1973 *Present :* **Rajaratnam, J.**

L. SAVUNDARANAYAGAM, Appellant, *and*
H. B. DAYAPALA, Respondent

S. C. 793/72—M. C. Negombo, 48156

Control of prices—Charge of profiteering in sale of an imported saree—Quantum of evidence—Legends on the saree—Admissibility in evidence—Evidence Ordinance, ss. 45, 114 (e) (f).

In a prosecution for profiteering in the sale of an imported printed saree the Price Control Inspector stated that the accused sold him the saree when he was asked for an imported saree. The saree had on it the legends " Made in Pakistan " and " Manufactured by Pakistan ". The accused did not give evidence but relied on the Report of the Government Analyst who was unable to say whether the saree was imported or not.

Held, that there was sufficient evidence to prove that the saree was an imported one. In the circumstances of the present case it could not be contended that the legends on the saree were items of hearsay which were inadmissible. The legends were further circumstances to be taken into consideration to prove that the article was imported.

Held further, that the requirement of the law is not that the article in question must be proved objectively to be a controlled article but that it must be proved to be a controlled article beyond reasonable doubt.

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

N. Satyendra, for the accused-appellant.

F. Mustapha, State Counsel, with *M. L. M. Ameer,* State Counsel, for the Attorney-General.

Cur. adv. vult.

October 29, 1973. RAJARATNAM, J.—

The accused was convicted on a charge of profiteering in the sale of an imported saree which came within the relevant Price Order.

The Price Control Inspector Kuruppu stated that he asked for an imported saree and he was sold the saree in question for Rs. 75. This same witness for what it was worth stated that from his experience he could say that the saree P1 was an imported saree but conceded in cross-examination that he was not an expert on the identification of sarees. He also stated that plain sarees could be imported into Ceylon and printed here in which case such a saree was excluded from the operation of the Price Order but rather unpatriotically said that as the flower printed did not fade off when he rubbed his wet finger on it, it was not a flower print made in Ceylon on an imported saree. The saree P1 also had these legends on it " made in Pakistan " and " manufactured by Pakistan Rayon Mills, Karachchi " which the defence submitted were items of hearsay evidence. The accused did not give evidence but relied on D2 the Report of the Government Analyst who was unable to say whether P1 was imported or not.

Inspector Kuruppu's evidence was that he asked for an imported saree. The accused asked him whether he wanted a plain imported saree or an imported printed saree whereupon he asked for an imported printed saree (p. 25 of the proceedings). It was in this context that P1 bearing the two legends referred to above was sold, and the transaction on the evidence was on the basis that P1 was a printed imported saree. The accused as I stated earlier gave no evidence but relied on the helplessness of the Analyst to identify P1 as an imported saree.

On the particular facts adduced in evidence in this case and not contradicted by the defence the context in which and the basis on which the transaction took place have been proved.

The question before me is whether the prosecution has proved that P1 is an imported printed saree. Learned Counsel for the appellant has with great ability and thoroughness submitted that the prosecution has not done so and the legends were items of hearsay which were inadmissible. He further argued that there was no objective proof of the fact that P1 was an imported printed saree. He relied heavily on the following cases :—

1. *Patel v. Controller of Customs*—1965 3 A. E. R. 593.
2. *Myers v. Director of Public Prosecutions*—1964 2 A. E. R. 881.
3. *Piyadasa v. Yapatilleke*—70 N. L. R. 475.

In the light of these decisions I have considered the decisions in *Jalaldeen v. Jayawardena,* 70 N.L.R. 476, which did not follow the decisions in *Piyadasa v. Yapatilleke* and the decisions in the following cases :—

Mustapha v. Sub-Inspector of Police Batticaloa—72 N. L. R. 310.

Perera v. Mohideen—73 N. L. R. 393.

Lebbe v. Food and Price Control Inspector—73 N. L. R. 475.

Somdlingam v. Jayawardena—70 N. L. R. 214 at 216.

In *Patel's case,* the legend in question was the "Produce of Morocco" marked in the inner bags which was in an outer bag and which legend the accused did not adopt in the transaction. In *Myer's case* too there was no active adoption as such. It may be said that even in the case of *Piyadasa v. Yapatilleke,* there was no adoption as the customer asked only for a tin of milk.

On the facts of this case, however, there was an undoubted active adoption and an admission by the accused that what he was selling was an imported printed saree and there was an additional circumstance that there were two legends on P1 as referred to above. The conduct of the accused was another circumstance and again there are the presumptions under s. 114 (*e*) and (*f*) of the Evidence Ordinance that the common course of business has been followed by this accused and that the evidence which could have been produced as far as the accused's knowledge is concerned has not been produced because it would have been of an unfavourable nature. Quite apart from these presumptions, why should a Court in the circumstances of the other facts referred to presume that the accused was either a cheat and a confidence trickster or an ignoramus who did not know what he was selling although he conducted himself in an unmistakable way to give the confidence to the customer that he was buying a printed imported saree ?

I hold that in the circumstances of this case where there was a strong prima facie case which was unexplained by the accused there was no burden on the Court to consider the possibility that the transaction was other than what it was made out to be.

In this case the helplessness of the Analyst as reported in D2 does not damage the prosecution case nor help the defence. I do not know on what material an Analyst could have expressed an opinion under s. 45 of the Evidence Ordinance which refers to an opinion as to foreign law or of science or of art if not with regard to the identification of finger prints or handwriting. I suppose

our fastidious ladies would have been more qualified to assist Court on this matter with their not too infallible and fickle opinion whether P1 was an imported saree or not.

I now refer to the other submission made by learned Counsel that there must be objective proof and nothing short of it and that an admission made by an accused as to the nature of the article of which he could have known nothing was not a relevant admission. It was argued that apart from this admission there must be independent proof presented by the prosecution that P1 was a printed imported saree. I find it rather difficult to agree with learned Counsel on this point. The question is really not one of objective proof or subjective proof. The question is whether the prosecution succeeded in proving P1 as being what it alleged it to be beyond reasonable doubt.

If this submission is correct, then if the controlled article is a tin of Cadbury's chocolates or a tin of Horlick's Milk, I suppose it will be necessary to call the evidence of some one from the Cadbury's or Horlick's factory to identify the legends thereon in addition to the circumstance that the customer asked for Cadbury's chocolates and Horlick's Milk and he was sold these articles on this basis. In my view if that degree of proof is necessary, than the burden on the prosecution will be to prove something with mathematical accuracy which is never so. I hold that the legends are admissible as circumstances accompanying other circumstances as have been proved in this case. When a person buys for instance a tin of Horlicks does he ever seek objective proof ? The Court may presume even as the customer did that the common course of business has been followed under s. 114 (*e*) of the Evidence Ordinance. The law does not place the Court in a dark room so to speak forbidding it to use its common sense, and enjoining it to be always a doubting Thomas.

In all the circumstances of this case, I hold that the finding of the learned Magistrate is correct. The sentence of imprisonment is altered to 1 month's rigorous imprisonment and the fine imposed with its default sentence will stand. Subject to this variation the appeal is dismissed.

Appeal dismissed.
Sentence altered.