

1948

*Present : Basnayake J.*

SANTIAPILLAI, Appellant, *and* SITTAMPALAM (Price Control Inspector), Respondent.

*S.C. 1,010—M. C. Jaffna, 5,376.*

*Criminal procedure—Witness—Prosecuting officer giving evidence—Conviction—Irregularity.*

The mere fact that the officer who conducts a prosecution gives evidence in the course of it is not fatal to the conviction of the offender.

**A**PP<sub>E</sub>AL from a judgment of the Magistrate of Jaffna.

*R. L. Pereira, K.C.*, with *H. V. Perera, K.C.*, and *H. W. Tambiah*, for accused, appellant.

*Boyd Jayasuriya, C.C.*, for the Attorney-General.

*Cur. adv. vult.*

January 29, 1948. BASNAYAKE J.—

The accused-appellant (hereinafter referred to as the appellant) was convicted of an offence punishable under section 5 of the Control of Prices Ordinance, No. 39 of 1939, as amended by the Defence (Control of Prices) (Supplementary Provisions) Regulations and sentenced to undergo rigorous imprisonment for a term of three months.

The appellant is a retail trader with a place of business at premises No. 46, 4th Cross street, Jaffna, situated in the quarter known as Small Bazaar. He is authorised to sell articles the distribution of which is controlled and has 255 consumers attached to his boutique by the Food Controller. On February 24, 1947, one Sittampalam, a Price Control Inspector stationed at Jaffna in the performance of his duties decided to ascertain whether Bombay onions or potatoes were being sold in the Small Bazaar above the prescribed maximum price. He sent Price Control Inspector Muttuvelupillai to purchase a pound of Bombay onions or potatoes from any boutique in Small Bazaar. Price Control Inspector Navaratnarajah accompanied him. Navaratnarajah's function was to give a prearranged signal to Sittampalam, who followed him and remained in sight, if either article was sold to Muttuvelupillai above the prescribed maximum price. Muttuvelupillai was given a rupee note by Sittampalam who made a record of its number. He carried no other money. Navaratnarajah carried no money at all. Muttuvelupillai carried a marketing bag with some green leaves in it to give him the semblance of a casual customer. He went to the boutique of the appellant and asked for a pound of Bombay onions, and received it. He tendered in payment the rupee note he had with him. As the appellant had no change he went over to the adjoining boutique, changed it and returned to Muttuvelupillai 75 cents for the pound of Bombay onions, the prescribed maximum price of which was 19 cents. After the transaction was over Navaratnarajah gave the prearranged signal and Sittampalam came up and heard the story of the sale from Muttuvelupillai. Sittampalam recovered from the adjoining boutique the rupee note he had given Muttuvelupillai and next weighed the Bombay onions in the appellant's scales in his presence and recorded in the appellant's boutique his statement, the statement of the boutique-keeper next door and the two Price Control Inspectors. The cash and the Bombay onions were parcelled and sealed immediately.

The evidence for the prosecution consists of the evidence of the three Price Control Inspectors who deposed to the facts stated hereinbefore. The appellant gave evidence on his behalf and admitted the sale of a pound of Bombay onions to Muttuvelupillai on the date alleged in the charge but denied that he charged 25 cents or any sum above the maximum prescribed price. While admitting that Muttuvelupillai tendered

a rupee note in payment he denied that he took it. The appellant's version is that when Muttuvelupillai asked him for a pound of Bombay onions he weighed a pound of Bombay onions and gave it to the latter who tendered a rupee note. On being informed by the appellant that he had no change, Muttuvelupillai went in the direction of a tea kiosk, returned and gave him 19 cents as he had been told earlier that that was the price. Later Muttuvelupillai returned with Price Control Inspector Sittampalam and Navaratnarajah, all of whom he knew to be Price Control Inspectors.

The appellant alleges that the charge is false. The reason for the false charge he says is that 24 days previous to the day in question while he was transporting goods by cart he met Muttuvelupillai who stopped the cart and asked him to unload it. On his refusing to do so there was an "exchange of words". The appellant produced a document D 1 in support. It is a bill for certain quantities of grain, rice, flour and sugar sold to one B. S. Pillai on February 3, 1947, bearing on the reverse the signature of Muttuvelupillai. The Price Control Inspector Muttuvelupillai admits his signature on the document but is unable to recall having spoken to the appellant on that day or the incident related by him.

