1966 *Present :* **Alles, J.**

S. PONNIAH, Appellant, *and* M. F. SHERIFF (Food and Price Control Inspector), Respondent

S. C. 312/66—M. C. Kalmunai, 21,691

Control of Prices Act—Sale of potatoes—Excess price—Accuracy of scales—Evidence of weighing on accused's scales only—Sufficiency of such evidence—Quantum of proof required from the prosecution—Evidence Ordinance, s. 114.

Judicial precedent—Scope of principle of stare decisis.

The accused was charged with selling a pound of potatoes at 50 cents a pound when the controlled price of a pound was 34 cents. The prosecuting Price Control Inspector gave evidence that, immediately after the sale, he weighed the potatoes in the accused's balance and found that it weighed a pound. The accuracy of the accused's scales was not challenged in the course of the cross-examination of the prosecution witnesses; nor did the accused lead evidence to rebut the natural inference to be drawn in such a case that his scales were accurate.

Held, that, on the evidence led in the case, the accuracy of the scales on which the potatoes were weighed was sufficiently established by the prosecution.

Sub-Inspector of Police v. Wassira (46 N. L. R. 93) not followed.

Held further, that the Court was not bound by an earlier decision in which material cases and statutory provisions were not considered.

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

A. H. C. de Silva, Q.C., with *P. Nagendran*, for the accused-appellant.

L. B. T. Premaratne, Senior Crown Counsel, with *Aloy N. Ratnayake*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 19, 1966. ALLES, J.—

The accused in this case was charged on two counts under the Control of Prices Act. On the first count he was charged with selling a pound of potatoes at 50 cents a pound when the controlled price of a pound was 34 cents ; on the second count he was charged with failing to exhibit in a conspicuous place in his boutique the price at which price-controlled articles have to be sold. After trial he was convicted on both counts and sentenced to a term of 6 months rigorous imprisonment and a fine of Rs. 1,000 in default a further term of six months rigorous imprisonment on the first count, and a fine of Rs. 500 in default six weeks rigorous imprisonment on the second count. Counsel for the accused-appellant has not canvassed the conviction and sentence on the second count but has urged that the conviction on the first count cannot be maintained on the ground that the accuracy of the accused's scales on which the potatoes were weighed has not been established by the prosecution by satisfactory evidence. In support of his submission, Counsel has relied on certain decisions of this Court to which I shall presently refer.

The facts of the case are not in dispute and may be briefly stated. According to the evidence of Food and Price Control Inspector, Sheriff, he sent a decoy, Somadasa, with a marked rupee note to buy a pound of potatoes from the accused's boutique. Another Inspector, Karunaratne, was sent to watch the sale. Somadasa went to the boutique and asked for a pound of potatoes. He inquired for the price of a pound from the accused and was informed that it was 50 cents. The accused then weighed the potatoes on his balance and gave Somadasa the potatoes and the balance of 50 cents. Sheriff then rushed up, revealed his identity, took charge of the potatoes and the balance sum of 50 cents from Somadasa, weighed the potatoes in the accused's balance and found that it weighed a pound. He tested the balance by interchanging the pans and found them to be correct. Counsel, however, submits—a submission with which I agree—that this test does not establish the accuracy of the scales. The accused did not give evidence at the trial and, in spite of a lengthy cross-examination of the prosecution witnesses, the only substantial suggestion made to them was that the commodity in question may not be potatoes but some other kind of yam. However, in the course of Counsel's submissions at the end of the trial, the accuracy of the scales on which the potatoes were weighed appears to have been raised by the defence.

Counsel for the Crown submits that on the evidence led in the case, the prosecution has established the accuracy of the scales on which the potatoes were weighed and in particular draws my attention to the fact that the accuracy of the scales was neither challenged in the course of the cross-examination of the prosecution witnesses nor did the accused by giving evidence seek to rebut the natural inference to be drawn in such a case that his scales were accurate. In *De Alwis (Food and Price Control Inspector) v. Subramaniam* S. C. 787, 788 M. C. Badulla 7812, S.C. Minutes of 23.9.49, Basnayake, J. (as he then was) said :—

> " I think it can safely be presumed that in the ordinary course of business a trader will not keep a balance which gives the customer more

goods than the quantity he purports to sell, nor is a trader likely to keep a weight which weighs more than the weight indicated on its face, for the reason that a trader who sells with such scales or such weights is inviting loss and not gain. Profit being the motive of trade, it must be presumed that a trader's scales are not inaccurate at least to the extent of causing him loss. A person who claims that he trades with scales which favour the customer must rebut the presumption in favour of the accuracy of his scales and weights."

