1917.

[FULL BENCH]

Present : Wood Renton C.J. and Ennis and De Sampayo JJ.

SENARATNA *v.* LENOHAMY *et al.*

724—P. C. Negombo, 10,757

Criminal Procedure Code, s. 191—Summary trial—Discharge—Is it a bar to fresh proceedings ?

Per WOOD RENTON C.J. and DE SAMPAYO J. (ENNIS J. *dissentiente*).—The discharge of an accused without trial under section 191 of the Criminal Procedure Code is no bar to the institution of fresh proceedings in the same case: Where, therefore, in a summary case, the accused, after he had pleaded to the charge, was discharged, as the complainant's witnesses were absent on the day fixed for the hearing, and as he was not ready to go on without them—

Held, that the discharge was not a bar to fresh proceedings.

ENNIS J.—An order of discharge after the accused has been called upon to plead must be deemed to be an order of acquittal, from which the Attorney-General is entitled to appeal within twenty-eight days, and the absence of the appeal makes the order conclusive.

IN this case the accused were charged with the theft of three heaps of unthreshed paddy, which had been seized and advertised for sale under the provisions of the Police Ordinance, 1865, and with having voluntarily obstructed the complainant, who is a Vidane Arachchi, in the discharge of his public functions. The Police Magistrate discharged them without trial, on the ground that they had already been charged for the same offence in P. C. Negombo, 10,045, and had been discharged under section 191 of the Criminal Procedure Code. The Solicitor-General appealed. The case was reserved for argument before a Bench of three Judges by Ennis J. by the following judgment:—

September 17, 1917. ENNIS J.—

In case No. 10,045 of the Police Court of Negombo proceedings were instituted against the present respondents and another, by the Vidane Arachchi of Udugampola, by presenting a complaint to the Court (section 148 (*b*), Criminal Procedure Code). A summons was issued, and on April 30, 1917, on the appearance of the accused, a statement from the summons (deemed to be the charge, section 187 (2) was read to the accused, to which the present respondents

pleaded not guilty. The complainant was not ready to proceed with the trial, and the Magistrate, acting under section 289 (5), refused an adjournment, as he was not satisfied that reasonable efforts had been made to secure the attendance of witnesses, and he discharged the present respondents by an order under section 191. An order under section 191 is an appealable order (*Gooneratne v. Barnado*,[1] and the present appeal is an instance), but no appeal was presented.

On July 30, 1917, the Vidane Arachchi presented a new complaint of the same offence, and summons issued in a new case, No. 10,757. At the hearing the previous proceedings were brought to the notice of the Court, which thereupon discharged the accused, holding that new proceedings could not be instituted, as they were virtually a revival of the old proceedings which had been finally closed by an order under section 191, from which no appeal had been taken. The Solicitor-General appeals on the ground that a discharge under section 191 did not amount to an acquittal, and was, therefore, no bar to fresh proceedings. In support of the appeal the cases of *Davidson v. Appuhamy* [2] and *Vellavarayam's case* [3] were cited. Neither of these cases is a direct authority for the appellants' contention. *Davidson v. Appuhamy* [2] decided that the old proceedings could not be re-opened, while *Vellavarayam's case* [3] was an application for a writ of prohibition. Both cases, however, suggested the possibility of fresh proceedings on a fresh complaint in a new case with a new number. The point, however, did not arise in either case. It seems to me to be highly technical, and that the learned Magistrate in the present case is right in saying that such fresh proceedings are virtually a revival of the old.

The word " discharge " is defined in the Code to mean " the discontinuance of criminal proceedings against an accused, but does not include an acquittal," and the argument is that, inasmuch as it is not an acquittal, an accused cannot in a new trial avail himself of the provisions of section 330, by which the rule, that no person is to be tried twice for the same offence, is enunciated. That section refers only to cases where an accused has been convicted or acquitted, and makes no mention of a discharge. A discharge is the proper order to make when the Magistrate stops the proceedings without making any order of acquittal or conviction (section 196). It may have the effect of an acquittal, as when an accused is discharged from custody on an offence being compounded (section 290 (5)), and it does not have that effect when the discharge is ordered in the course of an inquiry held by a Magistrate preliminary to trial by a higher Court (section 157 (2)). Section 191, which provides for orders of discharge during the trial, *i.e.*, after the charge has been framed, is silent as to the effect of the order.

