1943 *Present :* **Keuneman J.**

PONNUDURAI, Appellant, *and* MAILVAGANAM, Respondent.

555—M. C. Point Pedro, 2,535.

Burden of proof—Charge of failing to furnish a return specifying a store or place for keeping controlled articles—Control of Prices Regulations 1942, s. 6.

Where a person is charged with having in his possession a stock of controlled articles in his house, which is not a registered store or place, and failing to furnish to the Controller a return specifying such store or place,—

Held, that the burden of proving that the accused failed to furnish to the Controller a return, in the manner specified, lay upon the prosecution.

APPEAL from a conviction by the Magistrate of Point Pedro.

L. A. Rajapakse (with him *N. M. de Silva*), for accused, appellant.

G. E. Chitty, C.C., for respondent.

Cur. adv. vult.

September 14, 1943. KEUNEMAN J.—

The accused in this case was charged with having in his possession a stock or quantity of seven bags of chillies, a price-controlled article, in his house which is not a registered store or place and failing to furnish to the Controller a return specifying such store or place, and thereby committing a breach of section 6 of the Control of Prices Regulations of 1942 published in *Government Gazette* No. 9,019 of October 8, 1942. The charge set out that the offence was punishable under section 5 (6) of the Food Control Ordinance (Cap. 32), but this is not correct, as the offence is really punishable under the Control of Prices Regulations of 1942.

Section 6 of the Regulation runs as follows :—

"Every person who desires to keep any stock or quantity of any price-controlled article at any store or other place which is not a registered store, shall furnish to the Controller a return specifying such store or other place, and the Controller may in respect of such store or other place exercise the powers conferred on him by Regulation 5."

It is to be noted that the offence alleged is the breach of a positive requirement to furnish a return to the Controller.

This case has followed an unusual course. The Inspector of Police gave evidence of the search at the house of the accused who was present, and of the finding of the seven bags of chillies. The Inspector proved that chillies were a price-controlled article, and produced a *Gazette* in support of this, and added that the accused had no permit to store the chillies. The cross-examination of the Inspector was directed to the point whether the accused was or was not a wholesale trader or importer. Thereafter the record runs as follows :—

> "Defence concedes that the premises where these chillies were seized were not registered, and also that the chillies were found in the house of the accused. In view of this, the prosecution closes its case. The accused leads no evidence.
> I find the accused *guilty.*"

I think the proceedings at this point were irregular, and that the Magistrate should not have accepted what is apparently an admission of the accused's Counsel. But I need not consider that matter further, for Counsel for the appellant urges that there is no evidence that the accused failed to furnish a return to the Controller. Certainly there is no evidence whatsoever on that point.

Crown Counsel contends that the burden of proof on this point lay on the accused, and that it was not incumbent on the prosecution to prove a negative. He relies on the case of *Perkins v. Dewadasan*[1], and the English cases followed in that decision. In *39 N. L. R. 337*, the charge was that the accused "not being a medical practitioner did practice for gain . . . . " in breach of section 41 (*b*) of Ordinance No. 26 of 1927. de Kretser A.J. followed the English cases and came to the conclusion that the burden of proving that he is a medical practitioner lay on the accused.

I have examined the English cases relied upon. *In The King v. Turner*[2] the offence charged was that the accused being a carrier, and not having the qualifications set out under 10 heads, did unlawfully have in his custody and possession sixteen pheasants and five hares. It was held. that the burden of proving the qualifications was on the accused persons. In *Apothecaries Co. v. Bentley*[3], a penalty was claimed in that the defendant practised as an apothecary "without having obtained such certificate as by the said Act is required". It was held that the affirmative had to be proved by the defendant and not the negative by the plaintiffs. In *Williams v. Russel*[4] Talbot J. said,—

> "On the principle laid down in *Rex v. Turner* (*supra*) and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority."

This was a case where the accused was charged with using a motor vehicle without there being in force in respect of such user a policy of insurance.

[1] *39 N. L. R. 337.*
[2] *105 E. R. 1026.*
[3] *171 E. R. 978.*
[4] *149 L. T. 190.*

In *Roche v. Willis*,[1], the offence alleged was that the respondent did unlawfully drive a heavy locomotive when under the age of 21. The section in the Road Traffic Act, 1930, was as follows :—

"A person under 21 years of age shall not drive a heavy locomotive . . . . on a road unless on first applying for a licence . . . . he satisfies the licensing authority that he was . . . . in the habit of driving a motor vehicle of that class."

It was held that the onus of bringing himself, if he could, within the proviso or exception or exemption lay upon the respondent.

I do not think any of these cases are applicable in the present instance. The proof of the finding of the chillies in the house of the accused no doubt establishes that the accused desired to keep a stock or quantity of such articles in his house. The substance of the charge is that the accused failed to furnish to the Controller a return in the manner specified. The accused is not trying to force upon the prosecution the proof of any proviso, or exception or exemption. In my opinion the burden of proving this fact lay upon the prosecution, and in the circumstances the prosecution fails.

I set aside the conviction and confiscation and acquit the accused.

Set aside.