1967 *Present :* Tennekoon, J.

K. S. P. MAHABOOD and another, Appellants,
and FOOD AND PRICE CONTROL INSPECTOR, Respondent

S. C. 368-369/67—M. C. Colombo, 35275/A

Food Price Order No. 390—Charge of sale of beef at excessive price by more than one person jointly—Quantum of evidence—Penal Code, s. 35—Question whether the beef sold was not imported—Burden of proof—Evidence Ordinance, s. 105—Control of Prices Act, s. 8 (1) and (6).

In a prosecution of the 1st and 2nd accused for jointly selling beef with bones at a price above the controlled maximum retail price, the evidence established that the sale was effected by means of several acts, some done by the 1st accused, others by the 2nd accused.

Held, that upon an application of the principle of liability contained in section 35 of the Penal Code, each of the two accused was guilty of the offence charged.

Held further, that evidence led by the prosecution that the beef which was sold was fresh meat was sufficient to establish *prima facie* that the beef did not fall into the category of "imported beef whether frozen, salt or chilled" which is exempted in the relevant Price Order.

Quaere, whether, if the beef had in fact been imported, that fact was a fact peculiarly within the knowledge of the accused so as to make section 105 of the Evidence Ordinance applicable.

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

Y. L. M. Mansoor, with *Gamunu Seneviratne,* for the accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

The two appellants were charged with jointly selling beef with bones at a price above the controlled maximum retail price fixed by Food Price Order No. 390 and thereby committing an offence under section 8 (1) of the Control of Prices Act and punishable under section 8 (6) thereof. They were both convicted and each sentenced to four weeks' rigorous imprisonment and to a fine of Rs. 500, in default a further 4 weeks' simple imprisonment.

The prosecution case rested mainly on the evidence of three price control inspectors, de Silva, Maney and Weerasekera. The Magistrate said of them that their evidence was consistent, uncontradicted and clear.

De Silva's evidence was to the effect that he was the organiser of the raid: that he gave Maney a five-rupee note and instructed him to go to the beef stall at Edinburgh Market and buy some beef; he himself stood a short distance away near the entrance to the Market while Maney and Weerasekera went up to the accused's stall. He goes on to say—

"Maney asked for 2 pounds of beef from the 1st accused and the 1st accused cut and weighed and gave a parcel of beef to Maney. Maney tendered the Rs. 5 note to the 2nd accused as directed by the 1st accused. Then I saw him taking a balance from the 2nd accused and Maney gave me a signal."

Cross-examined he said—

"The 1st accused cut the beef. He cut the beef and put it into the spring balance and to that he added some bones. After that he wrapped it in a piece of brown paper and handed it to Maney. Thereafter Maney was directed by the 1st accused to go to the 2nd accused and pay the money. He went to the 2nd accused and paid the money. I did not hear the 1st accused saying anything to the 2nd accused. I did not see the 1st and 2nd accused having a conversation prior to this. The 2nd accused is only a cashier. The 2nd accused handed over something to Maney. I did not know what it was."

A close-up of what actually transpired at the stall is obtained from the evidence of Maney and Weerasekera.

Maney testified—

"I went to Stall No. 24 and asked for 2 pounds of beef with bones from the 1st accused. He cut two pounds of beef with bones and having weighed it, he handed it over to me. I asked him for the price and he quoted Rs. 2·50. When I gave him the Rs. 5 note, he directed me to pay it to the 2nd accused. When I went to the 2nd accused and tendered the Rs. 5 note, he quoted Rs. 2·50. He recovered Rs. 2·50 from the Rs. 5 and handed over to me a balance of Rs. 2·50 made up of a two-rupee note and a 50 cent coin."

Cross-examined as to what exactly took place between him and the 2nd accused Maney said:

"I asked for the price of beef from the 2nd accused. He quoted Rs. 2·50. The 1st accused also shouted out the amount."

Witness Weerasekera also testified in relation to this part of the incident as follows:—

"Maney asked for the price. The 1st accused said Rs. 2·50. Then Maney offered the Rs. 5 note to the 1st accused. He wanted it to be given to the 2nd accused. While offering the Rs. 5 to the 2nd accused, Maney said two pounds of beef with bones."

A veterinary surgeon Mr. Amarasingho to whom the beef was taken immediately after the "raid" testified that "the meat was the flesh of neat cattle and was fresh. There were no offals present."

Counsel for the accused raised two points at the hearing of the appeal. The first was that the 2nd accused was wrongly convicted because while the sale was effected only by the 1st accused, the 2nd accused merely collected the money as cashier. I am not disposed to agree that no case has been made out against the 2nd accused. The charge against the two accused was that they jointly committed the offence. The evidence establishes that the sale of beef with bones in excess of the controlled price was committed by means of several acts, some done by the 1st accused, others by the 2nd accused. The first accused quotes the price and delivers the beef into the hands of Manoy; the sale is not complete at that stage. The 2nd accused then himself quotes the sum of Rs. 2·50 as the price for 2 pounds of beef without bones and receives that sum from the buyer. It is obvious that he was not a mere cashier in the sense that he was collecting a sum stated on a bill or a sum that he was asked by the 1st accused to collect without reference to the sale of a particular quantity of beef. The evidence establishes that the 2nd accused was aware of the fact that two pounds of beef with bones was the subject of the transaction when he quoted and recovered Rs. 2·50 as the price thereof.

