1944 *Present:* **Moseley S.P.J.**

GUNAWARDENA, Appellant, *and* KANDY POLICE, Respondent.

274—M. C. Kandy, 6,308.

Defence (Miscellaneous No. 3) Regulations—Arrest of accused—Omission to set out grounds of belief in order for arrest—Validity of order—Regulation (1) 1.

Where a person is detained on an order made by His Excellency the Governor in pursuance of the powers vested in him by regulation (1) 1 of the Defence (Miscellaneous No. 3) Regulations it is not essential to the validity of the order that it should set out the conditions precedent to the making of the order, viz., that the Governor has reason to believe that a certain state of things existed and that by reason thereof it is necessary to exercise control over the accused.

It is desirable, however, to include in the order the Governor's belief on reasonable grounds as to the category into which the detainee fell.

APPEAL from a conviction by the Magistrate of Kandy.

H. V. Perera, K.C. (with him *S. Nadesan* and *N. Nadarasa*), for the accused, appellant.

Walter Jayawardene, C.C., for A.-G.

Cur. adv. vult.

June 20, 1944. MOSELEY J.—

The appellant was convicted of an offence punishable under section 220A of the Penal Code in that he escaped from custody in which he was

lawfully detained on an order made by His Excellency the Governor, in pursuance of powers vested in him by regulation 1 (1) of the Defence (Miscellaneous No. 3) Regulations, dated June 3, 1940.

The relevant sub-regulation is as follows:—

"1 (1) If the Governor has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the Island or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

On June 18, 1940, the Governor made the following order:—

Detention Order.

In pursuance of the powers vested in me by Regulation 1 of the Defence (Miscellaneous No. 3) Regulations published in *Gazette* No. 8,619 of June 3, 1940, I, Andrew Caldecott, Governor of Ceylon, do hereby order that Don Philip Rupesinghe Gunawardena, M.S.C., reputed to be resident at Boralugoda, Kosgama, and Buller's Road, Colombo, be detained in accordance with the instructions set out in the succeeding paragraphs of this order.

2. I instruct the Inspector-General of Police to cause the said Don Philip Rupesinghe Gunawardena, M.S.C., to be detained and delivered to the custody of the Inspector-General of Prisons in order that the Inspector-General of Prisons may give effect to the instructions to him which appear in paragraph 3.

3. I instruct the Inspector-General of Prisons, upon such delivery to cause the said Philip Rupesinghe Gunawardena, M.S.C., to be detained at Welikada Prison or at such other place as I may authorise from time to time and in accordance with such instructions as I may issue from time to time.

Given under my hand in triplicate at Colombo, this eighteenth day of June, 1940.

Sgd. A. CALDECOTT,
Governor.

On July 7, 1940, a further order was made directing that the appellant be removed to the appropriate prison at Kandy. During the night of April 7, 1942, he escaped from that prison. The fact of escape was admitted by the appellant in an unsworn statement from the dock. He has appealed on the ground that the custody from which he escaped was not lawful.

The point taken by his Counsel is that the order for detention, on the face of it, is invalid in that it does not set out the conditions precedent to the making of such an order, that is to say that the Governor had reasonable cause to believe that a certain state of things existed and that by reason thereof it was necessary to exercise control over the appellant. Alternatively, he contended that there is no proof of the existence of such conditions and that consequently an element of doubt as to their existence remained. That being so the prosecution cannot be said to have proved its case beyond reasonable doubt.

To me it seems that the whole case depends upon the validity of the order. It is either valid or invalid. If it is invalid, it cannot be said that the custody of the appellant was lawful. If it is valid, the onus laid upon the prosecution has been discharged. I find it difficult to visualize the circumstances in which the alternative position taken up by Counsel for the appellant can arise.

No authority exactly in point has been brought to my notice. In *Rex v. Brixton Prison (Governor) ex parte Pitt-Rivers* [1] an order for detention was made by the Home Secretary under regulation 1 (1A) which set out a belief that the detainee was engaged in certain activities but omitted a recital that the Secretary of State had reasonable cause to believe it to be necessary to exercise control over him. It was held that the absence of such recital did not invalidate the order. Counsel for the appellant, however, sought to distinguish between the nature of the two conditions precedent. He described the belief—that the belief, for example, as to a person's activities as subjective, the belief as to the necessity for control as objective. I cannot think that this is a distinction of any substance. It seems to me that the existence of each condition depends upon the state of mind of the Secretary of State. With that ground of distinction out of the way, can it be said that there is anything attaching to the first condition which does not attach to the second? That is to say, if the absence of a recital as to the existence of the second condition has been held not to invalidate a similar order, what is there to prevent me from holding a similar view in the present case where neither condition is recited? In the case above cited Humphreys J. dealing with the matter from the point of view of prejudice, said:—

> "The applicant cannot be prejudiced in any way by the omission of a recital that the Home Secretary had reasonable cause to believe that it was necessary to exercise control over the applicant. The fact of his detention was the plainest intimation to him that the Secretary of State considered it necessary to exercise control over him, and the insertion of the words omitted would have added nothing to his information on the subject."