[1] *2 Bal. 32.*

[2] *(1916) 19 N. L. R. 57.*

[3] *(1903) 7 N. L. R. 116.*

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It is to be observed that the meaning assigned to " discharge " in the definition does not apply when a different intention appears from the subject or context. The subject of section 330 is the rule that no person is to be tried twice for the same offence. It seems to me that where a person has been discharged before trial, *i.e.*, at any stage before the framing of a charge as in section 151, the subject of section 330, *i.e.*, a second trial, does not arise, as there has been no first trial. But when a person has been put on his trial and has been called upon to answer a charge, the position is one which falls within the subject of section 330, and, but for the definition of discharge, the words are wide enough to cover any order finally stopping proceedings after an accused has been put on his trial. (It is to be observed that the Indian equivalent to section 330 has an explanation as to when an order of discharge is not an acquittal for the purposes of the section.) The intention of the section must be looked for in the express provisions of the Code for relief against wrong orders. The first is appeal, and there is an appeal from any final order. Whenever there is an intention to do away with the necessity of an appeal or to bar an appeal, express provision is found in the Code. For instance, section 391 enacts that whenever a Police Court discharges an accused under the provisions of section 157 the Attorney-General may direct the Magistrate to commit the accused for trial, or may order him to re-open an inquiry. It is to be observed that this remedy is available only when the Magistrate has discharged the accused under section 157, *i.e.*, when the Magistrate is making an inquiry preliminary to trial by a higher Court. Further, we find, in an explanation to section 338, that a discharge under section 157 is not a final order and is therefore not appealable.

I find it difficult to believe that there was an intention to allow an appeal from a discharge under section 191 and to allow the appellant on a failure of the appeal to re-open the case by presenting it again on a fresh piece of paper. The provisions for appeal and the provisions for intervention by the Attorney-General when there is no appeal, in my opinion, go to show a contrary intention.

To me the definition of " discharge " is peculiar. The words might cover a conviction which is a final order stopping proceedings (as defined). The word " discharge " is not found in section 330, which uses the words " conviction " and " acquittal." There is nothing to prevent the word acquittal including an order of discharge, even if an order of discharge does not include an acquittal. In view, however, of the finding in *Rex v. Podi Singho*,[1] I would refer this case for the decision of three Judges.

Obeyesekere, C.C., for the appellant.—A " discharge " is not an acquittal; see definition of the term, section 3, Criminal Procedure Code. If in this case fresh proceedings cannot be taken against the accused, the discharge will have the same effect as an acquittal

[1] *(1907) 3 Bal. 206.*

When an accused is discharged under section 191 of the Criminal Procedure Code, though the same case cannot be re-opened, fresh proceedings may be instituted. *See Rex v. Podi Singho.*[1] Counsel also referred to *Davidson v. Appuhamy.*[2]

A. St. V. Jayewardene, for the respondent.—Under the circumstances of this case the discharge is a bar to further prosecution, whether in the former case or in a fresh proceeding. Counsel referred to *7 N. L. R. 116, 2 Bal. 20.*

If the order of discharge in the former case was wrong, the proper procedure was to have appealed against that order. See *2 Bal. 32.* If it be held that fresh proceedings may be taken for the same offence, it may happen that the complainant may, even after he has failed in an appeal against an order of discharge, institute fresh proceedings.

Cur. adv. vult.

