1950 *Present :* **Nagalingam J. and Pulle J.**

ATTORNEY-GENERAL, Applicant, *and* KANAGARATNAM *et al.*, Respondents

S. C. 239—Application in Revision in M. C. Nuwara Eliya, 4,944

Revision—Power of Supreme Court to revise orders of Magistrate in a non-summary inquiry—Criminal Procedure Code (Cap. 16), ss. 5, 356, 357, 358—Effect of words " whether already tried or pending trial "—Courts Ordinance (Cap. 6), ss. 19 (b), 36, 73.

Non-summary inquiry—Duties and obligations of Magistrate vis a vis *the Attorney-General—Scope of power of Attorney-General to issue instructions to Magistrate—Criminal Procedure Code (Cap. 16), s. 390 (2).*

The powers of revision given to the Supreme Court by section 356 of the Criminal Procedure Code should be read with section 19 (*b*) of the Courts Ordinance and section 5 of the Criminal Procedure Code and extend, therefore, to the revision of orders made by a Magistrate in the course of non-summary proceedings, whether such orders were made prior to or subsequent to the presentation of the indictment against the accused.

In a non-summary inquiry, the Magistrate cannot question the validity of an order or instruction issued to him by the Attorney-General under section 390 (2) of the Criminal Procedure Code.

Where, in a non-summary inquiry, the Magistrate directs the prosecution to furnish particulars in order to amplify certain charges, the Attorney-General has the power to direct the Magistrate to proceed with the charges in the form in which they were read out to the accused and without further particulars being supplied by the prosecution. It is not open then to the Magistrate to do anything but carry out the instructions of the Attorney-General.

APPLICATION by the Attorney-General to revise an order of the Magistrate's Court, Nuwara Eliya.

In the course of a non-summary inquiry the Magistrate was of opinion that some of the charges which had been read over to the accused under section 156 of the Criminal Procedure Code did not contain sufficient particulars. He therefore directed the prosecution to furnish further particulars and, on the application of Crown Counsel, the inquiry was postponed. Before the inquiry was resumed the Attorney-General called for the record of the case and, acting under the provisions of section 390 (2) of the Criminal Procedure Code, sent instructions to the Magistrate to proceed with the inquiry on the charges which had already been read over by the Magistrate to the accused.

When the inquiry was resumed it was contended on behalf of the 1st accused (*a*) that the Magistrate had no power to vacate the order which he had already made for further particulars of the charges, (*b*) that if the Magistrate did not have the power, the Attorney-General could not confer that power on the Magistrate by means of instructions. The learned Magistrate then made order that he could not give effect to the instructions of the Attorney-General and that the inquiry should proceed

in respect of the remaining charges. The legality of this order was, thereupon, challenged by the Attorney-General by the present application in revision.

Colvin R. de Silva, with *H. W. Tambiah* and *J. C. Thurairatnam*, for the 1st accused respondent took a preliminary objection to the hearing of the application by way of revision.—There is no " order " in this case capable of revision. What is before the Court are the contents of a transaction which took place between the Magistrate and the Attorney-General. The Magistrate has given to his reasons for not complying with the Attorney-General's instructions the form only of an order. The Supreme Court can only intervene in respect of the consequences in Court of the compliance or non-compliance by the Magistrate of the Attorney-General's instructions.

Assuming there is an " order ", revision does not lie in respect of a case not " already tried or pending trial ". *Vide* section 356 of the Criminal Procedure Code. This is a matter pending preliminary inquiry. Inquiry under Chapter 16 of the Criminal Procedure Code is an inquiry preliminary to the decision whether there should be a trial or not. At such inquiry there is no pleading in respect of a charge. A plea is a necessary concomitant of a trial. A trial cannot be said to be pending in a Court which has no power to try. Nothing can be said to be pending where a third party's decision has to intervene as to whether an indictment should be framed or not.

The " order " sought to be revised in this case, if it is an order, is appealable because it is a final order. Where there is a joinder of charges there are as many inquiries as there are charges, and an order striking out a charge is a final order.

H. W. R. Weerasooriya, Acting Solicitor-General, with *Douglas Jansze*, Crown Counsel, and *Boyd Jayasuriya*, Crown Counsel, for the Attorney-General, applicant.—In regard to the preliminary objection, sections 356 and 357 are not exhaustive of the revisional powers of the Supreme Court. *Vide* sections 19 and 36 of the Courts Ordinance and section 5 of the Criminal Procedure Code.

Once proceedings are instituted a case is pending trial, whether it be a summary or a non-summary case. The Supreme Court has consistently exercised its powers of revision in this manner. See *Alles v. Palaniappa Chetty* [1], *In re Application of Abdul Latiff* [2] and *Costa v. Peris* [3].

In regard to the main application, the duty of framing a charge is on the Magistrate. He cannot delegate this duty to anyone else—*Ebert v. Perera* [4]; *Solicitor-General v. Aradiel* [5].

The Magistrate cannot decline to proceed with the inquiry or make an order of discharge when the prosecution fails to furnish particulars.

