C.C., for the Crown.

February 10, 1916. DE SAMPAYO J.—

In view of the order which I am obliged to make on this appeal, it is not desirable that I should express any opinion on the merits of the case. The appellant, Punchi Appuhamy, and one Caldera Baas, were arrested and produced before the Court on a charge of theft of three corrugated iron sheets belonging to the Badulla Railway Extension. These sheets, together with a number of others,

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were found in the possession of the appellant, who stated that he got them from Caldera Baas. The Police Magistrate examined Appu Singho, the town arachchi of Haputale, who had acted in the matter on the complaint of the Railway authorities, and upon that evidence a charge of theft was framed against both the appellant and Caldera Baas. The latter, in answer to the charge, pleaded "not guilty," but stated: "I lent these corrugated sheets to D. M. Punchi Appu (the appellant), to be returned to me. The sheets were purchased from Messrs. Walker & Greig, at Haputale. They were not railway sheets". Thereupon the Magistrate thought there was no reason to proceed against the appellant, and discharged him, and postponed the case against Caldera Baas. The case next came before another Magistrate, who, after examining the Resident Engineer of the Railway, thought that the appellant should be brought before the Court again. Accordingly summons was issued on the appellant, and he having appeared on the day appointed, the case proceeded against himself and Caldera Baas. The Magistrate heard further evidence, and at the conclusion of the trial he held that Caldera Baas in his original statement had meant to refer to some sheets which were not the subject of the charge, and acquitted him, but he convicted the appellant and sentenced him to three months' rigorous imprisonment.

The order of discharge of the appellant by the previous Magistrate must be taken to have been under section 191 of the Criminal Procedure Code. Section 190 provides for the entry of a verdict of acquittal if, after taking the evidence for the prosecution and the defence, the Magistrate finds the accused not guilty, and then section 191 enacts: "Nothing hereinbefore contained shall be deemed to prevent a Police Magistrate from discharging the accused at any previous stage of the case".

All the authorities are agreed that a discharge under section 191 does not amount to an acquittal. (*In re V. C. Vellavarayan*,¹ *K. V. Podi Singho*.²) But these authorities are also agreed that although the order of discharge cannot be availed of for the plea of *autrefois acquit* in the event of a fresh prosecution, it is final, and determines the prosecution in which it is made, and that the Magistrate has no power to re-open the proceedings in the same case. I concur in this view, and I think that the conviction in this case is irregular and cannot stand.

The conviction is therefore set aside. I must add that, in the event of a fresh prosecution, it is only fair that the case should come before another Magistrate.

Set aside.

¹ (1903) 2 Bal. 20.

² (1907) 3 Bal. 206.