

1958

Present: Weerasooriya, J.

FERNANDO, Appellant, and EXCISE INSPECTOR OF WENNAP-  
PUWA, Respondent

*S. C. 305—Application in revision in M. C. Chilaw 25,355*

*Autrefois acquit—Elements necessary for such plea—Acquittal on the ground that charge is defective—Does it bar a subsequent prosecution?—Criminal Procedure Code, ss. 187, 190, 191, 194, 195, 330.*

Where, after the case for the prosecution is closed, the accused is acquitted solely on his submission that the charge is defective, the acquittal is a bar to a subsequent prosecution for the same offence.

A plea of *autrefois acquit* may be taken in respect of an order of acquittal made otherwise than on the merits of a case.

**A**PPPLICATION to revise an order of the Magistrate's Court, Chilaw..

*A. H. C. de Silva, Q.C.*, with *A. K. Premadasa*, for the petitioner.

*V. C. Gunatilaka*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

November 6, 1958. WEERASOORIYA, J.—

The accused-petitioner was charged in *M. C. Chilaw Case No. 16,925* with the commission of certain offences punishable under the *Excise Ordinance (Cap. 42)*. After the prosecution had adduced evidence at the trial and closed its case, the accused was called upon his defence. His proctor thereupon stated that he was not adducing any evidence, but he took the objection that the proceedings at the trial were rendered illegal by reason of the fact that although the accused was produced in Court otherwise than on a summons or warrant the Magistrate had omitted to conduct the examination as required by section 187 (1) of the *Criminal Procedure Code* before framing the charge against the accused. He relied on the decision in *Mohideen v. Inspector of Police, Pettah*<sup>1</sup>. The Magistrate upheld the objection and made order acquitting the accused. From the terms of the order it is clear that although the Magistrate acquitted the accused he did not do so on a consideration of the evidence but because he regarded that to be the appropriate order inasmuch as the case for the prosecution as well as for the defence had been closed.

Thereafter in respect of the same offences a second prosecution was launched against the accused in *M. C. Chilaw Case No. 25,355*. On being charged in this case the accused took the plea of *autrefois acquit*

<sup>1</sup> (1957) 59 *N. L. R.* 217.

relying on his acquittal in the previous case. The plea was rejected by the Magistrate, and the present application is made to revise that order of the Magistrate on the ground that it is wrong in law.

Two submissions against this application were made by Crown Counsel. One of them is that in view of the failure to frame a proper charge in the earlier case the trial in that case, including the order of acquittal, was a complete nullity with the result that there is no acquittal in respect of which the plea of *autrefois acquit* could be taken by the accused. This submission was based on certain observations made by Abrahams, C.J., in *Abeyesekera v. Goonewardene*<sup>1</sup> that the absence of a charge vitiates the proceedings and renders the trial illegal *ab initio*. I do not think, however, that those observations were intended by that learned Judge to imply that a trial taking place on a defectively framed charge, or without any charge at all, is a proceeding entirely outside the scope of the Magistrate's jurisdiction. It is only in such a case that the purported order of acquittal may be said to be a nullity in the sense contended for by Crown Counsel, in that the order is to be regarded as never having been made and as one which need not even be set aside by this Court in the exercise of its appellate or revisionary powers. In my opinion this submission, therefore, fails.

The other submission of learned Crown Counsel was that a plea of *autrefois acquit* lies only in respect of an acquittal on the merits, and that as the acquittal in the earlier case clearly did not proceed on that basis the accused's plea was rightly rejected. Crown Counsel cited in this connection *Fernando v. Rajasooriya*<sup>2</sup> and *Wanigasekera (Food and Price Control Inspector) v. Simon*<sup>3</sup>. While the judgments in these cases contain *dicta* which support the submission of Crown Counsel, it is to be noted that in our Criminal Procedure Code there are at least two instances, namely, sections 194 and 195, where an order of acquittal may be made otherwise than on the merits of the case and, as pointed out in *The King v. William*<sup>4</sup>, the acquittal of an accused under either of these sections is sufficient to sustain a plea of *autrefois acquit* in a subsequent prosecution of him for the same offence. Learned Crown Counsel relied on a passage in the judgment of the Court of Criminal Appeal in that case that in section 190 the word "acquittal" has no artificial meaning but means an acquittal on the merits. But section 190 deals only with the recording of the verdict where, after the close of the case for the prosecution and of the defence, the Magistrate finds the accused either guilty or not guilty (i.e. on the merits). Section 190 is not exhaustive of the instances where a verdict of acquittal may be recorded after the close of the case for the prosecution and the defence.

In my opinion the Magistrate adopted the correct course in M. C. Chilaw Case No. 16,925 when he acquitted the accused instead of discharging him. The only provision in the Criminal Procedure Code for a discharge of an accused in a summary trial is section 191, and that section

<sup>1</sup> (1938) 39 N. L. R. 525.

<sup>2</sup> (1946) 47 N. L. R. 399.

<sup>3</sup> (1956) 57 N. L. R. 377.

<sup>4</sup> (1942) 44 N. L. R. 73.

clearly contemplates a stage prior to the close of the case for the prosecution and the defence. The proceedings in M. C. Chilaw Case No. 16,925 had advanced beyond that stage when the Magistrate decided, though without arriving at a definite finding whether the accused was guilty or not guilty, that they should be terminated on the ground of the defect in the charge. In the circumstances it was not open to him to make any other order than one of acquittal, and while that order stood unreversed the plea of *autrefois acquit* was available to the accused in the present case, *Solicitor-General v. Aradiel*<sup>1</sup>.

I therefore uphold the plea of *autrefois acquit* and discharge the accused.

*Appeal allowed.*