Colvin R. de Silva, in reply.—The duty of the Magistrate is to carry into effect the instructions of the Attorney-General " subject to the provisions " of the Code. *Vide* section 390 (2) of the Criminal Procedure

[1] *(1917) 19 N. L. R. 334.*
[2] *(1917) 19 N. L. R. 346.*
[3] *(1933) 35 N. L. R. 326 ; 13 C. L. Rec. 73.*
[4] *23 N. L. R. 362 at 367.*
[5] *(1948) 50 N. L. R. 233 at 235.*

Code. A Magistrate may in appropriate cases disregard instructions which are manifestly in contravention of the provisions of the Code.

A charge, to be valid, requires amplification—Section 169 of the Criminal Procedure Code.

E. D. Cosme, with *O. M. da Silva*, for the 2nd accused respondent.

A. I. Rajasingham, with *C. Kamalanathan*, for the 3rd accused respondent.

Cur. adv. vult.

November 20, 1950. NAGALINGAM J.—

This is an application by the Attorney-General to revise an order dated April 27, 1950, made by the learned Magistrate of Nuwara Eliya, and it focuses attention on the question as to what are the duties and obligations of a Magistrate *vis a vis* the Attorney-General.

A report under section 148 (1) (*b*) of the Criminal Procedure Code was made to the Magistrate by an Inspector of Police complaining that the three respondents and another accused person had committed certain offences which were set out in duly numbered paragraphs and which disclosed no less than fourteen charges. The learned Magistrate gave his mind to the charges, separated the charges which affected each of the accused and read out to each of them as they put in their appearances the charges relevant to each of them. The inquiry was taken up on March 9, 1950, and after learned Crown Counsel opened the case, Counsel for the 1st respondent applied that " the Court will be pleased to direct that it (charge 2) should contain such particulars of the manner of abetment alleged as will give notice to the accused which form of abetment as defined in section 100 of the Penal Code the Crown is relying on " and added that his application extended to " particularisation of the acts of abetment ". Crown Counsel opposing the application stated that it was unnecessary and that he was not prepared to give particulars of the manner of abetment, contending that sufficient particulars had already been furnished in the counts as framed. The learned Magistrate made an order directing the prosecution to give particulars of the abetment in respect of the counts where the respondents were charged with abetment and in the course of the order observed that the remark of Crown Counsel that he was not prepared to give particulars of the manner of abetment rather startled him. Crown Counsel thereupon moved for a date for " consideration to give particulars " and the inquiry was put off for March 15. On the following day, namely March 10, 1950, the Attorney-General called for the record and acting under the provisions of section 390 (2) of the Criminal Procedure Code sent instructions to the Magistrate dated March 16, 1950, in these terms :—

The Magistrate, Nuwara Eliya,

I, Alan Edward Percival Rose, Kt., K.C., His Majesty's Attorney-General for the Island of Ceylon, do hereby, under the provisions of

section 390 (2) of the Criminal Procedure Code, order you to proceed with the inquiry against—

(1) Joseph Jeyeratnam Kanagaratnam,

(2) Jim Albert Navaratnam,

(3) Rengasamy Mutturetty,

(4) Mervyn Kingsley Joseph Koelmeyer,

accused in Case No. 4,944 of your Court, on the charges which have been read over by you to the said accused under section 156 of the Criminal Procedure Code.

Given under my hand at Colombo this 16th day of March, 1950.

(Sgd.) ALAN ROSE,
Attorney-General.

When the inquiry was resumed on March 22, 1950, the learned Magistrate informed Counsel of the Attorney-General's instructions to him, whereupon Counsel for the 1st respondent raised the question of the validity of the instructions by formulating his objection in the form of the following two questions :—

(*a*) Has the Court the power to vacate the order already made ?

(*b*) If the Court has not got the power, can the Attorney-General confer that power on the Court by instructions ?

These questions appear to have been argued at very great length on a subsequent date by Counsel for the respondents and by the learned Solicitor-General for the Attorney-General.

The order on these questions was delivered by the Magistrate on April 27, 1950, in the course of which, after making an observation that " it would appear that there is a duty cast on the Magistrate to consider whether the instructions of the Attorney-General are instructions in terms of the Code ", he ruled:

" By my order of 9. 3. 50, I have held that the abetment charges against the 1st, 3rd and 4th accused (respondents) are not proper and valid charges as they do not conform to the provisions of Chapter 17 of the Code. Therefore the instructions of the Attorney-General to proceed on these charges which have been held by this Court to be not in terms of the Code are instructions which this Court is unable to give effect to. In the result this inquiry as against the 1st, 3rd and 4th accused will proceed on the charges other than the charges of abetment."

The legality and propriety of this order is challenged by the Attorney-General by filing papers in revision. A preliminary objection has been taken to this application on the grounds, (*a*) that this Court has no jurisdiction to entertain the application having regard to the revisionary powers of the Court, and (*b*) that assuming that the Court has, the order made by the Magistrate is one which cannot form the subject of review by this Court.

In support of the first ground, attention was drawn to section 356 of the Criminal Procedure Code which runs as follows :—

> The Supreme Court may call for and examine the record of any case, whether already tried or pending trial in any court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such court.