The learned Judge thereafter draws attention to the various provisions of the Weights and Measures Ordinance which provide for the periodic examination and stamping of weights and the imposition of penalties for the possession of false weights to indicate that the law seeks to ensure that traders carry on their business regularly and without prejudice to the public. When a trader carries on business using scales and weights which represent to prospective customers that the scales and weights are accurate, I do not think it is open to such a trader to submit that the prosecution must prove the accuracy of the scales. The prosecution need only go so far, if the defence challenges that fact or concedes that the weights and scales are not accurate. In this case the defence did not dispute that what was represented to Somadasa was, that a pound of potatoes was sold to him and weighed on scales, which prima facie were represented to be accurate. When the accused therefore in the ordinary course of business, sold to his customer what purported to be a pound of potatoes weighed on his own scales, it must be presumed not only that he represented that his scales were accurate but also, in the absence of any evidence to the contrary, that they are in fact accurate ; that is the logical inference to be drawn from the proved facts. In my view this is a case to which the Court may legitimately presume the existence of such a fact under Section 114 of the Evidence Act. As Swan, J., said in *Joseph v. M. D. H. Perera*[1] in dealing with a case of profiteering in bread, where the Magistrate had acquitted the accused on the ground that the accuracy of the scales had not been established by the prosecution, "the Magistrate did not realise that the accused was under a legal obligation to use correct weights himself and if the loaf weighed 15 ounces according to the accused's own scales and weights there was, to say the least, a prima facie case made out against the accused". The unreality of accepting the submission of the defence that in every case of this kind the burden is on the prosecution to prove the accuracy of the scales, may be illustrated from the facts of the instant case itself. The price charged for the controlled commodity was almost 50 per cent. more than the controlled price. It must therefore mean that the accused, without his knowledge, was using scales that were so inaccurate that a customer received 1½ times the quantity of the commodity for one unit of the price. Is it conceivable that any person carrying on his daily business as a trader would use so inaccurate a pair of scales ? In this connection, Mr. Premaratne for the Crown brought to my notice the interesting case of *Nicholas v. Penny*[2]. In this

[1] *(1952) 53 N. L. R. 502 at 503.* [2] *(1950) 2 K. B. 466.*

case the question that arose for decision was the accuracy to be attached to a watch or speedometer which was used to calculate the speed at which a motorist was driving his car. The police constable gave evidence that he drove a police car at an even distance behind the defendant's motor car for four-tenths of a mile along a road subject to a speed limit of 30 m.p.h. and that the speedometer showed an even speed of 40 m.p.h. The Court (Lord Goddard, C.J., Humphreys and Morris, JJ.) held that when a watch or speedometer records a particular time or speed, that is prima facie evidence of that time or speed, notwithstanding that no evidence is adduced as to the accuracy of the device. Said Lord Goddard at p. 473 :—

> ' The question in the present case is whether, if evidence is given that a mechanical device such as a watch or speedometer—and I cannot see any difference in principle between a watch and a speedometer—recorded a particular time or a particular speed, which is the purpose of that instrument to record, that can by itself be prima facie evidence, on which a court can act, of that time or speed. It might be that in a particular case the court would refuse to act on such evidence. For instance, if it were a question whether a man died before midnight on a certain day and one party alleged that he died half a minute before 12 o'clock and another party that he died half a minute after 12 o'clock, and the first party said " It was half a minute before 12 because I observed the time by the clock " it might be that the court would say " we will not find that as a fact unless we are satisfied as to the accuracy of the clock ". In the present case counsel for the prosecution called our attention to the fact that the speedometer must have been very inaccurate if the offence was not committed. The offence is driving at a speed exceeding 30 m.p.h. and the evidence is that the speedometer showed at the time in question that the defendant was exceeding 30 m.p.h. by no less than 10 m.p.h. It would be a considerable error in the speedometer if it were as much out as that.'

Counsel for the Crown submits, with considerable force, that the same analogy would apply to the facts of the present case. The variation in the price demanded for the controlled commodity was so great that the accused's scales must have been unreasonably inaccurate. He therefore argues that the accused's scales in this case must be prima facie presumed to be accurate, in the absence of any evidence to the contrary.

This case is also useful for another purpose. Lord Goddard had to consider whether he was bound by a decision of another Bench of three Judges which laid down the proposition that all speedometers must be tested and the Court can only act on the evidence of a police constable supported by a speedometer reading if the speedometer was tested. Lord Goddard thought that the principle laid down in this case went too far, particularly as certain other decisions relevant to the issue had not been cited to the Judges in that case ; he therefore adopted the dictum laid down by the Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd.*[1] ' that where *material cases and statutory provisions* which show

[1] *(1944) K. B. 718.*

that a Court had decided a case wrongly, were not brought to its attention, the Court is not bound by that decision in a subsequent case'. This observation has some bearing on the submission made by Counsel for the accused-appellant in the present case, who cited certain decisions of this Court in support of the proposition, as to the quantum of evidence required from the prosecution to prove the accuracy of the scales and which decisions, according to him, were binding on me.

