

1933

*Present : Garvin S.P.J.*

ROSAIRO v. SILVA.

588—P. C. Negombo, 1,534.

*Discharge of accused—Complaint by Excise Inspector—Absence of complainant—Magistrate's right to vacate order—Criminal Procedure Code, s. 191.*

Where proceedings before a Police Court commenced upon the complaint of an Excise Inspector in terms of section 148 (1) (b) of the Criminal Procedure Code and in the absence of the complainant, on the day of trial, the Magistrate made order discharging the accused.

*Held*, that the order was in its legal effect an order under section 191 of the Criminal Procedure Code and that the Magistrate had no jurisdiction to vacate it.

**A** PPEAL from an order of the Police Magistrate of Negombo.

Earle Wijewardene, for the accused-appellant.

Wendt, C. C., for the complainant-respondent.

October 12, 1932. GARVIN S.P.J.—

These proceedings commenced upon the complaint of an Excise Inspector in terms of section 148 (1) (b) of the Criminal Procedure Code. On the day appointed for the trial the Excise Inspector was absent. An application was made on his behalf for a postponement but this was disallowed and the Police Magistrate made order discharging the accused. A few days later upon an application made to him he made the following order: "I think the absence of complainant has been sufficiently explained in the affidavit of Mr. Abeysinghe, Assistant Superintendent of Excise. I vacate the order of July 11, 1932." The appeal is upon the ground that the Police Magistrate had no power to vacate the order of discharge made by him.

The appeal is clearly entitled to succeed. The Police Magistrate having discharged the accused, when he addressed himself to the application made by the complainant in his endeavour to purge his default, and have the case restored, treated his earlier order as an acquittal under the provisions of section 194 of the Criminal Procedure Code. Had it been an acquittal under the provisions of that section, then it would have been competent for the Magistrate to cancel his order where he was satisfied that the complainant's absence was due to sickness, accident or some other cause. Apart entirely from the circumstances that the order is in terms an order of discharge, there is the further difficulty that inasmuch as this prosecution was initiated by a complainant under section 148 (1) (b) it would have been impossible for the Magistrate to apply to the case the provisions of section 194 which are only applicable to prosecutions initiated under the provisions of section 148 (1) (a). This was in its terms and in its legal effect an order under section 191. An order of discharge made under its provisions and in pursuance of the powers conferred on the Magistrate by that section is a final order which determines the proceedings and which he has no jurisdiction to vacate. Such an order is not, of course, a bar to a fresh prosecution but it is a final determination of the proceeding in which the order of discharge was entered.

The appeal must therefore be upheld and the order of the Police Magistrate by which he purported to cancel and vacate his order set aside.

*Set aside.*

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