It was argued that the powers of this Court to call for and examine the record of cases are limited to cases either " *already tried or pending trial* ". The argument was elaborated by putting forward the contention that the term " pending trial " has reference in respect of non-summary proceedings to a stage subsequent to the presentation of the indictment against the accused persons and not to any proceedings had anterior thereto and would not apply to a non-summary inquiry held by a Magistrate under Chapter 16 of the Code.

I am wholly unable to accept this contention. The phrase " whether already tried or pending trial " has been used in the section with a view to comprehend all cases that a Criminal Court may take cognizance of as all cases, whatever their character or nature may be and whatever the stage they may be in, must necessarily fall under the two broad divisions of (*a*) cases that have been concluded, or (*b*) cases that have not been concluded. The word " tried " as used in this section is not to be given a technical or narrow meaning but the popular and broad one in the sense of " disposed of ". A non-summary inquiry before a Magistrate may end in an order of discharge being made therein; the Attorney-General may himself concur in the propriety of the order made by the Magistrate and refuse to re-open proceedings. A party dissatisfied with the order made by the Magistrate would not be liable to canvass the correctness of that order by an application to this Court by way of revision if it be held that the term " already tried " is to be given a technical meaning in the sense in which the word " trial " is used in the headings to Chapters XVIII, XIX and XX of the Criminal Procedure Code. In fact, in practice applications have been made to this Court by parties to have orders of discharge made by Magistrate in non-summary cases revised. In regard to cases triable summarily it was similarly contended by learned Counsel for the respondents that a case could be said to be pending trial only subsequent to the charges being read over by the Magistrate to the accused person.

If these submissions are correct a large class of matters would on the basis of the contention be beyond the purview of this Court to review or rectify—matters in which the Court has consistently and over a long period of years exercised its powers of revision. The learned acting Solicitor-General referred to various such matters, such as the issue by a Magistrate of a warrant in the case of an offence in respect of which summons should issue in the first instance or of a warrant without endorsing bail in a bailable offence (section 51) or of a proclamation in respect of a person alleged to be absconding (section 59) or of a search warrant for a document in the custody of postal or telegraph authorities (section 68 (3)) or of an order requiring a person to execute a bond for

keeping the peace (section 81) or imposing imprisonment for failure to give such security (section 94) or making an order for disposal of property produced at the conclusion of the inquiry or trial (section 413) or of property in respect of which an offence is alleged to have been committed (section 417). In all these cases it may be said that there is no case already tried or pending trial and it would then follow that a party would be without remedy where an error has been committed by a Magistrate. Mr. de Silva, while conceding that such would be the result, however, seeks to surmount the difficulty by putting forward the view that in respect of these the Legislature has provided no remedy and that the true position is that there is a lacuna in respect of these matters. He sought to reinforce his argument by asserting that the question had not arisen before and had in consequence not been considered by his Court. An examination of the reported cases, however, reveals the contrary.

In the case of *Alles v. Palaniappa Chetty* [1] the Magistrate took non-summary proceedings against the accused person and acting under the provisions of the Fugitive Offenders Act, 1881, issued a warrant for his arrest. The accused then applied by way of revision to have the warrant withdrawn on the ground that the Fugitive Offenders Act did not apply to the circumstances of his case. Objection was taken to the application *inter alia* on the specific ground that the non-summary proceedings before the Magistrate did not fall within the class of cases " already tried or pending trial "; Shaw J. repelled the objections in these words :—

> " The powers of revision given to the Supreme Court by sections 21 and 40 of the Courts Ordinance are very wide and general, and in a very recent case, No. 6143, P. C. Colombo, the Chief Justice expressed his opinion that in a proper case they might be exercised in respect of non-summary proceedings."

The case referred to by Shaw J. is that of *In re application of Abdul Latiff* [2] which was argued before a bench of two Judges consisting of Wood Renton C.J. and De Sampayo J., and the former of whom in delivering the judgment of the court observed:

> " . . . while I have no doubt as to, and have certainly no intention of restricting, the width and generality of the powers of the Supreme Court under section 21 of the Courts Ordinance, it is equally clear that we ought not to interfere lightly in non-summary cases."

An order of a Magistrate purporting to be made under section 419 of the Criminal Procedure Code in the course of non-summary proceedings—the charge was one of criminal misappropriation of property valued over Rs. 1,300—held before him was revised by this Court without objection being raised to the competency of this Court to deal with the matter by way of revision—*Costa v. Peris* [3].

I should myself construe the words " pending trial " in this section as the equivalent of " not finally disposed of by an order of acquittal, conviction or discharge ", and to embrace every stage of the case from the presentation of a report to Court, and in the case of a non-summary

[1] *(1917) 19 N. L. R. 334.* [2] *(1917) 19 N. L. R. 346.*
[3] *(1933) 35 N. L. R. 326 ; 13 C. L. Rex 73.*

offence through the entire gamut of non-summary proceedings in the Magistrate's Court, and in respect of both summary and non-summary cases to the final order made by a Magistrate or by a higher Court, ending in a verdict of acquittal or conviction or in an order of discharge.

