"*Particulars of offence*—That he on the 9th day of July, 1960, at Peyima Village, in the Kamara Chiefdom in the Kono District in the Protectorate of Sierra Leone, fraudulently converted to his own use and benefit certain property, that is to say the sum of £7,750 entrusted to him by Hassan Darwish Fawaz in order that he, the said Moray Kabba, might retain the same in safe custody."

The conduct of the preliminary investigation was started by the police but subsequently taken over by Mr. Khan, now solicitor for the defendant, with the consent of the Attorney-General. The magistrate at the close of the prosecution's case held there was sufficient evidence to put the plaintiff on trial before the Supreme Court and committed the plaintiff for trial before that court. The evidence for the prosecution before the magistrate in the main was that the defendant took with him the sum of £7,750 at night from Koidu to Peyima in a car and whilst at Peyima he got news that he was to be robbed and so became afraid. His car was giving trouble and so he thought it dangerous to return to Koidu that night with the money. He took the money to the plaintiff and handed it to him for safe keeping. He (plaintiff) gave him a receipt for the money which was produced. Defendant then returned to Koidu. When defendant later asked plaintiff for the money he failed to produce it. He later paid £1,000 and did not pay balance and so the matter was reported to a magistrate who issued a warrant of arrest. In accordance with section 118 of the Criminal Procedure Ordinance the then Acting Solicitor-General on February 2, 1961, filed an Information which charged the plaintiff with the offence of fraudulent conversion of £6,750. The trial came up before Marcus-Jones Ag. J., before the Supreme Court at Sefadu on February 14 and 15, 1961, and the plaintiff was acquitted and discharged. The plaintiff now complains inter alia that the defendant had no reasonable cause for such proceedings; that in instituting the criminal proceedings defendant acted maliciously and the plaintiff consequently suffered damage. I have carefully considered the evidence in this case and on the whole the story of the defendant seems to me probable and I accept it. I do not believe the plaintiff nor the witness Barrie Karim and I reject their story. I am satisfied on the evidence that the defendant did not put forward a false case against the plaintiff but honestly believed that the charge preferred against the plaintiff was true. The story of the defendant, which as I have already said I accept, is such that, viewed objectively, a reasonable man would have reasonable cause for prosecuting. I do not find on the evidence any positive proof that the defendant had no belief in the plaintiff's guilt. In those circumstances this action is dismissed with costs—such costs to be taxed.

[SUPREME COURT]

ALASTAIR PETER McNEILE . . . . . *Appellant*

v.

COMMISSIONER OF POLICE . . . . . *Respondent*

[Magistrate Appeal 13/61]

Magistrate's court—summary jurisdiction—Autrefois acquit—Prosecuting officer unable to proceed because of lack of witness—Appellant "discharged" by magistrate—Whether appellant entitled to be "acquitted and discharged."

Appellant was charged before a magistrate with the offence of driving a vehicle without due care and attention. When he appeared before the magistrate, after pleading not guilty, the prosecuting officer told the magistrate that, as he was unable to trace his main witness, he was offering no evidence against appellant. The magistrate thereupon "discharged" appellant. When appellant contended that he was entitled to be "acquitted and discharged" instead of merely "discharged," the magistrate reserved this question for the consideration of the Supreme Court.

Held, that the magistrate came to a correct determination in point of law in "discharging" appellant instead of "acquitting and discharging" him.

The court also said, obiter, "The effect of this, of course, is that the Commissioner of Police is entitled to prefer the same charge against the appellant and that a plea of autrefois acquit would not stand him in good stead."

Cases referred to: *Davis* v. *Morton* [1913] 2 K.B. 479; *Owens* v. *Minoprio* [1942] 1 K.B. 193; *Land* v. *Land* [1949] P. 405; *Pickavance* v. *Pickavance* [1901] P. 60.

No appearance for the appellant.

Nicholas E. Browne-Marke for the respondent.

BANKOLE JONES, AG. C.J. The police magistrate in the Kono District on March 22, 1961, reserved for the consideration of this court a question of law which arose on the hearing of certain proceedings before him. The facts were that the appellant Alastair Peter McNeile was charged before the magistrate with the offence of driving a vehicle without due care and attention contrary to section 43 (1) of the Road Traffic Ordinance 1959. After he had pleaded not guilty to the charge, and on his second appearance, the prosecuting officer representing the Commissioner of Police, told the magistrate that, as he was unable to trace his main witness, namely, the driver of the other vehicle, he was offering no evidence against the appellant, whereupon the magistrate discharged the appellant. It was contended on behalf of the appellant that:

"(i) The prosecutor, to wit the Commissioner of Police, having appeared by his officer and subordinate in the person of Sub-Inspector Allie who after the appellant had been arrested and charged with the offence and after the appellant had pleaded not guilty to the charge, on the second appearance of the appellant informed the court that because he was unable to trace one of the other witnesses, i.e., the driver of the other vehicle, he was offering no evidence against the appellant, he was thereupon 'discharged' by the court and not 'acquitted and discharged.'

"(ii) The appellant having heard the charge read and having pleaded not guilty thereto was in jeopardy of the offence and was in the circumstances entitled to be acquitted and discharged.

"(iii) The prosecutor by his agent, to wit Sub-Inspector Allie, having informed the court that the other driver could not be traced, had in fact given evidence—(admittedly not on oath) in the proceedings and in consequence the appellant was entitled to be 'acquitted and discharged.'"

The question for this court to decide is whether upon these facts the magistrate came to correct determination in point of law in "discharging" the appellant and not in "acquitting and discharging" him.

