1968 *Present :* **Weeramantry, J.**

A. H. GUNAPALA, Appellant, *and* WILSON DE SILVA (Food and Price Control Inspector), Respondent

S. C. 104/68—M. C. Colombo, 41448

Control of Prices Act (Cap. 173), as amended by Acts Nos. 44 of 1957 and 16 of 1966—Subsections (1) and (6) of section 8—Dried chillies—Sale to a decoy at excessive price—Whether it is a sale for the purpose of consumption or use within the meaning f Rule 11 (b) of the relevant Price Control Order—Inapplicability of noscuntur a sociis *rule of interpretation—Sentence—Imprisonment as well as fine mandatory—Penal Code, s. 72—Criminal Procedure Code, s. 325.*

A sale of dried chillies to a decoy is a sale for the purpose of consumption or use within the meaning of Rule 11 (*b*) of the relevant Price Control Order. In such a case the rule of interpretation *noscuntur a sociis* cannot give the word " use " a meaning cognate to that of the word " consumption ".

Where an offence punishable under section 8 (6) of the Control of Prices Act has been committed, it is mandatory not only to pass a sentence of imprisonment but also to impose a fine.

Observations on the applicability of section 325 of the Criminal Procedure Code to contraventions of Price Control Orders.

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

E. R. S. R. Coomaraswamy, with *C. Chakradaran* and *M. S. Aziz*, for the Accused-Appellant.

Ranjith Gunatilleke, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 24, 1968. WEERAMANTRY, J.—

The accused appellant in this case was charged with having sold 2 ounces of dried chillies for 38 cents, a price in excess of the maximum retail price of 24⅜ cents for 2 ounces, and thereby committing an offence under section 8 (1) of the Control of Prices Act (Cap. 173) punishable under section 8 (6) of the said Act as amended by the Control of Prices (Amendment) Acts No. 44 of 1957 and No. 16 of 1966.

The detection of this offence was effected through the employment of a decoy who was instructed to purchase a reasonable quantity of flour and failing that to buy any other price controlled article. The decoy first asked for wheat flour and on being told that this was not available, asked for dried chillies and was given 1/8th of a pound by the 1st accused in response to this request. The decoy tendered a marked one rupee note for this purchase and received a balance sum of 62 cents from the 1st accused.

According to the prosecution the actual sale was effected by the first accused and the second accused was the cashier in the boutique to whom the first accused gave the rupee note that had been handed to him by the decoy and from whom the balance sum of 62 cents had been obtained.

After trial the second accused was acquitted on the ground that the only evidence against the second accused was that he had appropriated 38 cents out of a rupee note handed to him by the first accused, but there was no evidence that he had been apprised of the particular sale in connection with which he was asked to take the money. The first accused was found guilty and sentenced to a term of 4 weeks' rigorous imprisonment.

The relevant order made under the Control of Prices Act as appearing in Gazette No. 14,724/3 of 3rd December 1966 fixed the maximum retail price per pound for dried chillies at Rs. 1·90 and states that for the purpose of that order any sale of any quantity of the article less than 1 cwt. gross for the purpose of consumption or use shall be deemed to be a sale by retail.

The correctness of the learned Magistrate's findings on questions of fact cannot be assailed. A point was indeed made of the fact that one of the Price Control Inspectors who participated in this raid, an inspector

by the name of Jayawardene, had not been called as a witness although he was, according to the prosecution, the only witness standing at a point close enough to the boutique to hear the conversation between the decoy and the first accused. It is not essential however, to the success of the prosecution case that this witness Jayawardene should have been called, for the other prosecution witness Wilson de Silva who was in charge of the raid was standing at a point across the road from which he could command an unobstructed view of the first accused and the decoy. From here he states that he saw the first accused weighing out the article sold, and it was not seriously challenged in cross-examination that Wilson de Silva saw the sale in question being effected by the first accused. This sale was clearly one in respect of the dried chillies in question, for these were found immediately afterwards in the possession of the decoy.

The marked note given by the decoy to the first accused was found in the second accused's drawer and although there was a discrepancy in the serial letter of the rupee note, as noted down by de Silva in his note book, all the eight digits of the note tallied with the number as noted by de Silva. The discrepancy in the serial letter is clearly, as the learned Magistrate has observed, due to a genuine mistake on the part of de Silva.

It is clear from all these circumstances that the sale was effected by the first accused to the decoy and that it was a sale in respect of dried chillies, and I do not think the prosecution case has suffered in any way from the failure to call the witness Jayawardene.