I now proceed to notice another argument of Counsel in this connection. Counsel's argument based on the wording of section 356 is founded on the assumption that the jurisdiction of this Court in revision is conferred on it by that section. In truth and in fact it is not. This section merely reiterates a jurisdiction that this Court stood already possessed of and re-enacts that it extends to all cases before a criminal Court. I say re-enacts because the jurisdiction of this Court to act in revision is conferred on it by section 19 of the Courts Ordinance, which, to quote only what is relevant for the purpose of the present discussion, enacts :

> " The Supreme Court *shall have and exercise* sole and exclusive cognizance by way of revision of all causes, prosecutions, matters and things of which any original Court may take cognizance."

The term " jurisdiction " I use in this context in the sense of the authority conferred on the Court to deal with a matter and not in the sense of the power the Court might exercise in pursuance of that authority. The words of section 19 conferring authority as set out above, it would be noticed, are subject to no limitation or modification of any kind or nature whatsoever. The words are perfectly general and extend to all matters both civil and criminal though I have not set out the words which are more properly applicable to civil proceedings. There is nothing singular in this, in as much as unless this Court as the highest tribunal of judicature in the Island were vested with such wide powers, no relief would be available in a large class of matters in respect of which no remedy could be obtained either by way of appeal or by means of any of the well known writs that issue from the Registry of this Court. Furthermore, that neither section 356 nor any of the other sections of the Code was intended to limit the powers of this Court is made manifest by the Code itself, which in section 5 provides :

> " Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the Supreme Court or of the Judges thereof or of the Attorney-General,"

which are perfectly plain.

It was also attempted to narrow down the jurisdiction of this Court by reference to the provisions of section 37 of the Courts Ordinance. To my mind, it is clear that this section does not limit the jurisdiction but it indicates the nature of the order the Court could make—in other words, the powers of the Court in the exercise of its jurisdiction in revision, and this notwithstanding the use therein of the phrase " subject to the provisions in the preceding section and in the Criminal Procedure Code contained ". The preceding section, namely section 36, in the first part thereof confers powers on this Court in its appellate jurisdiction to corect all errors committed by an original Court and in the second part thereof proceeds to indicate that in the exercise either of its appellate jurisdiction or of its *revisionary jurisdiction*, it should not interfere, unless the error shall have prejudiced the substantial rights of either

party. This part of the section is substantially re-enacted in section 425 of the Criminal Procedure Code. Neither the second part of section 36 of the Courts Ordinance nor section 425 of the Criminal Procedure Code, therefore, can be said to limit the jurisdiction but rather the manner or mode of the exercise of that jurisdiction.

The qualifications contained in the Criminal Procedure Code are said to be those prescribed in section 356, 357, 358 and 425. I have already discussed the scope of sections 356 and 425 and indicated my view that far from making an attempt to curb the jurisdiction of the Court they point to the jurisdiction being co-extensive with the whole range of cases of which a Criminal Court may take cognizance. Section 357 (1) is a provision which in effect indicates, even as section 37 of the Courts Ordinance does, what orders the Court may pass in the exercise of its revisionary powers. Sub-section (2) of the section and section 358 are procedural sections, indicating that no order should be made without the accused being given an opportunity of being heard and that no party as of right can claim to be heard. Sub-section (3) of section 357 enacts that a finding of acquittal should not be converted into one of conviction in the course of revisionary proceedings. This sub-section cannot properly be said to take away any jurisdiction the Court may possess in regard to revisionary proceedings. On the other hand, this is a limitation on the nature of the order this Court may make and does not affect its jurisdiction, for it is on the basis that the jurisdiction exists that the direction is given to the Court that it shall not alter a verdict of acquittal into one of conviction but leaves the Court free to make any other order the circumstances may demand. For instance, there was a time when this Court could have sentenced an accused person found guilty on a capital charge to transportation for life. This particular sentence was thereafter abrogated. Can it be said that the jurisdiction of this Court in regard to capital offences was in anywise thereby affected ? I do not think so. The term " jurisdiction " may be used in more than one sense. The jurisdiction in the sense of the authority of the Court to try a capital case was in no way affected while its jurisdiction in the sense of the nature of the sentence it could pass was modified. If one looks at the main provisions of section 37, it would be found that it enumerates all possible orders that the Court may deem it necessary to make, in fact every conceivable order is catalogued in this section. I do not consider that this section in any way limits the jurisdiction in the first of the senses referred to in regard to revision matters nor is there either in section 36 of the Courts Ordinance or in any other provision of the Criminal Procedure Code any rule that could be said to so limit it.

I therefore hold that this Court is vested with ample jurisdiction to entertain this application.

I shall now deal with the next ground of objection, namely, that the order sought to be revised is one in respect of which no revisionary proceedings lay. The foundation for this argument is that the order complained of is not in fact an order but, to use the language of Counsel, " a transaction " between the Magistrate and the Attorney-General whereby the Magistrate " replies " to the Attorney-General in regard

to the order issued by the latter to him. I do not agree with this contention either, for the reasons I shall set out presently in discussing the main application.