There can hardly be disagreement with that view. So, in the case before me it must have been clear to the appellant that the Governor believed that it was necessary to exercise control over him. Cannot the matter be carried a step farther to the point that possessing that knowledge, the appellant must have been aware of the reasons underlying the necessity for control? Humphreys J. thought that a document giving the general reasons for detention was essential, as "it would be contrary to the dictates of natural justice that a person not accused of an offence should be imprisoned for even a day without being informed of the general reasons for his detention". This expression of opinion is *obiter dictum* since, in the case then under consideration, the reasons had been set out in the order. It might be more correct to say that a variety of reasons had been set out since the order contained a recital of each of the three alternative reasons upon which an order made in pursuance of regulation 1 (1A) might be founded. In the present case, starting from the hypothesis that the appellant knew that the Governor thought it

[1] *(1942) A. E. R. Vol I. p. 207.*

necessary to exercise control over him, the reference to the regulation under which the order was made would convey to the appellant that the Governor had reasonable cause to believe that he was of hostile origin or associations or had been recently concerned in acts prejudicial to the public safety or the defence of the Island or in the preparation or instigation of such acts. It seems to me that the appellant was no more prejudiced than was Mr. Pitt-Rivers in the above-mentioned case. It should be mentioned that regulation 1 (1A) was not made applicable to Ceylon until April 8, 1942, so that the recital that the Governor's order was made pursuant to the powers conferred by regulation 1 had no reference to the powers conferred later by regulation 1 (1A). Apart from the question of prejudice it was held by the Court of Appeal in *Rex v. Secretary of State for Home Affairs ex parte Less*[1] in which it was argued that the order setting out allegations in terms of regulation 1 (1A) in the alternative was bad for duplicity, that there was "nothing in the point". A similar point was taken later in the case of *Stuart v. Anderson and Morrison*[2] where exception was taken to an order made by the Home Secretary under regulation 1 (1A) which recited each of the conditions set out in that sub-regulation upon which a detention order might be made, and which ordered the detention of no less than 350 persons. Tucker J. following the decision of the Court of Appeal, to which I have just referred, declined to hold that the order was bad on the face of it.

In support of the view taken by Humphreys J. in *Rex v. Brixton Prison (Governor) ex parte Pitt-Rivers (supra)* Counsel for the appellant cited the case of *Gossett v. Howard*[3] in which it was held that " in the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to show their authority on the face of them by direct averment or reasonable intendment ". There has, Counsel contended, been no dissension from this principle. Even so, does not a recital of the number of the regulation under which the present order was made amount to a "direct averment" as contemplated by the learned Judges of the Exchequer Chamber ? It seems to me that it does.

The position, I think, may be summed up in this way. It is fairly clear that the order must be in writing. No form is prescribed. The regulations themselves contain no requirement that the grounds for making the order should be stated therein. On this point, in *Rex v. Brixton Prison (Governor) ex parte Pitt-Rivers (supra)* Wrottesley J. thought that an order in writing purporting to be made under regulation 18B (1) or (1A) without further ado could not be said to be in excess of the powers of the Home Secretary, provided he had what he thought reasonable grounds for the necessary belief. He thought, however, that a statement of the Home Secretary's belief on reasonable grounds as to the category into which the detainee fell, "a desirable thing to be included in any order, since it gives the appellant early notice of the category". With that desirability I respectfully and entirely agree, but I am quite unable to say that the omission of such a statement is fatal to the validity

[1] *(1941) 1 K. B. p 72.* [2] *(1941) A. E. R. Vol. 2, p 665.*
[3] *(1845) 10 Q. B. 411 at 452.*

of the order. Further it would appear, from a perusal of the succeeding sub-regulations of Regulation 1, and particularly sub-regulation 5 that at a certain later stage the detainee is to be furnished with " the grounds on which the order has been made against him " which would appear to be an unnecessary proceeding if they had already been set out in the order.

For these reasons I hold that the order for detention is valid. The appeal is dismissed.

Appeal dismissed.