Present : Porter and Jayawardene JJ. 1923.

THE CHAIRMAN, MUNICIPAL COUNCIL, KANDY, *v.* MOHOMED ALI *et al.*

564 and 200—P. C. Kandy, 8,755.

Ordinance No. 3 of 1897, s. 12—Delegation of authority by Governor—Storing grain at a place not licensed—Case sent back for disposal by Magistrate—Magistrate delivering judgment written by another Magistrate who had been transferred from station—Second appeal—Right of accused to urge points not urged at the hearing of first appeal.

The accused were charged by the Chairman, Municipal Council, Kandy, with allowing grain in excess of five bushels to be stored in a place which was not licensed as a grain store in breach of regulation 6 under Ordinance No. 3 of 1897. At the trial in August, 1922, the accused called no evidence, but relied on two points of law : (1) That the delegation required by section 12 had not been conferred on the Chairman (complainant), and that therefore the regulations could not be enforced by him ; and (2) that the regulations were *ultra vires* of the powers conferred on the Governor in Executive Council. The Magistrate held that the regulations were not *ultra vires*, but upheld the first contention and acquitted the accused. The Supreme Court held that a delegation of authority was not necessary, and that if necessary a delegation must be implied ; and set aside the order of acquittal and sent the case back to be dealt with as the Magistrate should think fit. The Magistrate who tried the case had been transferred to another station. The new Magistrate ordered the case to be forwarded to Mr. Rogerson, who had tried the case, for final judgment. He noted when forwarding that counsel for the accused wished to call further evidence. Without hearing evidence Mr. Rogerson wrote out his judgment and sent it to Kandy to be delivered on a day on which he was appointed to officiate as Magistrate of Kandy.

Held, that the judgment was not invalid, though delivered by another Magistrate ; and that accused was not in the circumstances entitled to lead further evidence. It was not open to the accused at the hearing of the second appeal to urge that the regulation were *ultra vires*, as he should have urged it at the hearing of the first appeal.

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THE facts are set out in the judgment of Jayawardene J. The judgment of the Supreme Court on the first appeal was as follows :—

Hayley (with him *Soertsz*), for appellant.

H. J. C. Pereira, K.C. (with him *R. L. Pereira* and *R. C. de Fonseka*), for respondent.

February 7, 1923. PORTER J.—

The accused in this case were charged with having acted in breach of section 6 of the regulations made by His Excellency the Governor in Executive Council under "The Quarantine and Prevention of Diseases Ordinance, 1897," in that without obtaining a license from the complainant they allowed grain in excess of five bushels to be kept or stored in their place of business in Colombo street, Kandy.

When the case came on for trial on August 31 last, the accused were acquitted on the sole ground that there was no proof that His Excellency the Governor in Executive Council had delegated the enforcement of the above-mentioned regulations to the Chairman of the Municipal Council of Kandy under section 12 of Ordinance No. 3 of 1897.

Section 12 of Ordinance No. 3 of 1897 reads as follows :—

> "The Governor, with the advice of the Executive Council, may delegate the enforcement and execution of any regulation made under the Ordinance to any Municipal or local authority, subject to such restrictions as the Governor with such advice may from time to time think fit to impose."

The regulations alleged to have been infringed were published "by His Excellency's command" in the *Ceylon Goverment Gazette* on May 20, 1921, and from that date had the force of law. I do not think that any delegation of authority to prosecute was necessary, and, if so, such authority is implied. I consider that the Chairman of the Kandy Municipal Council was the proper person to prosecute. It is difficult to know exactly what section 12 of Ordinance No. 3 of 1897 means, but it probably means that the Governor may delegate any executive functions to some one other than the Chairman of the Municipal Council, who, as I have said, I think, is the proper person to prosecute for a breach of any of the regulations made under the Ordinance. I would, therefore, set aside this acquittal and send the case back to the Police Court to be dealt with as the learned Magistrate may deem fit.

Sent back.

The following is the judgment of the Supreme Court on the second appeal in this case :—

Elliott, K.C. (with him *Vethavanam* and *Canekeratna*), for appellants.

Hayley (with him *Soertsz*), for respondent.