This brings me to a consideration of the principal questions involved in this application. It cannot be emphasised too strongly that this application is in connection with a non-summary inquiry. Chapter 16 of the Code requires the Magistrate to hold the inquiry in such a case. In view of the phraseology of section 392, it would be apparent that it is the right of the Attorney General to conduct the prosecution before the Magistrate, so that it will be correct to say that the Magistrate is required to conduct the inquiry under Chapter 16 with the assistance of the Attorney-General. The inquiry itself should be conducted in accordance with the law and in conformity with the provisions of the Code and in particular of Chapter XVI. At the conclusion of the inquiry a Magistrate is empowered to make one of two orders, either an order of discharge or an order of committal. Where the Attorney-General is of opinion that the order of discharge should not have been made, he can in the exercise of the powers conferred on him by section 392 of the Code direct the Magistrate either to commit the accused to the Court nominated by him or to re-open the inquiry and give such instructions as he deems proper. Where the Attorney-General does direct the Magistrate to commit an accused person to a higher Court or to re-open the inquiry, the order of the Attorney-General has the effect of superseding the order made by the Magistrate discharging the accused, and this without any specific order vacating the order of discharge. It will be noticed that the Attorney-General directs the Magistrate either to commit or re-open, and himself does not commit the accused to a higher Court or re-open the inquiry. The directions of the Attorney-General in these cases are imperative, and there is no option left to the Magistrate but to comply with the order (Section 391).

Where the Magistrate has made an order of committal of the accused, one of three courses is open to the Attorney-General ;

(*a*) He may, if he concurs in the committal of the Magistrate, proceed to draw up an indictment for trial before a higher Court (section 165 (*f*)), an over-riding power to alter the venue of the trial being vested in the Attorney-General ; or

(*b*) He may direct the Magistrate to take further evidence, and in this case the committal of the Magistrate would stand and the Magistrate would, after taking fresh evidence, return the certified copy to the Attorney-General, who would be at liberty to adopt either course (*a*) or course (*c*) ; or

(*c*) He may if he takes the view that the committal is not justified on the evidence recorded, or for any other reason, notwithstanding the order of committal of the Magistrate quash the committal, and the proceedings thereupon terminate and no further steps can be taken by the Magistrate against the accused (section 389).

In regard to every order of committal or discharge made by the Magistrate, the final word, therefore, as to whether the committal or order of discharge should stand or not is with the Attorney-General.

It is of the greatest importance to note in this connection that the orders of committal or discharge made by a Magistrate are judicial orders made by him in the exercise of judicial functions. These sections, 391, 388 and 399 permit of the intervention of the Attorney-General only after the inquiry is concluded and not during its pendency.

The right to intervene during the pendency of an inquiry is conferred on the Attorney-General by section 390 of the Code. The function of sub-section (1) of the section is to vest in the Attorney-General a right to call for any record from the Court either of a Magistrate or of a Disrict Judge, and in order to indicate that that right extends to all cases, whatever the stages they may be in, the sub-section uses the phrase " in any criminal case in which an inquiry or trial has been or is being held ", that is whether concluded or yet pending. Sub-section (2) then proceeds to confer on him powers to issue instructions to a Magistrate—the scope and extent of the instructions being circumscribed, if at all, by the qualifications, (*a*) that the instructions should be with regard to the inquiry, and (*b*) that the instructions should be such as he may consider requisite. These qualifications in reality on a close scrutiny disappear as any qualifications at all. Any instructions that may be given must necessarily be given in regard to the inquiry itself. And when the Attorney-General is empowered to give such instructions as he may consider requisite, the language, far from imposing any limitation, vests an unlimited discretionary power in him. But it is said that the latter part of the sub-section does create a limitation in regard to the nature of the instructions that the Attorney-General may give. It is urged that the limitation is created by the words " It shall be the duty of the Magistrate to carry into effect *subject to the provisions of this Code* the instructions of the Attorney-General " and emphasis is laid on the phrase, " subject to the provisions of this Code ". It is sought to read this phrase into the earlier part of the sub-section and to read it in this way: " It shall be competent for the Attorney-General . . . to give such instructions subject to the provisions of this Code . . . as he may consider requisite ". I do not think there is any warrant for transposing this phrase in this manner. If it was the intention of the Legislature that the nature of the instructions should be subject to the provisions of the Code, it could very well have said so, but it has not, and it seems to me that it has deliberately not said so for good reasons.

It is then said that the same effect is achieved by the Legislature enacting that the Magistrate is to carry into effect the instructions subject to the provisions of the Code and that a duty is thereby cast on the Magistrate to see that the instructions he is called upon to carry out are instructions which do not offend against the provisions of the Code; it has also been suggested that were it otherwise the Magistrate would be under an obligation to carry out an absolutely illegal order. The answer to that is that it is inconceivable that any Attorney-General would issue instructions that would be so palpably illegal. Should such a case ever arise, other remedies should be sought for and would be available to an aggrieved party. The omission to incorporate the phrase " subject to the provisions of the Code " in sections 388, 389, and 391 has also been adverted to as, supporting the contention. I do not

think any special significance can be attached either to the omission of the phrase in these sections or to the inclusion of the phrase in section 390. I am satisfied that the phrase " subject to the provisions of this Code ", however, relates to the manner in which the Magistrate is to carry out the instructions, that is to say, he is to carry out the instructions in conformity with the provisions of the Code, such, for instance, as the taking of evidence in the presence of the accused person and of permitting the accused or his lawyer to cross-examine the witnesses to record the evidence in writing, and so on.