Mr. Browne-Marke, Senior Crown Counsel, appearing in this court, said that he was supporting the contention of Mr. McNeile. He submitted that once the appellant had pleaded to the charge, the magistrate should have "acquitted and discharged" him. He said that in merely "discharging" him, the appellant would lose his right to a plea of autrefois acquit if he were faced with the same charge at a future date.

I have had an opportunity of considering this matter and with the greatest respect to Mr. Browne-Marke, I find myself unable to agree with his submission. It seems to me that when the prosecuting officer told the magistrate that he was offering no evidence for the reason he gave, he was in fact withdrawing the charge and that when the magistrate discharged the appellant, he in effect consented to the charge being withdrawn. The test of autrefois acquit is to be found in Archbold's 34th ed., at para. 438. To fulfil such a test an accused person must have been tried upon the merits and found not guilty of the offence by a court competent to try him. In such circumstances his acquittal is a bar to a second charge for the *same* offence. Could it be said in this case that the appellant was tried upon the merits and found not guilty of the offence so that he would be in peril if charged at some later date with the same offence? In my view certainly not. There is a long line of authorities which favours this view.

In the case of *Davis* v. *Morton* [1913] 2 K.B. 479, an information was preferred by the respondent against the appellant under section 1 of the Betting Act, 1853, for using a house for the purpose of betting with persons resorting thereto. It was discovered, when the third of the respondent's witnesses was being examined, that the appellant had not, through inadvertence, been informed before the charge was proceeded with, as required by section 17 of the Summary Jurisdiction Act, 1879, of his right to be tried by a jury, and thereupon the solicitor for the respondent withdrew the summons with the consent of the justices; although the solicitor for the appellant contended that there was no power to withdraw it. A further information was subsequently preferred by the respondent under the same section (s. 1 of the Betting Act, 1853) against the appellant. The evidence given on the hearing of both informations was substantially the same. It was held that the withdrawal of the first summons in consequence of technical informality was not equivalent to a dismissal which could be pleaded in bar of the subsequent proceedings.

Again in the case of *Owens* v. *Minoprio* [1942] 1 K.B. 193, an information was laid against the respondent for failing to comply with a billeting notice by a person who was not authorised to institute the proceedings, a second information was laid against the respondent for the same offence by an authorised police officer who applied to the justices for the withdrawal of the summons issued in respect of the first information. On the hearing of the second information, the respondent contended that he had been put in peril on the first summons and could not be put in peril for the same offence and the justices on that ground dismissed the second information. But it was held that the respondent had not been put in peril and the justices ought, therefore, to have heard the second information, and that where the withdrawal of a summons has been not on the merits of the case, but on a preliminary point, the withdrawal is not equivalent to a dismissal or an acquittal.

Also in *Land* v. *Land* [1949] P. 405, it was held that where there has been a withdrawal of a summons (not leading to an adverse adjudication), the withdrawal does not operate as an estoppel per rem judicatam and this applies

whether it be a withdrawal upon a preliminary point or upon the merits of the case.

Mention must be made of the case of *Pickavance* v. *Pickavance* [1901] P. 60. This case appears to have been incorrectly interpreted to mean that after the withdrawal of a summons, no fresh summons can be issued upon the same cause or complaint. This case was explained and distinguished in both *Owens* v. *Minoprio* and *Land* v. *Land*. The statement in *Pickavance* v. *Pickavance* was obiter dictum and is no authority whatever for the proposition under consideration.

In the instant case, the appellant was never tried and no decision was given by the magistrate on the merits. The fact that the prosecuting officer informed the court that he could not proceed in the absence of a witness does not amount to evidence being taken. I therefore hold that the magistrate came to a correct determination in point of law in "discharging" the appellant and not in "acquitting and discharging" him. The effect of this, of course, is that the Commissioner of Police is entitled to prefer the same charge against the appellant and that a plea of autrefois acquit would not stand him in good stead.

Freetown
Aug. 18, 1961
Luke Ag.P.J.

[SUPREME COURT]

SHEKU KAMARA . . . . . *Respondent*

v.

T. H. A. GRAHAM . . . . . *Appellant*

[C. C. 88/61]

Practice—Appeal from judgment of magistrate's court—Appeal dismissed for non-compliance with procedural requirements—Application for extension of time limit for lodging appeal—Whether appellant should have appealed to Court of Appeal against order dismissing appeal—Whether order final or interlocutory.

Appellant was the defendant in a case in the Police Magistrate's Court, Freetown, in which decision was given for the plaintiff (respondent). Appellant appealed against this decision to the Supreme Court, but when the appeal came before the court a preliminary objection was raised that appellant had not complied with the requirements for lodging the appeal, and so the appeal was dismissed with costs. Appellant then applied by motion for an order that the time limit for lodging the appeal be extended and that in the meantime all further proceedings be stayed pending the determination of the appeal. In opposing this motion, respondent's solicitor argued that appellant should have appealed to the Court of Appeal against the order dismissing the appeal instead of applying to the Supreme Court.

Held, granting the application, that the order dismissing the appeal was interlocutory, and, therefore, appellant acted correctly in applying to the Supreme Court for an extension of time within which to appeal, rather than appealing against the order to the Court of Appeal.

Cases referred to: *Grimble & Co.* v. *Preston* [1914] 1 K.B. 270; *Salaman* v. *Warner* [1891] 1 Q.B. 734; *Vint* v. *Hudspith* (1885) 29 Ch.D. 322.

W. S. Marcus Jones for the appellant.
Gershon B. O. Collier for the respondent.