

1942

Present : Wijeyewardene J.

PAKIAMPILLAI, Appellant,

and

MERRY, Respondent.

797—*M. C. Colombo, 48,633.*

Control of prices—Sale of Maldivé fish above-controlled price—Contract of sale—Control of Prices Ordinance, No. 39 of 1939, s. 3.

Where an accused person is charged with having sold Maldivé fish at a price above the maximum price fixed by the Controller of Prices, the prosecution is not bound to prove a contract of sale enforceable by action within the meaning of section 4 of the Sale of Goods Ordinance.

A PPEAL from a conviction by the Magistrate of Colombo.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the accused, appellant.

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

November 10, 1942. WIJEYWARDENE J.—

The accused-appellant was convicted on a charge of having sold Maldivé fish (mixed Kundira and Male) on August 31, 1942, at a price above the maximum price fixed by the Controller of Prices, and sentenced to six months' rigorous imprisonment.

Acting under the powers vested in him by section 3 of the Control of Prices Ordinance, No. 39 of 1939, the Controller of Prices made and signed an order on July 31, 1942, fixing Rs. 57.50 as the maximum "wholesale" price of this particular kind of Maldivé fish. The word "wholesale" as used in the Order is so defined in the Order itself as to make a sale of any quantity of Maldivé fish for the purpose of resale a sale by wholesale. That Order is published in the *Government Gazette* No. 8,979 of July 31, 1942, and the prosecution produced at the trial a copy of that *Gazette*.

The learned Magistrate has recorded his findings of fact after a very careful analysis of the evidence and I accept those findings though, no doubt, there are certain passages in the evidence as pointed out by the Counsel for the appellant which appear to be in conflict with the evidence accepted by the Magistrate. I may add also that no evidence was given on behalf of the accused.

The facts as found by the Magistrate may be summarized as follows:— On August 31 a trader called Herat reported to the Assistant Superintendent of Police, Colombo, that he found it difficult to buy Maldivé fish. The Assistant Superintendent gave Herat a list of boutiques dealing in Maldivé fish and sent him with Police Constable Rasiah in plain clothes. Herat returned shortly afterwards and informed the Assistant Superintendent of Police that he bought at one of the boutiques a bag of 1 cwt. and 20 lb. for Rs. 92.50. Then the Assistant Superintendent noted down the numbers of 50 two-rupee notes belonging to Herat and handed

back to him 47 of them in one bundle and the remaining three notes separately and asked him to return to the same boutique and buy another bag. A bundle of 47 notes was made separately as it was thought that the second bag would contain the same quantity as the first bag and would cost only Rs. 92.50. Herat went this time with Police Constable Wijeyesinghe in plain clothes while Police Constable Rasiah was sent to report to the Assistant Superintendent when the transaction was completed. Herat went to the boutique and waited until the door was opened. Herat was then admitted by the accused. Wijesinghe went in, a few minutes later, and said he wanted to buy onions. Wijesinghe was asked to go out and wait outside the boutique as it was said "only one person at a time could be served inside". Herat opened the bag, examined some pieces of Maldivé fish in it and was satisfied with the quality. The accused thereupon got the bag restitched and weighed and found it to contain 1 cwt. and 25 lb. He then kept the bag apart and began to calculate on a piece of paper P 3 the price of the Maldivé fish at Rs. 78 per cwt. and got the result as Rs. 95.65. He gave the paper P 3 to Herat, showing the price that had to be paid and Herat then held out to the accused the bundle of notes amounting to Rs. 94 before paying the balance Re. 1.65 out of the notes which he kept separately. Just as the accused stretched out his hand and held the bundle Wijesinghe and the Assistant Superintendent who had been summoned by Rasiah entered the boutique after ordering one of the men at the door to open the door without giving a warning to those inside. On seeing the Police entering the boutique the accused pulled the paper P 3 out of the hands of Herat and tore it up. He also released his hold on the bundle of notes which then dropped on the ground. Herat picked up the notes and the Assistant Superintendent collected the torn bits of P 3.

The accused is charged with regard to the second transaction. The value of 1 cwt. and 25 lb. contained in the bag would be a little less than Rs. 71 as the sale to Herat would be a sale by wholesale, according to the Order. Herat has, therefore, been charged nearly Rs. 25 over the controlled value.

It was argued in appeal that there was no sale of the Maldivé fish to Herat according to law as only a bundle was held out to the accused in payment of the prices and the accused had no opportunity of ascertaining whether the bundle contained currency notes. It was also argued that even according to the evidence of Herat the money actually tendered was only Rs. 94 while the value of the goods was Rs. 95.65. It should be noted in this connection that Herat intended to tender the balance Re. 1.65 after giving the notes when the Police arrived. This contention is urged on the footing that the sale to be considered in this case should be a sale governed by the Sale of Goods Ordinance. Even on that assumption I am of opinion that there has been a sale. A contract of sale is defined in section 2 of that Ordinance as a contract whereby the seller transfers the property in goods to the buyer for a money consideration. Under section 18 (3) where there is a contract for the sale of specific goods in a deliverable state and the seller has weighed the goods for the purpose of ascertaining the price and the buyer had notice of it the property would pass to the buyer in the absence of any special

circumstances. Of course the right to property in goods must be distinguished from the right to their present possession. Where there is a sale of specific goods for cash the property passes by the contract but the seller may (unless otherwise agreed) retain the goods till the price is paid. Here Herat tested the goods in the bag. The bag was stitched and then weighed and kept apart in Herat's presence. The value was then worked out and shown to Herat. On these facts alone there would be a contract of sale within the meaning of the Ordinance. These facts along with the tender of Rs. 94 preparatory to the handing over of the balance Re. 1.65 would even make it a contract of sale "enforceable by an action" within the meaning of section 4 of the Ordinance. I do not think that it is necessary for the purpose of a prosecution of this nature to prove a contract of sale "enforceable by action" within the meaning of section 4 of the Sale of Goods Ordinance. (Vide *The King v. Townbrow*¹ *Miles v. Melias, Ltd.*, referred to in Bell's "Sale of Food and Drugs" (9th edition), p. 99.)

The Counsel for the appellant has also pleaded for reduction of the sentence. The sentence passed in this case is undoubtedly a severe one. The learned Magistrate has, however, addressed his mind very carefully to this question before he sentenced the accused to six months' rigorous imprisonment. The evidence discloses as pointed out by the Magistrate a bold and systematic evasion of the law. It cannot be said that the Magistrate has exercised his discretion on a wrong principle or that there are any circumstances in this case which make it desirable for this Court to interfere with the sentence.

I dismiss the appeal.

Affirmed.

¹ *English Reports 109 King's Bench 860.*