The upholding of the contention put forward would without the least doubt tend to introduce chaos and uncertainty into judicial proceedings. If the Attorney-General takes a different view from that of the Magistrate in regard to some particular question that arises in the conduct of an inquiry, and he gives instructions directing the Magistrate to act in a particular manner, and were it open to the Magistrate to sit in judgment on the Attorney-General's instructions and disregard them, the proceedings would reach a deadlock. It is said that in such an event it will be open to the Attorney-General to apply for a writ of mandamus or put in motion some other machinery to see that his instructions are carried out. Assuming that a mandamus lies in those circumstances. I cannot believe that it was the intention of the Legislature to permit such a situation to arise.

The difficulties would present themselves only on the basis of the construction placed upon the section by Counsel for the respondents, but if the section is construed according to its plain and true meaning, I cannot see that there is any over-riding power in the Magistrate to question the validity of an order or instruction issued by the Attorney-General, and no impasse would then result. That this should be so is also clear from the consideration that it is the Attorney-General who is ultimately responsible for the indictment, that is to say, for the sufficiency of the charge upon which an accused person is committed to trial and for the proper conduct of the anterior inquiry according to the provisions of law, while no such responsibility is placed on the Magistrate.

I should at this stage notice an under-current that made itself felt during the course of argument by Counsel for the respondents that the instructions given to the learned Magistrate by the Attorney-General had been unnecessarily couched in the form of an order and he drew attention to the use of the different words, " order ", " directions ", " instructions " in sections 388 to 391. I do not think that any fine distinction was sought to be drawn by the draftsman by the use of these different words. An instruction given by an employer to an employee which the employee is under a duty to carry out is nothing more than an order. A subordinate officer who is under a duty to carry out the orders of a superior may be directed to do a particular thing. Such a direction cannot be said to be any the less an order. Section 390 expressly declares that *it shall be the duty* of the Magistrate to carry into effect the instructions of the Attorney-General. If it is the duty of the Magistrate to carry out those instructions, then it is perfectly immaterial whether they are worded as instructions or directions or even orders, for in every such case the instructions or directions would also in

fact be an order. I do not think that any Magistrate would feel hurt that inroads have been made upon his dignity, status or position as a judicial officer by the use of the word " order " by the Attorney-General in conveying the instructions, which is the proper legal term to indicate that an instruction or direction or guidance issued or offered should be carried out.

It seems to me that the difficulty in this case has arisen as a result of the attitude adopted by Counsel for the prosecution before the Magistrate in conveying his submission that the defence was not entitled to ask for any further particulars than were already furnished in the counts read out to the accused persons, for otherwise the learned Magistrate would not have made a pointed reference to the fact that he was rather startled by the statement of Counsel for the prosecution that he was not prepared to give particulars of the manner of abetment. It may be that not merely the words themselves but the manner and the tone in which the words were uttered annoyed the learned Magistrate. The situation thus created certainly does not appear to have been improved by the position taken up by the Crown before the Magistrate in regard to the powers of the Attorney-General in relation to a Magistrate. The learned Solicitor-General in his argument before the learned Magistrate appears to have contended that the Attorney-General was in relation to a Magistrate in the position of an appellate tribunal and that the orders of the Attorney-General had to be implicitly obeyed by the Magistrate. At the argument in this Court, however, the learned Acting Solicitor-General did not support the analogy, but he rather strove to define the powers of the Attorney-General in relation to a Magistrate as supervisory. I do not think, having regard to the framework of the Code, it is necessary to define the relationship by reference to the powers of an appellate tribunal or to supervisory powers, for the same result can be achieved by drawing attention to an analogy in the law of partnership. I think the Attorney-General and the Magistrate are more like co-partners with residual powers in the Attorney-General to direct and guide the Magistrate in the common task which both of them are jointly engaged in of bringing offenders to justice. If the relationship is viewed in this way there would be no conflict and the wheels of the legal machinery would run smooth.

If in a case it should ever happen—say through an error of a typist or clerk or even through the oversight of a member of the Attorney-General's department—that an order palpably erroneous is issued to the Magistrate by the Attorney-General, the proper course for a Magistrate to pursue in those circumstances would be to refer the matter back to the Attorney-General and inquire whether the instructions correctly set out his view, indicating at the same time any doubts that may have arisen in his mind in regard to the regularity of the order. In such an event I do not think any one can doubt that the Attorney-General himself would be the first person to rectify the error and would express his feeling of obligation to the Magistrate for pointing out the defect. Should the Attorney-General, on the other hand, say that the instructions need no modification, the Magistrate has no further responsibility in the matter but to carry them out, for it may then well be a case where diametrically opposite views are taken on the subject of the instructions.

I should also say in this connection that it will not be proper for a Magistrate to disclose to the accused persons or to members of the public any instructions he may have received in regard to the inquiry pending before him. The instructions are of a confidential nature and never intended to be and should not be divulged.