There is in my mind no doubt arising on the evidence that the 1st and 2nd accused knowingly co-operated to effectuate a sale of two pounds of beef with bones at Rs. 2·50, each one of them doing what he did at the different stages of the transaction in order to effect a sale of that quantity of beef at that price. Section 35 of the Penal Code provides that—

> "When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence."

I am of the opinion that upon an application of the principle of liability contained in this provision of law, the 1st and 2nd accused are each guilty of the offence charged.

The second ground urged by counsel for the appellants is that the prosecution has failed to establish that the subject of the sale was 'beef'. He relies of the definition given to the word 'beef' in the Price Order. It reads as follows :—

> "For the purpose of this Order the expression 'beef' does not include imported beef whether frozen, salt or chilled and any form of offal."

There was evidence in the case to show that the meat was the flesh of neat cattle and that it was not offal, but there was no direct evidence to show that the beef in question was not imported. Counsel for the appellant submitted that the burden of proving all ingredients of the offence was on the prosecution and there being no evidence that the beef was not imported the accused were entitled to be acquitted. He relied on the case of *The Attorney-General v. A. M. A. Rahim*[1] where in a similar case my brother Abeyesundere, J. held that the burden of proving the fact that the beef in respect of which the charge was framed was not imported beef was on the prosecution.

The facts of that case are clearly distinguishable. Counsel for the appellant overlooks the fact that in the instant case there was the evidence of Mr. Amarasinghe to the effect that the beef when brought to him immediately after the raid was *fresh* meat. The learned Magistrate himself took the view that this was sufficient to establish *prima facie* that the beef did not fall into the category of 'imported beef whether frozen, salt or chilled'. I am inclined to agree. To my mind the words 'whether frozen, salt or chilled' exhaust the kinds of imported beef that are not subject to the Price Order. The arrangement of the words does not lend support to the view that even fresh beef imported fresh (if that is ever done) is also subject to the Price Order. The Price Order appears to me to have proceeded on an assumption of fact, which is notorious, that beef imported for sale in Ceylon is always beef that has undergone one or other of the processes of preservation—freezing, salting or chilling. Counsel for the appellant submitted that there may be the extraordinary and rare case of fresh beef being imported by air from South India for sale here, and that the existence of such a possibility was sufficient to raise a doubt as to whether the beef in question in this case is beef within the meaning of the Price Order. The answer to this is that the Price Order would apply even to that kind of beef which though imported is not frozen, salt or chilled. Even if I were wrong in taking this view, the possibility of the accused who are beef stall holders at the Edinburgh Market, having imported fresh beef by air from India is so fanciful in the prevailing context that such a possibility can be ignored. In my opinion the evidence that the beef was fresh was *prima facie* evidence of the fact of non-importation sufficient to 'shift' the burden to the accused. Here I may quote from Stephen's *Digest of the Law of Evidence* 12th Edn. Art. 104 a passage that was cited with approval in *R. v. Kakelo*[2] and in *R. v. Cohen*[3]:—

> "in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

[1] *(1966) 69 N. L. R. 519.* [2] *(1923) 2 K. B. 793 at 795.*

[3] *(1951) 1 K. B. 464.*

Mr. Amarasinghe was not cross-examined at all. Neither of the accused gave evidence nor produced any other evidence. It seems to me that if the beef were in fact imported beef that would be a fact peculiarly within the knowledge of the accused and no evidence to that effect having been adduced by the accused, the court is entitled to presume that the evidence if produced would establish not importation but the contrary. The proof of non-importation is thus established beyond reasonable doubt.

Learned Crown Counsel submitted that no evidence of non-importation need have been adduced by the prosecution at all because in his submission the effect of the definition of 'beef' in the Price Order as "not including imported beef whether frozen, salt or chilled and offal" is to create an exception to the offence that arises under section 8 (1) of the Control of Prices Act read with Price Order 390 and that accordingly the burden of proving importation (if that was the defence of the accused) was on them, under section 105 of the Evidence Ordinance. He relied for this submission on the case of *Mudliyar, Pitigal Korale North v. Kiri Banda*[1]. He also submitted that the case of *The Attorney-General v. A. M. A. Rahim*[2] was wrongly decided. Apart from noting a certain attractiveness in the argument and the fact that *The Mudliyar's* case was not cited to my brother Abeyesundere, J. when he heard the case of *Rahim*, it seems to me unnecessary to consider in this case the correctness or otherwise of learned Crown Counsel's submission in view of the fact that the conclusion reached by me in the paragraphs immediately preceding this one render that exercise superfluous.

The appeals of both accused are dismissed. Their convictions and sentences are affirmed.

Appeals dismissed.

[1] *(1909) 12 N. L. R. 304.*

[2] *(1966) 69 N. L. R. 519.*