In *Sub-Inspector of Police v. Wassira* the Crown appealed from an acquittal. The Magistrate acquitted the accused for the reason that there was no evidence as to the accuracy of the scales and weights on which the bread was weighed, the bread having been weighed only on the accused's scales. In appeal the further point was raised by appellant's Counsel that, since the amounts of bread controlled were 16-ounce and 8-ounce loaves the accused had not offended against the provisions of the Ordinance in selling two quarter-lb. loaves at more than the controlled price. Howard. C.J. considered this latter submission sound, and then proceeded to make the following observation on the point raised by the Crown in appeal :

> 'With regard to the weighing of the bread on the scales of the respondent, criminal cases of this kind must be established beyond all reasonable doubt. With *no evidence* as to the accuracy of the scales it cannot be said that this standard of proof has been reached.'

The head note of the report of this case correctly represents, in my view, the two matters on which the learned Chief Justice came to a decision, the second of which was that the prosecution was bound to establish by *satisfactory evidence* the accuracy of the scales and weights on which the bread was weighed. In 1947 Howard C.J. had occasion to consider the decision in *Wassira's case* in *Segarajasingham* (*Food and Price Control Inspector*) *v. William Singho* (S. C. 810/ M. C. Galle 5343/S. C. Minutes of 19.8.47) where he distinguished the facts in the former case from the facts in the latter case. In *Segarajasingham v. William Singho* there was the additional evidence, that after the controlled commodity was weighed on the accused's scales, it was again re-weighed on the Inspector's scales with standard weights and tallied with the weight as found on the accused's scales. This same additional evidence was available in the later cases that were cited before me—*Gnanaiah v. Kandiah* [2], *De Alwis v. Subramaniam* (1952) (supra) and *Joseph v. M. D. Perera* (1952) (supra).

Gnanaiah v. Kandiah was a decision of two Judges ; it is not apparent from the report why two Judges should have heard this appeal when ordinarily it should have been decided by a single Judge ; there is nothing in the report to indicate that the case had been referred to a Bench of two Judges as a result of any important or controversial question of law. This decision merely re-affirmed the view taken by Howard, C. J. (Soertsz, S.P.J. agreeing) in the unreported Galle case, that the accuracy of the accused's scales had been established by the prosecution, when the

[1] *(1945) 46 N. L. R. 93.* [2] *(1948) 49 N. L. R. 153.*

additional evidence referred to earlier, was available. Although *Wassira's case* was referred to in the course of the judgment by the learned Chief Justice, the decision did not endorse the view taken by him in the earlier case, that where the only evidence consisted of the commodity being weighed on the accused's scales, the prosecution had not proved by satisfactory evidence the accuracy of the weights and scales. As Basnayake, J. said in the later case of *De Alwis v. Subramaniam* the ratio decidendi in *Gnanaiah v. Kandiah* was that " in the *absence of any evidence indicating the inaccuracy* of the weights and scales, the accused should have been convicted " and according to Swan J. in *Joseph v. M. D. H. Perera* " the ratio decidendi of that appeal was *not the absence of evidence regarding the accuracy* of the scales and weights employed ".

I am therefore unable to agree with the submission of learned Counsel for the accused-appellant that *Gnanaiah v. Kandiah* reaffirmed the view taken by Howard C.J. as to the quantum of evidence required from the prosecution to establish the accuracy of the scales and weights. Even if the case of *Gnaniah v. Kandiah* can be called a decision of a Divisional Bench, I do not agree that it lays down the proposition of law for which Counsel for the accused-appellant contends. The evidence in the instant case is almost on all fours with the evidence that was available in *Wassira's case* and the question for determination in the present case is whether, in similar circumstances, the prosecution has established by satisfactory evidence the accuracy of the scales and weights. With all respect to the learned Chief Justice I am unable to subscribe to the proposition of law laid down in that judgment with regard to the quantum of evidence required from the prosecution. Had the statutory provision laid down in Section 114 of the Evidence Act been brought to the notice of the learned Chief Justice in *Wassira's case* it may well be that he might have come to a different conclusion.

I think, therefore, that the accused has been rightly convicted on the first count. In regard to the default sentence passed by the learned Magistrate on the first count, the Magistrate, on an erroneous view of Section 312 (1) (c) of the Criminal Procedure Code, has imposed a default term of six months' rigorous imprisonment when it should have been a term of six weeks' imprisonment. I therefore alter the default sentence on the first count to one of six weeks' rigorous imprisonment instead of one of six months. Subject to this variation the appeal is dismissed.

Appeal mainly dismissed.