It was urged on behalf of the appellant that he would never have sold the Bombay onions above the prescribed maximum price to Muttuvelupillai whom he knew to be a Price Control Inspector, and Counsel asks me to accept the evidence of the appellant and reject the evidence for the prosecution. Great stress was laid on the omission of the prosecution to call the boutique-keeper, one S. Atputhan, at whose boutique the prosecution alleged the rupee note was changed. The name of this witness was included in the list of witnesses for the prosecution as witness No. 3. He attended Court on the first day of trial April 16, 1947, was ordered to appear on the next date May 7, 1947, and on that date ordered to give personal bail in five hundred rupees to attend on May 28, 1947, the date for which the trial was refixed for want of time. On that date the Magistrate recorded only the evidence of Sittampalam, the Price Control Inspector, and refixed the case for June 11, 1947, on which date the trial was again refixed for July 3, 1947, and summons ordered on all the prosecution witnesses. When the case was taken up on July 3, 1947, the Price Control Inspector Sittampalam drew the attention of the Court to the fact that summons had not been served on Atputhan, witness No. 3, and Navaratnarajah, witness No. 2. The trial was finally fixed for July 23, 1947, and summons re-issued on witnesses Nos. 2 and 3. When the trial was taken up on July 23, 1947, witness No. 3 was absent Muttuvelupillai's evidence that the witnesses had left for India since the last date of trial is uncontradicted.

In these circumstances I am unable to hold that the prosecution has withheld the evidence of this witness and presume under section 114 illustration (g) of the Evidence Ordinance that his evidence would, if produced, be unfavourable to the prosecution.

A legal objection to the conviction was taken on the ground that the Price Control Inspector Sittampalam who was a witness for the prosecution had led evidence in the case. In support of this objection Counsel

referred me to the cases of *Police Sergeant Kulatunga v. Mudalihamy et al.*<sup>1</sup> and *A. J. M. de Silva v. Magistrate, Gampola, and Police Inspector Herat.*<sup>2</sup> In the first-named case at an early stage in the proceedings the pleader for the accused stated that his position was that the case was a conspiracy by the prosecuting Sergeant Kulatunga and the Arachchi against the accused and objected to the Sergeant conducting the trial. He also submitted that his client had submitted a petition against the Sergeant. The Sergeant challenged the statement and the Magistrate made the following order :—

“ It is not uncommon for the prosecuting Sergeant or Inspector to give evidence. The Sergeant will proceed to conduct the trial ”. The Sergeant subsequently gave evidence for the prosecution. He was not merely a formal witness. His examination in chief occupied two and a half pages of the record and his cross-examination another two and a half pages. In cross-examination he admitted that the second accused had sent a petition against him. In these circumstances it was held that it was not in the interests of justice that the prosecution should have been conducted by Sergeant Kulatunga.

The second case was an application for a Mandate in the nature of a Writ of Mandamus on the Magistrate of Gampola and Police Inspector Herat. The question for decision there was whether a Proctor retained by the injured person was entitled to appear and lead evidence for the prosecution in preference to the Police Inspector in charge of the case. De Kretser J. held that the Police Inspector was not justified in opposing the appearance of the Proctor for the injured party.

Neither of these cases has any application to the present. Learned Crown Counsel referred me to the case *J. Sanmugam Pillai v. Ferdinands*<sup>3</sup> wherein this Court refused to set aside a conviction on the ground that the officer who conducted the prosecution was a material witness for the prosecution. I am of opinion that the mere fact that the officer who conducts a prosecution gives evidence in the course of it is not fatal to the conviction of the offender. Nevertheless an officer whose duty is to conduct the prosecution in certain classes of cases should, if he knows beforehand that in any particular case his evidence is material to the case, arrange for some other officer to conduct the prosecution and avoid a situation in which he has to perform the dual role of prosecutor and witness, for it may turn out that in certain events the performance of such a dual role is not in the interests of justice, I am satisfied that in this case the interests of justice have not suffered by reason of the fact that Price Control Inspector Sittampalam who prosecuted was also a witness for the prosecution.

For the reasons I have stated I am not prepared to interfere with the finding of the learned Magistrate. It has been urged by Counsel that the sentence of three months' rigorous imprisonment is too severe having regard to the age of the accused his antecedents and his position in life.

The accused has admitted a previous conviction of an offence under the Control of Prices Ordinance, No. 39 of 1939: It is an imperative requirement of section 5 (6) (a) of that Ordinance that a person convicted of a subsequent offence committed after conviction of the first offence

<sup>1</sup> (1940) 42 N. L. R. 33.

<sup>2</sup> (1943) 44 N. L. R. 320.

<sup>3</sup> (1942) 46 N. L. R. 380.

shall be punished with imprisonment of either description for a term not exceeding two years. Having regard to the maximum punishment prescribed for the offence, I am not prepared to hold that the sentence imposed by the learned Magistrate is excessive.

The appeal is dismissed.

*Appeal dismissed.*

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