JAYAWARDENE J.—

The accused who are dealers in rice in Kandy were charged by the Chairman of the Municipal Council of Kandy with allowing grain in excess of five bushels to be stored or kept in premises Nos. 199 to 201, Colombo street, Kandy, which are not licensed as a grain store, in breach of regulation 6 of the regulations under Ordinance No. 3 of 1897 by the Governor in Executive Council. They have been convicted and sentenced to pay a fine of Rs. 30 each. At the trial held on August 31, 1922, when the cases, both for the prosecution and the accused, were fully gone into, the accused called no evidence, but relied on two points of law firstly, that the delegation required by section 12 of Ordinance No. 3 of 1897 had not been conferred on the Chairman of the Municipal Council of Kandy, the complainant, and that therefore the regulations could not be enforced by him ; and secondly, that the regulations were *ultra vires* on the powers conferred on the Governor in Executive Council. The learned Police Magistrate dealt at length with both these points and upheld the first contention and acquitted the accused. As regards the second point, he held that the regulations were not *ultra vires* as alleged. The complainant appealed against this order, and this Court on February 7 of this year set aside the judgment of acquittal, holding that a delegation of authority to prosecute was not necessary, and that, if necessary, a delegation must be implied. The case was ordered to be sent back to the Police Court to be dealt with as the learned Magistrate shall think fit.

When the case was called before the Police Court for the purpose of communicating to the accused the result of the appeal, it came before another Magistrate, as Mr. Rogerson, the Magistrate, who had tried the case, had been transferred to another station. This Magistrate ordered the case to be forwarded to Mr. Rogerson for final judgment and to fix a date for such judgment. Counsel for the accused then stated that he wished to call further evidence for the defence. The complainant's proctor objected. The application and objection were noted, but without any order being made on it the record was forwarded to Mr. Rogerson. On March 14, for which date Mr. Rogerson had been appointed Police Magistrate of Kandy, the judgment convicting the accused and imposing on them a fine of Rs. 30 was delivered by his successor. The accused appeal against this judgment. It is contended for them that the judgment is invalid, as it was not delivered by the Magistrate who heard the

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case. It is also urged that when the case was s nt back, it should have been called before the Magistrate who had tried it, as the accused should then have had an opportunity of leading in further evidence and urging other grounds in their defence. The judgment convicting the accused has been written by Mr. Rogerson, and was delivered at Kandy on a day on which he was appointed to officiate as Police Magistrate of Kandy. His judgment, although he was not physically present at Kandy when it was delivered, is valid. As regards the other contention, I do not think the accused were entitled to lead evidence or urge further arguments. The case was fully and completely heard by Mr. Rogerson at the trial held on August 31, 1922. At that trial the Magistrate wished to hear the defence, but the accused called no evidence, and I find in the record the entry, "no witnesses called," under the heading "Defence." The accused's counsel contended themselves with urging the two points of law I have referred to above. I could understand a complaint of this kind being made if the Magistrate had said that he did not wish to hear the defence on the facts, and had asked counsel to confine himself to the legal objection. But in this case the Magistrate had desired to hear the case for the defence fully both on the facts and on the law, but the accused's counsel chose to stake their case on points of law alone. In the circumstances, I do not think the accused are entitled to lead further evidence or to urge other grounds at this stage of the proceedings. The case must be decided on the record as it stood at the conclusion of the trial on August 31. Counsel for the appellant wished to urge before me the objection that the regulations were *ultra vires*. This was a matter on which Mr. Rogerson had expressly given a decision in his judgment which came up in appeal. The question could have been, and ought to have been, debated at the first argument before this Court, if there was any substance in the objection. It directly arose on the judgment then under appeal, and the acquittal of the accused could have been justified on that ground. But the objection appears to have been abandoned and not pressed, as the judgment of this Court contains no reference to it. I do not think I would be justified in allowing it to be raised now. Then it is contended that there is no proof that the commodity that was stored in accused's premises was "grain," as defined in the regulations, or that the quantity so stored was in excess of five bushels. The evidence of the witness Abeysinghe proves that the quantity stored was clearly in excess of five bushels. This witness also spoke of the commodity found in the accused's store as "grain." Regulation 2 of these regulations declares that the word "grain" as used in these regulations shall mean "foreign or imported grain only . . . . ." When the witness spoke of "grain" he must be taken to have referred to "foreign or imported grain." He was speaking with reference to the violation of the regulation and to

grain which these regulations required to be kept in licensed grain stores. It is not contended even now that the commodity was not "foreign or imported grain." No question was raised with regard to it in the lower Court. It is in my opinion without substance. The only result of upholding the objection would be to give the prosecution an opportunity of proving that the grain was foreign or imported grain which it is not seriously contended it was not. No doubt in these cases it is necessary for the prosecution to prove that the grain stored is foreign or imported grain, and it is to be hoped that in similar prosecutions in the future the fact of the grain stored being foreign or imported grain will be clearly and specifically stated and proved.

I dismiss the appeal.

Appeal dismissed.