There is no specific provision in the Code which expressly enables a Magistrate to direct the prosecution to furnish particulars in order to amplify a charge. The absence of such a provision is referable to the policy of the Code which regards the framing of the charge and amending it from time to time as part of the duty of a Magistrate. But nevertheless the Magistrate is entitled to have the assistance of the prosecution and there can be little doubt that the prosecution should ordinarily comply with a request of the Magistrate. If the prosecution is unhelpful, it is open to the Magistrate to call for notes of the investigation made by the Police Officers and with the material then available make the necessary amendments. If the material available be inadequate, he may, after examining the principal witnesses, amend the charge. But where the prosecution fails to furnish particulars, the Magistrate cannot for that reason decline to proceed with the inquiry or make an order of discharge of the accused person. There is no provision in the Code which sanctions such a course.

It seems to me that in fact the learned Magistrate fully appreciated this position for, after making the order that the prosecution should furnish the particulars, he proceeded to make the further order that the prosecution was to submit the notes of inquiry to him. This order suggests to my mind that it was the intention of the learned Magistrate in the event of the prosecution not furnishing any or adequate particulars to equip himself by a perusal of the notes of inquiry in order to discharge that duty. The course the events took did not permit the Magistrate to carry out his own intentions. On the day after the learned Magistrate made these orders the Attorney-General called for the record and issued the order dated 16th March fully set out at the beginning.

It may be a question whether it was really necessary for the Attorney-General to have intervened at that stage. There certainly was no irregularity in the proceedings and the order made by the learned Magistrate can hardly be said to be one which required to be set right or one which if not set right would have tended to deflect the true course of proceedings in his Court. The learned Acting Solicitor-General submitted that because of the view taken by the Attorney-General's Department, that the Magistrate would not proceed with the charges of abetment unless the particulars were furnished, the Attorney-General intervened. A perusal of the proceedings had up to the stage at which the Attorney-General made his order does not sustain the submission made by the learned Acting Solicitor-General, but apparently some observation of the Magistrate may have given such an indication to the prosecuting Counsel, for when the Magistrate came to make his order of April 27, 1950, he expressly states that he had held that the abetment charges against the 1st, 3rd and 4th accused (respondents) are not proper and valid charges as they do not conform to the provisions of Chapter 17

of the Code. In the light of these observations of the learned Magistrate, it is not possible to take the view that the intervention of the Attorney-General was unnecessary at the stage he intervened.

It was argued on behalf of the Attorney-General that the order of the Attorney-General amounted to no more than directing the Magistrate to proceed with the inquiry according to law and left it open to the Magistrate to amend the charges if he deemed fit. I do not think that such a construction of the order is possible; if that is all that was meant the order of the Attorney-General would have been a superfluity. But, as was pointed out by Counsel for the respondents, the purpose of the order was to direct that the Magistrate should proceed with the inquiry on the basis of the *charges which had been read over by him*, that is to say, that the Magistrate should continue the inquiry without amending the charges but as they stood at the date he read them out to the accused.

These facts raise the fundamental question whether the Attorney-General can compel a Magistrate to conduct an inquiry upon charges which the Magistrate has rightly or wrongly held to be defective. As I remarked earlier, the responsibility for conducting the inquiry and for presenting an indictment embodying proper charges is placed on the Attorney-General and not on the Magistrate. I think I have already said enough in discussing the provisions of the relevant sections to indicate my view that it is not open to the Magistrate to question the propriety, regularity or validity of the Attorney-General's order, and I do not think that any question of vacating the order made by the learned Magistrate or of the conferring of any power on him by the Attorney-General by means of instructions arises. By the Magistrate carrying out the instructions of the Attorney-General, the order made by the Magistrate would get submerged in the subsequent proceedings just as, under the provisions of sections 388, 389 and 391 other orders made by the Magistrate get submerged. All that the Magistrate need have done on receipt of the instructions of the Attorney-General was to have indicated to the defence that he was proceeding with the inquiry on the charges as read out by him. If the accused were dissatisfied with that order, then it would have been open to them to pursue any legal remedy they deemed proper. In such an event, it would be for the Attorney-General to sustain the correctness of his instructions. If the accused persons succeeded in obtaining relief, then the order of the Attorney-General would cease to be effective, but that must and can happen only in other proceedings and before another tribunal, and it certainly was not open to the Magistrate to refuse to carry out the instructions of the Attorney-General.

The effect of the order issued to the Magistrate by the Attorney-General is that in the Attorney-General's opinion the charges do not stand in need of amendment by the furnishing of more particulars than were to be already found in the charges read out to the accused. If the charges were invalid, as was held by the learned Magistrate, and the inquiry proceeded on the invalid charges, the validity of the charges could be called in question by the accused persons both before trial in the Court of trial and, if unsuccessful before the Court of trial and the trial ended in a conviction by way of appeal thereafter.

It has been contended by Counsel for the respondents in regard to the operative part of the order made by the learned Magistrate that the order of the Magistrate means nothing more than that he was not prepared to proceed with the charges of abetment as then framed but not that he was not prepared to proceed with the charges of abetment after making the necessary amendments in the charges. It was on the basis of this interpretation of the order that the argument was put forward that what the learned Magistrate termed "an order dated 27. 4. 50 " was nothing more than a " reply " to the Attorney-General in public in regard to a " transaction " between him and the Attorney-General, and that no application by way of revision therefore lay.

