1958 *Present :* **H. N. G. Fernando, J.**

H. W. HENDRICK SINGHO, Appellant, *and*
S. D. WANIGATILLEKA *et al.*, Respondents

S. C. 913—M. C. Rakwana, 61,191

Withdrawal of charge by prosecution—" Discharge " of accused—Failure of Court to record reasons—Effect on subsequent prosecution of accused—" Autrefois acquit "—Criminal Procedure Code, ss. 190, 191, 195.

Where the prosecution moved to withdraw a case and the Magistrate " discharged " the accused without recording any reasons—

Held, that the order of the Magistrate was not an acquittal within the meaning of section 195 of the Criminal Procedure Code and, therefore, could not be of assistance to the accused to raise a plea of *autrefois acquit* in a subsequent prosecution.

APPEAL from an order of the Magistrate's Court, Rakwana.

A. H. C. de Silva, Q.C., with *E. Gunaratne* and *K. I. de Silva* for the Complainant-Appellant.

K. Shinya, with *Nimal Senanayake*, for the 2nd Accused-Respondent.

Cur. adv. vult.

November 14, 1958. H. N. G. FERNANDO, J.—

On 14th June, 1957 a Divisional Revenue Officer filed a report in the Magistrate's Court of Rakwana against the present second accused respondent and one T. P. Weerasingha in consequence of which both persons were on the same day charged firstly with the theft of a " Bedi-del " log being property in the possession of the Range Forest Officer, Rakwana, and secondly with dishonestly receiving or retaining stolen property to wit the same " Bedi-del " log.

On the same day, 14th June 1957, the present appellant filed private complaint against one Wanigatilleka (the first accused respondent) and the second accused respondent alleging that the two accused on 30th April, 1957 committed theft of a " Bedi-del " log from the possession of the complainant and in the alternative that they retained possession of the log knowing it to have been stolen property.

Both cases were taken up for hearing on 12th July, 1957. In the one to which I have first referred the Magistrate made the following order :

> " Prosecution moves to withdraw this case. Allowed. Accused discharged. Mr. Edirappuli for the accused states that he is ready for trial.
>
> Return lorry to owner. Ambalantota Police to retain boat till disposal of case No. 61,191. "

It is clear that the reference in the Magistrate's order to a boat was intended to be a reference to what was described in the charge as a " Bedi-del " log. Case No. 61,191 is the second case which I have mentioned above and with which I am now concerned. The allegation in the charge framed by the Magistrate in that case was that the alleged stolen property was a " Bedi-del " log scooped out into the shape of a boat. This second case was also taken up by the same Magistrate on the same date, 12th July, 1957, on which occasion the Magistrate after recording some evidence of the complainant assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code (the value of the log or boat had been claimed by the complainant to be about Rs. 4,000). The accused were then charged and trial was fixed for 26th July, 1957, but the case was actually heard on 23rd August, 1957. On that occasion a plea of " autrefois acquit " was raised and upheld by the Magistrate in his capacity as District Judge. I have no hesitation in allowing the appeal.

The question is whether the order of 12th July, 1957 in case No. 61,172 was made under section 191 of the Code or else whether it was made under section 195. In the one case the Magistrate is empowered to " discharge " the accused and in the other the Magistrate may permit a complainant to withdraw a case and shall thereupon acquit the accused. In either event however the law requires a Magistrate to record his

reasons, whether for the discharge or for the withdrawal and acquittal. One purpose which would be served by a record of reasons is that this Court is thus made aware of the circumstances in which proceedings terminated and the grounds upon which the Magistrate purported to act; and such a record would be of assistance in subsequent proceedings if a plea of " autrefois acquit " is raised. This imperative provision of the law has not been complied with by the Magistrate, so that there is nothing on record from which I can gather what he thought he was doing.

There are many decisions of this Court which establish that an order purporting to be merely " a discharge " must nevertheless be regarded as an order of acquittal made under section 190 or under section 195. Most of these cases deal with purported orders of discharge either after the refusal of a postponement or after the prosecution states its inability to lead further evidence. If it is clear that the proceedings terminate because the prosecution for such a reason is unable to go with the case then the accused is placed in the same position as though he had been acquitted after trial.

In the present case however the only legitimate inference which arises from the proceedings before the Magistrate on 14th July, 1957 is that the prosecuting officer in case No. 61,172 desired that the charge in the other case No. 61,191 should be proceeded with. The Magistrate had no power to permit a withdrawal under section 195 unless the prosecuting officer had adduced sufficient ground for such a step. If indeed the prosecuting officer had informed the Magistrate that his ground of withdrawal was that the accused should by means of an order made under section 195 be allowed the privilege of securing immunity from trial in another case pending before the same Magistrate on the same day, the Magistrate could surely not have regarded that as a sufficient ground for making an order under section 195.

It is important to note that in his order of discharge the Magistrate directed the Ambalantota Police to have custody of the boat until the second case No. 61,191 was disposed of, and that on the same day he himself heard evidence in the latter case. In these circumstances I wonder whether it is not absurd for him afterwards to take the view that he intended to make an order of acquittal. If he had taken the trouble to consider the matter for a few moments he would have realised that the proper course would have been for case No. 61,172 to be laid by pending conclusion of the other case.

I see no ground for regarding the order of discharge as anything other than what it purports on its face to be. It was a discharge and not an acquittal. I would therefore set aside the second order of discharge made in the present case on 23rd August, 1957 and remit the case for trial in due course under section 152 (3) of the Code.

Appeal allowed.