1947 *Present :* **Dias J.**

FERNANDO (P. C. 867), Appellant, *and* SENARATNE,

Respondent.

S. C. 746—M. C. Kandy, 26,167

Criminal Procedure Code—Section 325 (1)—Plea of guilt—Applicability of section—Right of appeal.

Where the accused on being charged under a Defence Regulation pleaded guilt and the Magistrate recorded "I find the accused guilty"—*Held*, that this amounted to a "conviction" of the accused and that the Magistrate could not, therefore, act under the provisions of section 325 (1) of the Criminal Procedure Code. It was his duty, in the circumstances, to have imposed a sentence according to law.

Held, further, that no appeal lies against an order under section 325 (1), but the Supreme Court may deal with the case in revision.

APPEAL from an order of the Magistrate, Kandy.

No appearance for the complainant-appellant.

V. S. A. Pullenayagam, for the accused-respondent.

Boyd Jayasuriya, C.C., as amicus curiae.

Cur. adv. vult.

Septeber 2, 1947. DIAS J.—

The accused was charged under the Defence (Control of Textiles) Regulations with having in his possession certain textiles in excess of that which a customer could purchase, and alternatively with transporting the same and failing on demand to produce the invoice, debit note or cash receipt for inspection in terms of section 14 of the Regulations and punishable under section 59 thereof.

The accused who had originally pleaded Not Guilty to the charge subsequently retracted his plea and pleaded Guilty. Thereupon the Magistrate recorded :

"I find accused guilty .. . . . In the circumstances as the accused is not a dealer in textiles, I order accused to enter into a bond under section 325 (1) (b) with one surety in a sum of Rs. 150/150 for a period of eighteen months. I confiscate the productions and forward to the Controller of Textiles".

I agree with counsel for the respondent that the complainant has no right of appeal in this case. There are conflicting single-Judge decisions on the point, but Soertsz J. in the case of *Cassim v. Abdurasak* [1] considered the earlier cases and came to the conclusion that no appeal lies from an order under section 325 (1) of the Criminal Procedure Code, because it is not a "final order" within the meaning of section 338 (1) of the Criminal Procedure Code. If I may respectfully say so, I think the reasoning in *Cassim v. Abdurasak* is sound, and I follow it.

The complainant having no right of appeal, it is open to me to consider the case by way of revision. Crown Counsel has kindly appeared as *amicus curiae* to assist the Court.

[1] *(1937) 38 N. L. R. 428.*

Unlike section 325 (2) which applies only to trials on indictment, a Magistrate can only make an order under section 325 (1) "without proceeding to conviction". When the accused pleaded guilty the Magistrate knew that the charge was "proved". If he then decided for any of the reasons stated in section 325 (1) to bind over the accused, he had to do so "without proceeding to conviction". Therefore, the question is, when the Magistrate after the accused pleaded Guilty recorded "I find the accused guilty", whether he thereby proceeded to convict the accused? In the case of *Marthelis v. James*[1] this question was answered in the affirmative. What is more, the fact that the Magistrate thereafter went on to confiscate the textiles shows that he regarded that the accused had been convicted, because such an order of forfeiture can only be made under the Regulations after "conviction"—see section 61 (2) of the Regulations.

The applicability of section 325 (1) was, therefore, ousted. The Magistrate having convicted the accustd could not act under section 325 (1) He should have proceeded to impose a sentence on the accused according to law—*Chelliah v. Samman*[2]

In England the Probation of Offenders Act, 1907, contains a provision almost identical with the terms of section 325 (1) of our Code In Stone's Justices' Manual (1946 edition), pages 142 and 2772, it is stated that "This provision is not to be used as a means of evading the law, or to encourage persistent offenders in their contumacy. It cannot properly be applied to an offence under section 4 (2) of the National Service Act. 1941—*Eversfield v. Story*[3] . . . . . A delibeerate breach of the Rationing Order, 1939, is not 'trivial'—*White v. Hurrell Stores, Ltd.*[4]"

In the present case I cannot hold that section 325 (1) was resorted to in order to evade the imposition of the heavy fine provided by section 59 of the Regulations for a first offence; nor is there any proof that the accused has been guilty of a deliberate or persistent breach of the Regulations. The Magistrate apparently formed the view that there were "extenuating circumstances". I cannot say that he has erred in coming to that conclusion.

Section 59 (*a*) of the Regulations provides for a first offence a fine not less than Rs. 500 and not more than Rs. 5,000, or with imprisonment of either description for a term not exceeding one year, or with both such fine and imprisonment.

I set aside the Magistrate's order subsequent to the words "I find the accused guilty", and direct that the bond given by the accused should be cancelled and discharged. In place of the order made I sentence the accused to imprisonment until the rising of the Court.

Sentence varied.

[1] *(1929) 10 C. L. Rec. 36.*
[2] *(1921) 3 C. L. Rec. 37.*
[3] *(1942) 1 K. B. 437.*
[4] *(1941) 164 L. T. 334.*