If the Magistrate in this case had merely declined to carry out the instructions but made no order directing that the charges of abetment should be excluded from the inquiry, then undoubtedly no case for revision would have been made out, for there would have been no order in the case capable of revision, for a revision of an order implies the interference with it to the prejudice of a party. But unless many more words are read into the Magistrate's order it is utterly impossible to accept the interpretation of the order placed by learned Counsel for the respondents. The order is clothed in language which necessarily leads to the inference that the Magistrate does not propose to proceed *at all* with the charges of abetment. Whatever the nature of the " transaction " may be between the Magistrate and the Attorney-General, Magistrate has no jurisdiction to make an order directing that the inquiry shall not proceed in respect of charges which need investigation, merely because of the existence of some such " transaction ".

The only powers vested in a Magistrate in respect of charges he is inquiring into are: (*a*) to discharge an accused person in respect of any charge where the Magistrate considers that the evidence led is not sufficient to put the accused on his trial—this the Magistrate can only do after recording all the available evidence; (*b*) to discharge the accused at any stage if the Magistrate considers the complaint to be groundless (section 162). The order of the Magistrate that the inquiry will proceed on the charges other than the charges of abetment does not fall under either class of orders that a Magistrate can make under section 162, for he has not expressed the view that there is an insufficiency of evidence or that the complaint is groundless. The order of the learned Magistrate cannot in these circumstances be sustained.

I therefore set aside the order of the learned Magistrate dated April 27, 1950, and remit the case for the inquiry to be proceeded with.

Before, however, leaving this record, I feel it my duty to say that it is a matter for regret and one that should cause grave concern to all engaged in the administration of justice that nothing tangible has been done in these proceedings though over nine long months have elapsed since the plaint was filed, and it is to be hoped that even at this late stage an effort would be made to have the inquiry concluded without further avoidable delay, if not for other reasons, at least in fairness to the accused persons.

PULLE J.—

I agree that the contention on behalf of the respondents that this Court has no jurisdiction to entertain the present application fails. It was argued that the words " whether already tried or pending trial in any Court " in section 356 of the Criminal Procedure Code have the effect of restricting the revisionary jurisdiction to summary or indictable cases in which verdicts have been entered and to other cases, whether in a Magistrate's Court or a District Court, in which the stage has been reached for the trial to proceed after the plea of the accused person has been taken. Whatever interpretation the words " or pending trial " are capable of bearing any difficulties arising therefrom are resolved by the very wide powers of revision conferred by section 19 (*b*) of the Courts Ordinance read with section 5 of the Criminal Procedure Code. The latter provides that nothing in that Code shall be construed as derogating from the powers or jurisdiction of the Supreme Court.

On the main point I should like to make a few observations. It is undisputed that the Code has conferred on the Attorney-General by Chapter XVI and by sections 387, 388, 389, 391 and 392 the widest powers of control over non-summary proceedings when such proceedings are brought to a termination by order of commitment or an order of discharge. Again, it is not disputed that before the proceedings are brought to a close the Attorney-General is empowered " to give such instructions with regard to the inquiry as he may consider requisite ". In my opinion the amplitude of his powers and the exercise thereof cannot be called in question by the Magistrate to whom the instructions or the order, whichever term one may use, is addressed. Section 390 (2) gives, in my view, the Attorney-General a free hand to do all that he deems necessary because the duty is cast on him to present an indictment or quash a commitment or to order a discharge at any stage of the non-summary proceedings or re-open an order of discharge made by the Magistrate, and it is the Attorney-General who takes the ultimate responsibility for putting a person on trial by indictment and for conducting the trial. If an order made by the Attorney-General is not on the face of it bad, I think there is no legal process by which the reasons for the order can be canvassed.

On March 9, 1950, the learned Magistrate concluded his order in the following words ; " In the result I direct the prosecution to give particulars of the abetment in the counts where the 1st, 3rd, and the 4th accused are charged with abetment ". As I look at the matter it is not necessary to decide whether this order amounted to an express refusal to proceed with the inquiry on the charges of abetment. I cannot blame the prosecution for interpreting that order in the same way in which the learned Magistrate did in his order of April 27. These are his words, " By my order of the 9th March, 1950, I have held that the abetment charges against the 1st, 3rd and 4th accused are not proper and valid charges as they do not conform to the provisions of Chapter 17 of the Code ".

Whether the view taken by the prosecution or by the Magistrate as to the sufficiency of the particulars in the charge is the right one is not

the crucial question. The questions which conclude the matter are (*a*) whether the Attorney-General had the power to direct the Magistrate to proceed with the charges in the form in which they were read out to the respondents and without further particulars being supplied by the prosecution, and (*b*) whether it was competent to the Magistrate to dispute the correctness of the order. To my mind the Attorney-General did have the power to make the order and it was not open to the learned Magistrate to do anything but carry it out.

In my opinion the application in revision is entitled to succeed.

Order set aside.