

1969

Present : de Kretser, J.

A. ABUSALLY, Appellant, and THE PRICE CONTROLLER,
KANDY, Respondent

S. C. 964/68—M. C. Kandy, 53132

Control of Prices Act—Price order relating to sale of mutton with bone—Validity.

A Price Order of 7th August 1962 fixed the controlled price of mutton with bones at Rs. 2.25 per pound and further directed that "when mutton is sold with bones the weight of bones sold therewith shall not exceed 25 per cent. of the total weight sold".

Held, that the Price Order was invalid to the extent that it is not possible to say of mutton with bone, when it is sold as an indivisible whole, what percentage of it is bone. In such a sale, it is unreasonable to insist that the percentage of bone must not exceed 25 per cent.

APPEAL from a judgment of the Magistrate's Court, Kandy.

N. Satyendra, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 26, 1969. DE KRETZER, J.—

The Magistrate of Kandy (Mr. D. F. Dharmasckera) found the accused—a butcher by name Abusally—guilty of the two charges laid against him :

- (1) of selling a pound of mutton with bones at Rs. 2.50 when the controlled price was Rs. 2.25 ;
- (2) of selling a pound of mutton with bones—the weight of the bones exceeding 25% of the total weight of one pound.

The Magistrate imposed a sentence of four weeks' R. I. and a fine of Rs. 250 in default two weeks' R. I. on each count. The jail sentences to be concurrent. The accused has appealed.

The relevant Price Order No. KD. 107 is found in G. G. 13255 of 7th August 1962 and states (para. 2) that mutton for the purpose of the order means the flesh of sheep or goat but shall exclude all forms of offal and controls the price of mutton as follows :—

- (1) Mutton without bones Rs. 2.50 per pound.
- (2) Mutton with bones Rs. 2.25 per pound.

Para. 3 of the Order directs that “ when mutton is sold with bones the weight of bones sold therewith shall not exceed 25% of the total weight sold ”.

It is this direction that Counsel for the appellant submits is bad in Law in that it requires a seller of mutton with bone to do what is impossible, for he submits that where mutton is not separated from bone it is impossible for a seller to ascertain the bone content in it with the precision required to say what percentage of the total weight it is., e.g., when a butcher sells a mutton chop it is impossible for him to ascertain with precision what per cent. of it is bone short of scraping the flesh off it and weighing flesh and bones separately and making it to cease to be what the customer wants to buy, namely a mutton chop.

To sell three-quarter pound mutton and one-quarter pound of bone is to sell a pound of mutton and bone, but that is something quite different to selling a pound of mutton with bone which at the time of sale is an indivisible whole. There are cuts of mutton which are sought to be bought in butchers' stalls in which adherence of mutton to bone is essential for the purpose it is bought for, and the sale separately of mutton and bone cannot be adequately used as a substitute. The Price Order recognises this for while the Price Order controls *the price of mutton* and not the price of bone, it recognises that mutton has to be of two descriptions : (1) Mutton with bones ; (2) Mutton without bones.

Were that not so it could content itself with only controlling the price of mutton and stating that as in the case of mutton with offal (vide para. 5 of the Price Order) mutton when sold with bone must be weighed separately from the bone.

The Law does not force anyone to do what is impossible, and when a Price Order directs a person to do what is impossible a Court can say with certainty that Parliament never intended to give the Controller of Prices authority to make such an order and that it is unreasonable and *ultra vires*. In the instant case I am completely satisfied that it is not possible to say of mutton with bone what percentage of it is bone and the proof of that is that even in this case a veterinary surgeon had to be called who says that he separated the flesh from the bone and had it weighed and it is on these weighings that this prosecution was launched. It is so unreasonable to insist that where there is a sale of mutton with bone that the percentage of bone must not exceed 25% that I hold that the Price Order to that effect is *ultra vires*. The conviction of the accused on the charge of selling a pound of mutton with bones the weight of the bones exceeding more than 25% of the total is set aside.

— There remains the conviction on count 1. It is accused's own evidence that what he was asked for and what he supplied was a pound of mutton with bones. That he supplied a pound of mutton with bones the weight apparently being made up by the addition of bones is also established on complainant's evidence read with the evidence of the veterinary surgeon. The conflict of evidence is in regard to the price charged. For while accused admits he had handed over Rs. 2·50 as change from the Rs. 5 tendered in payment, he says that he intended to hand over 25 cents more but had no change and had sent 50 cents to be changed for that purpose. The decoy admits that he was asked whether he had 25 cents change and he strangely says that he cannot remember whether the accused asked people around whether they had 25 cents with them, and also that he cannot remember whether the accused gave 50 cents to be changed. But he does claim that he asked the accused "whether the amount was correct and when the accused said yes he lifted the parcel which was the agreed signal for the other Inspectors to come up." He has denied under XNM that he never asked that question.

The Magistrate bases his conviction on the evidence of the decoy who he says gave his evidence in a truthful manner. But he has apparently not given his mind to the fact that a person speaking to a true incident can give evidence in a truthful manner and yet smuggle in one lie without causing a change of impression. In this instance the one matter is whether it is true that he asked whether the amount was correct. It appears to me to have been an unusual question to ask in the given circumstances for surely what he would have asked is "What about the balance 25 cents"—the accused admittedly having asked him for change. The prosecution could have corroborated his evidence on this vital point by calling the Inspector who was sent for the specific purpose of watching the transaction and was doing so according to the decoy from 4 to 5 feet away. But the prosecution does not call him. While it is

possible that the Magistrate is correct when he says that the witness Perera called for the defence was not a witness of truth, the falsity of evidence given for the defence does not necessarily show that the evidence for the prosecution is true.

It appears to me that as the Magistrate has not given his mind to these aspects of the evidence I am entitled to give the accused the benefits of the doubts that assail me that what the accused says is true, namely, "Before I could give the 25 cents I was arrested." I set aside the conviction on this count as well. The appeal of the accused is allowed.

Appeal allowed.