October 2, 1917. ENNIS J.—

On the re-hearing of this appeal before the Full Court, the only argument which impressed me was the fact that the Ceylon Code allows of an accused being called upon to plead to a charge in certain summary cases before any evidence whatever has been led, *i.e.*, a summons may be issued on a complaint (section 149 (2)) by a police officer, and section 187 (2) provides that, in certain cases, a statement of the offence may be read from the summons and the accused asked to plead. In such a case there is no sworn evidence, and the question as to whether or not an order for discharge can be deemed to be an acquittal seems to me to turn on the question whether or not the accused is entitled to an acquittal. Section 194 prescribes the proper order to be made on failure of a complainant, other than a police officer, to appear. In such a case section 149 prescribes that the complaint must be heard on oath before summons issued, and section 194 prescribes that the order must be one of acquittal. Sections 190, 191, and 196 seem to be the only sections prescribing the order to be made when the complainant is a police officer, and summons has issued possibly without any sworn statement. Under section 196 the Magistrate may discharge the accused with the previous sanction of the Attorney-General. In the present case, however, the order of discharge does not come under that section. It has not been made with the previous sanction of the Attorney-General, but consequent upon the Magistrate being of opinion that reasonable efforts had not been made to secure the attendance of witnesses (section 289 (5). One witness, namely, the complainant Police Vidane, was present, and could have been examined, but was not, as he was not ready to proceed with the trial. In my opinion the proper order for the Magistrate to

[1] *(1907) 3 Bal. 206.*

[2] *(1916) 19 N. L. R. 57 and 31 Mad. 543.*

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have made in such circumstances was an order of acquittal, as if the complainant's evidence had been recorded and there were no more evidence forthcoming. The fact that the complainant's sworn statement is dispensed with before the issue of a summons, in the case of a police officer being the complainant, practically substitutes the report for the sworn statement, and it must further be remembered that even a statement sworn to before the issue of summons is not evidence against an accused until it has been read over to the witness in the presence of the accused.

Section 289 (5) is imperative. " No inquiry or trial in a Police Court shall be postponed or adjourned on the ground of the absence of a witness, unless the Magistrate has first satisfied himself that the evidence of such witness is material to the inquiry, and that reasonable efforts have been made to secure his attendance." It is clear that the intention of the Legislature was that inquiries and trials should be conducted without undue delay. No Police Magistrate can remand an accused for more than fourteen days in the event of a postponement being granted, yet it is urged that the Attorney-General can obtain what is in effect an indefinite postponement by an order for discharge. In the present case a new complaint was filed three months after the original complaint. In my opinion an order of discharge after the accused has been called upon to plead must be deemed to be an order of acquittal, from which the Attorney-General is entitled to appeal within twenty-eight days (section 338), and the absence of appeal makes the order conclusive.

I am strongly of opinion that once an accused is called upon to plead there is a trial; in the present case one of the accused pleaded guilty at that trial and was convicted, and an accused is entitled to an order of acquittal if the prosecution fail to adduce evidence to secure a conviction. The only exceptions to this, in my opinion, are to be found in sections 196 and (possibly) 388, when an order for discharge can be made with the consent, or by direction, of the Attorney-General.

The terms of section 191, in my opinion, support this view. " Nothing hereinbefore contained shall be deemed to prevent a Police Magistrate from discharging the accused at any previous stage of the case. " The " stage of the case " as to which the section speaks is clearly " the trial.....where a Police Court has power to try summarily." Sections 187 to 190 deal with the trial, and " the previous stage of the case " must refer to proceedings before trial, *i.e.*, before the accused has been called upon to plead.

In my opinion the proper order for the Magistrate to have made in the original case was an order of acquittal, that the order made must be deemed to be an order of acquittal, and that the appellant is entitled to the benefit of section 330.

I would dismiss the appeal.

