1959 *Present :* Sansoni, J.

THE ATTORNEY-GENERAL, Appellant, *and* M. KIRIBANDA *et al.*, Respondents

*S. C. 58—M. C. Anuradhapura, 13,383*

Autrefois acquit—*Difference between "acquittal" and "discharge"—Criminal Procedure Code, ss. 190, 191, 194, 195.*

An order of acquittal under section 190 of the Criminal Procedure Code cannot be made until the case for the prosecution has been closed. Such an order must be made on the merits and on no other ground.

The trial of the accused-respondents in an earlier case No. 8232 was postponed several times, and eventually the Magistrate made order discharging the accused, remarking that four dates of trial were enough punishment for the accused. The present case was thereafter filed against them on the same charge.

*Held*, that the order made in the earlier case was not one of acquittal and was therefore no bar to a second prosecution.

*Don Abraham v. Christoffelsz* (1953 ) 55 N. L. R. 92 and *Dias v. Weerasingham* (1953) 55 N. L. R. 135, not followed.

APPEAL from a judgment of the Magistrate's Court, Anuradhapura.

*V. S. A. Pullenayegum*, Crown Counsel, for appellant.

No appearance for respondents.

*Cur. adv. vult.*

November 2, 1959. SANSONI, J.—

This is an appeal by the Attorney-General against an order of the Magistrate upholding a plea of *autrefois acquit.*

The two accused had been charged in an earlier case No. 8232 with the offence of having in their possession parts of the hemp plant. The trial of that case was postponed several times, and eventually the Magistrate made order discharging the accused, remarking that four dates of trial were enough punishment for the two accused, who are husband and wife, and who had to come a distance of 14 miles to Court.

The present case was thereafter filed against them, on the same charge. The question I have to decide is whether Crown Counsel is right when he submits that the order made in case No. 8232 was not one of acquittal and is therefore no bar to a second prosecution.

Sections 190 and 191 of the Criminal Procedure Code are the relevant sections. They read :

> 190. If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.
>
> 191. Nothing hereinbefore contained shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, but he shall record his reasons for doing so.

On a reading of these sections one may well conclude that the earliest stage at which a verdict of acquittal may be recorded is after all the evidence for the prosecution has been taken, though the Magistrate is empowered to make an order of discharge at any previous stage, which I take to mean a stage earlier than the close of the case for the prosecution.

The two sections were considered in *Senaratna v. Lenohamy*[1]. In that case a Vidane Arachchi charged certain accused with theft and voluntarily obstructing him in the discharge of his public functions. On the trial date his witnesses were not present, and he could not go on without them. The Magistrate thereupon discharged the accused. It was never in dispute that the order fell under section 191, and the only question argued was whether it prevented the accused being charged again for the same offences. The majority view was that the order was no bar to a fresh prosecution. De Sampayo J. said that the words " at any previous stage of the case " in section 191 import that all the evidence for the prosecution, as contemplated by section 190, had not been taken ; he also said that " 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 ".

The same view was taken by Soertsz J. in *Sumangala Thero v. Piyatissa Thero*[2] where the learned Judge held that the Magistrate cannot enter an order of acquittal before the conclusion of the case for the prosecution. He added : " If, therefore, the Magistrate puts an end to the proceedings before the complainant had led all his evidence, the order by which he does so is an order of discharge and no more ". The learned Judge disagreed with the view taken by Garvin J. in *Gabriel v. Soysa*[3] and in *Weerasinghe v. Wijeyesinghe*[4] that an order of acquittal can be made before the case for the prosecution was closed.

The question was therefore ripe for decision, as to whether an order of acquittal can be made before the end of the case for the prosecution, and it came before the Court of Criminal Appeal in *R. v. William*[5]. The

[1] *(1917) 20 N. L. R. 44.*
[2] *(1937) 39 N. L. R. 265.*
[3] *(1930) 31 N. L. R. 314.*
[4] *(1927) 29 N. L. R. 208.*
[5] *(1942) 44 N. L. R. 73.*

accused in that case had raised the plea of *autrefois acquit* but it had been overruled by the presiding Judge, and he was convicted by the unanimous verdict of the jury. At a previous trial for the same offences, before a Magistrate who had assumed jurisdiction as District Judge, he had been acquitted after the evidence of four witnesses had been recorded, but before all the witnesses for the prosecution had been called. If the view of Garvin J. was correct the plea of *autrefois acquit* should have been upheld, but the Court of Criminal Appeal approved the view taken by Soertsz J. Hearne J. said : " We take the view that the wording of section 190 means that a Magistrate is prevented from making an order of acquittal under that section till the end of the case for the prosecution. It follows that although the Magistrate of Avissawella purported to make an order under section 190, in reality he made an order under section 191. mistakenly calling it an acquittal, instead of a discharge. Such an order cannot support a plea of *autrefois acquit* ". Hearne J. also pointed out that an acquittal under our Code is not necessarily an order made on the merits, for under sections 194 and 195 orders of acquittal can be made before the merits are gone into ; but so far as section 190 is concerned the learned Judge said : " the word ' acquittal ' has no artificial meaning. It means an acquittal on the merits ". Two distinct and unequivocal propositions were therefore enunciated by the Court in that judgment : (1) that an order of acquittal cannot be made at a trial until the case for the prosecution has been closed, and (2) that an order of acquittal which purports to have been made under section 190 must be made on the merits and on no other ground.

In view of that judgment it is easy to pronounce on the true effect of the order made by the Magistrate in case No. 8232. It was certainly not an order made on the merits and for that reason the plea of *autrefois acquit* cannot be sustained. Nor does the fact that the prosecution was unable to go to trial because of the absence of the Government Analyst's report make any difference ; it was a very similar situation to that which arose in *Senaratna v. Lenohamy* [1], and a discharge in those circumstances does not bar a fresh prosecution.

I wish, with respect, to point out that the opinion of Hearne J. in, *R. v. William* [2] that the case of *Senaratna v. Lenohamy* [1] was wrongly decided seems to have arisen from a misapprehension of the particular provision of the Code under which that case was instituted. It was a prosecution initiated with a report under section 148 (1) (*b*) by a public officer ; an order of acquittal under section 194 could not therefore have been made, though Hearne J. seems to have thought it could, for that section only applies where a complaint has been made under section 148 (1) (*a*). But this is by the way.

It would serve no useful purpose for me, having regard to the binding effect of the decision in *R. v. William*[2], to consider certain judgments which have been based on a view that cannot be reconciled with that decision. It would appear that a strong current of authority began to flow in a contrary direction, starting with the judgments of Nagalingam A.C.J.

[1] *(1917) 20 N. L. R. 44.*

[2] *(1942) 44 N. L. R. 73.*

in *Don Abraham v. Christoffelsz* [1] and *Dias v. Weerasingham* [2]. The judgment in *R. v. William* [3] does not appear to have been brought to the notice of the learned Judge before he gave judgment in those cases.

With great respect to the learned Judges who have thought that the decision in *R. v. William* [3] can be reconciled with the view taken by Nagalingam A.C.J., I find myself unable to share their opinion.

For the reasons I have given this appeal must be allowed. I set aside the order of discharge and send the case back to the Magistrate in order that he might proceed with the trial according to law.

*Appeal allowed.*