1947 *Present :* **Wijeyewardene, J.**

MAMMASALIE, Appellant, *and* THE INSPECTOR OF POLICE, KANDY, Respondent.

S. C. 1,044—M. C. Kandy, 25,217

Food Control—Order made under section 4 (1) (a) of Food Control Ordinance (Cap. 132)—Valid only for two months—Conviction under Defence (Mircsllansous) Regulation 52 (1)—Order of confircation illegal.

Where the accused was charges, under Food Control Order No. 109, with transporting flour without a permit—

Hsld, that a conviction for the contravention of an Order made by a Minister under the Food Control Ordinance is illegal if the Order has, by virtue of section 4 (5) of the Food Control Ordinance, already ceased to be in force after a period of two months.

Held, further, that the Defence (Miscellaneous) Regulation 52 (1) does not enable a Magistrate to make an order of confiscation.

[1] *(1806) R. & R. 109.*

APPEAL from a judgment of the Magistrate, Kandy.

S. R. Wijayatilake, for the accused, appeallant.

B. C. F. Jayaratne, C.C., for the respondent.

Cur. adv. vult.

October 28, 1947. WIJEYEWARDENE, J.—

The appellant and a woman called Ahmed Bee were charged with transporting a bag of 150 lbs of flour on August 19, 1946, without a permit " as required by Order No. 109 of the Minister of Agriculture and Lands dated March 12, 1946, published in *Government Gazette* No. 9,530 of March 12, 1946, and thereby committed an offence punishable under Defence (Miscellaneous) Regulations 52 (1)".

The Magistrate acquitted Ahamed Bee and convicted the appellant. He sentenced the appellant to pay a fine of Rs. 25 and ordered the bag of flour to be confiscated.

One Weerasekere, the proprietor of " Brownrigg Hotel ", gave evidence for the defence. He held a permit D 1 for the purchase of 440 lbs of flour a week. On August 17, 1946, he purchased 289 lbs. on a receipt D 2. He used to get Ahamed Bee to make the string hoppers which he sold at his hotel. Ahamed Bee lived within a quarter of a mile of the hotel. The appellant was carrying the bag in question for Ahamed Bee along a lane which connected " Brownrigg Hotel " with Ahamed Bee's boutique. Weerasekere stated in Court that he did not sell any flour to Ahamed Bee but he used to give her flour and pay her at the rate of Rs. 2 per 100 string hoppers made by her. The police sergenat who gave evidence for the prosecution said that, shortly after the appellant was arrested, Weerasekere told him that he supplied flour to Ahamed Bee at controlled rates and paid her at the rate of Re. 1 per 100 string hoppers. The sergeant, however, added that, when he read the statement recorded by him, Weerasekere wanted him to add the following word to the statement :—" I did not sell but gave it over to this woman for making string hoppers. The value of the bag viz , Rs. 25·50 is being deducted in instalments of Rs. 5 a day. I pay a string hopper at the rate of 1 cent each hopper ".

If the Order referred to in the charge applied to the accused, the appellant has acted in contravention of the Order. The question is whether the Order applied to the accused.

Order No. 109 was made by the Minister of Agriculture and Lands by virtue of the powers vested in him " by section 4 (1) (*a*) of the Food Control Ordinance (Chapter 132 , read with the Defence (Food and Price Control) (Transfer of Powers) Regulations, 1942, and with the Supplies and Services (Transitional Powers) Order, 1946 " (see *Gazette* No. 9,530 of March 12, 1946).

The reference to the Defence (Food and Price Control) (Transfer of Powers) Regulations, 1942, in the *Gazette* was necessary because the Order was made by the Minister of Agriculture and Lands and not the

Minister of Labour, Industry and Commerce, mentioned in the Ordinance. Now an Order made by the Minister under the Food Control Ordinance continues in operation only "for a period of two months commencing on the date of the publication" in the *Gazette*, even when the Order has been confirmed by the Board of Ministers and approved by the Council (*Vide* section 4 (5). Even if I assume that Order No. 109 mentioned in the charge has been so confirmed and approved, yet it could not have been in force after May 11, 1946. It is, therefore, not possible to say that the accused has contravened Order No. 109 by an act done by him on August 19, 1946. It may be that the Police who instituted the proceedings and the Magistrate who heard the case made a mistake in referring to Order No. 109 and there was another Order made at a later date which was in force at the date of the alleged offence. But this Court cannot be expected to refer to various *Gazette* to see if there was such an Order. Those responsible for the institution of proceeding should take care to see that the proper Order is mentioned in the charge. If the Magistrate who tried the case referred to the Food Control Ordinance, he would have seen the error made by the Police and would have tried to ascertain if there was a subsequent Order and made the necessary alteration in the charge.

There is another difficulty I experience in sustaining the order of the Magistrate. The accused is said to have committed an offence punishable under the Defence (Miscellaneous) Regulation 52 (1). Now that Regulation does not enable the Magistrate to make an Order of confiscation. Such an order could, no doubt, be made under section 6 (1) of the Food Control Ordinance amended by Ordinance No. 40 of 1939. But it is not, to say the least, fair to an accused to say that he committed an offence punishable under a Regulation which does not provide for a confiscation of the goods and then proceed to confiscate the goods at the end of the trial. The accused could not have thought that such an order would be made and he would not, therefore, have attempted to bring to the notice of the Magistrate any fact against the making of such an order.

I would set aside the conviction and the order of confiscation and acquit the accused.

Appeal allowed.