WOOD RENTON C.J.—

The accused in this case were charged (i.) with the theft of three heaps of unthreshed paddy which had been seized and advertised for sale under the provisions of the Police Ordinance, 1865,[1] and (ii.) with having voluntarily obstructed the complainant, who is a Vidane Arachchi, in the discharge of his public functions. The learned Police Magistrate discharged them without trial, on the ground that they had already been charged with the same offence in P. C. Negombo, No. 10,045, and had been " discharged," as the complainant's witnesses were not present on the day fixed for the hearing, and he was not ready to go on without them. The Solicitor-General appeals against this order, contending that a discharge of an accused person without trial under section 191 of the Criminal Procedure Code is not an " acquittal " and is therefore, no bar to the institution of fresh proceedings in the same case. The question referred by my brother Ennis for consideration by a Bench of three Judges is whether or not that contention is correct. In my opinion it is. In section 3 (1) of the Criminal Procedure Code " discharge " is defined as meaning " a discontinuance of criminal proceedings against an accused," but as not including " an acquittal." Sections 190 and 191 indicate the course to be followed by a Police Magistrate in summary cases. He has to hear the evidence on both sides, and such further evidence, if any, as he may think fit of his own motion to cause to be produced, and thereafter either acquit or convict the accused (section 190). But express power is given to him " at any previous stage of the case " to " discharge " the accused on recording his reasons for doing so. The Criminal Procedure Code no doubt presents difficulties of construction in this as in other matters. It was based partly on the old Criminal Procedure Code of 1883 and partly upon Indian legislation, and its adaption of the provisions of these enactments is not always either clear or happy. But I cannot think that the meaning of sections 190 and 191 is really obscure. The term " discharge " in the latter section has to be interpreted in the light of its definition in section 3 (1). It imports a final discontinuance of the proceedings from which the accused is discharged, but " does not include an acquittal," and is no bar to the institution of fresh proceedings if this should be considered available. I am not greatly impressed by the argument of the respondent's counsel that if the order of discharge is wrong, the proper machinery for the rectification of the error is an appeal. The order of discharge may be right, and yet, at the same time, it may 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. In my

[1] *No. 16 of 1865.*

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opinion the preponderating weight of authority is in favour of this view of the law. In *In re Vellavarayam*,[1] Wendt J., with whose judgment Sir John Middleton concurred, stated that it had been admitted at the Bar in argument that a discharge under section 191 could not have the same effect as an acquittal in barring a fresh prosecution, although so long as it stood unreversed it would prevent the Magistrate himself from re-opening the prosecution. It appears to me, in spite of the fact that at the close of his judgment Wendt J. said that " apparently " an order of discharge under section 191 would prevent a Magistrate from taking fresh proceedings without the express direction of the Attorney-General, that the rule that he intended to lay down was that the old proceedings cannot be continued till the order of discharge had been set aside, but that the institution of fresh independent proceedings was competent. In *Rex v. Podi Singho* [2] Hutchinson C.J., after an exhaustive examination of the relevant provisions of the Criminal Procedure Code and of the authorities, held that a discharge under section 191 of the Criminal Procedure Code is no bar to a fresh prosecution for the same offence. So far as my recollection goes, that decision has been followed ever since, and it is impliedly recognized as good law in the recent judgment of my brother De Sampayo in *Davidson v. Appuhamy*.[3] In my opinion it should be upheld.

On these grounds I would set aside the order against which the Solicitor-General appeals, and send the case back to be proceeded with in the Police Court in due course.

DE SAMPAYO J.—

I think that *Rex v. Podi Singho* [2] was rightly decided, and that for the reasons stated in that decision a discharge under section 191 of the Criminal Procedure Code will not prevent the accused person from being legally charged again for the same offence in fresh proceedings. The mere use of the word " discharge ", however, will not necessarily amount to an order under that section. Where, for instance, the proceedings are such as to require the Magistrate to record a verdict of acquittal under section 190, an order purporting to be a discharge will in effect be a verdict of acquittal, and will bar further prosecution for the same offence. It will be noticed that section 191 provides that the Magistrate shall record his reasons for discharging the accused, and this, I take it, means that the Magistrate should give his reasons for not deciding on the evidence and arriving at a definite verdict. The words " at any previous stage of the case " to my mind import that all the evidence for the prosecution, as contemplated by section 190, have

[1] *(1903) 7 N. L. R. 116.*

[2] *(1907) 3 Bal. 206.*

[3] *(1916) 19 N. L. R. 57.*

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.

Set aside.