The appeal was, however, more seriously pressed on a point of law, namely that, inasmuch as this was a sale to a decoy, it was not a sale for the purpose of consumption or use within the meaning of Rule 11 (*b*) of the Price Control Order.

The first limb of the appellant's argument was that an application of the *noscuntur a sociis* rule of interpretation would give the word 'use' a meaning cognate to that of the word 'consumption', and hence that, even though the word 'use' be wide enough to cover a variety of purposes other than consumption, for which the article may be purchased, the word in association with the word 'consumption' takes its colour from this word, and means use as food.

However, as Silva, J. has observed in *Martin v. Kandy Police*[1], it would hardly have been necessary for the legislature to use the second word redundantly, the word 'consumption' being quite adequate to express the idea of use as food.

In the English cases of *Brierly v. Phillips* and *Brierly v. Brear*[2], which were relied on by the appellant, the offence under consideration was the sale of eggs at a price exceeding the maximum price specified for sale

[1] *(1967) 70 N. L. R. 141 at 143.*

[2] *(1947) 1 K. B. 541, (1947) 1 All E. R. 269.*

by a producer to a consumer. In that connection it was held that a person who buys eggs for the purpose of hatching is not a ' consumer ' within the meaning of the relevant Order.

The word ' consumption ' was explained by Lord Goddard as bearing the ordinary meaning which the English language would attach to that word. Having referred to the nature of the article in question, the Court had no difficulty in concluding that a person who bought it for the purpose of hatching was not a ' consumer '. This finding cannot therefore avail the appellant in the totally different context of an Order where the relevant purpose is not limited to consumption but is extended to cover other purposes as well.

On the basis that the words ' consumption ' or ' use ' are to be understood in the limited sense of ' consumption ' or ' use for purposes of consumption ', the further argument is advanced that the sale to a decoy does not come within this description as the decoy's purpose was not consumption of the article but detection of the offence.

One cannot lose sight however of the fact that there is a dual aspect to every transaction of sale, for it may be viewed from the standpoint of the buyer or from that of the seller. This dual aspect, clearly reflected in the term *emptio-venditio*, by which the accurate terminology of Roman Law chose to describe it, assumes particular importance when one considers the purpose of the transaction. The buyer's purpose in purchasing and the seller's understanding of that purpose do not necessarily coincide. For example, a buyer purchasing an article of food for the purpose of a scientific experiment may well be thought by the seller to be purchasing it for consumption. It is in appreciation of this possible divergence between the buyer's purpose and the seller's understanding of that purpose that the Order in question speaks not of the purpose of the purchase but of the purpose of the sale. Concerning itself as it does with the seller, the Order concentrates on his state of mind. What the buyer intends to do or in fact does with his purchase cannot therefore affect the applicability of the Order to a seller who understands his sale to be for the purpose specified. This is the sense in which the relevant Order has been understood by this Court in more than one case.[1]

I am therefore unable to hold with the appellant on either limb of his argument, and the point of law urged on his behalf must fail.

It remains only to consider the question of sentence.

Learned Counsel for the appellant draws my attention to the fact that section 72 of the Penal Code is made inapplicable to this offence. He submits that the imposition by the Legislature of a mandatory sentence of imprisonment particularly in these circumstances must necessarily

[1] *Martin v. Kandy Police (1967) 70 N. L. R. 141 at 143, Podimenike v. Inspector of Police, Kiriella, S. C. 80/67/MC Ratnapura 26330/SCM of 22.11.67.*

cause a Court to construe very strictly the provision creating the offence, and to give to the accused the benefit of every possibility of leniency within the law. In this regard reliance is placed on the judgment of My Lord, the Chief Justice, in *Podiappuhamy v. Food and Price Control Inspector, Kandy*[1]. This decision drew attention to the exclusion by regulation of section 325 of the Criminal Procedure Code and described the fetter on the discretion of Court in regard to punishment as neither prudent nor necessary. As was there observed, in an expression of opinion with which I respectfully agree, the Courts, which have a discretion even in cases of homicide, ought not to be denied this discretion in simple cases of profiteering. In the present case, as in the case to which I have just referred, the exclusion of section 325 was subsequent to the offence in question and the Court is therefore not prevented from acting under section 325 if the circumstances warrant such a course. There are, however, in the present case, no mitigatory circumstances such as existed in that case, where the accused was not aware of the actual weight of any particular loaf, since he was not a manufacturer but only a purchaser of about fifteen loaves of bread every day from a bakery.

In the absence of any such circumstances which may so mitigate the offence as to justify the Court in acting under section 325 I do not think the appellant can invoke the benefit of the principle enunciated in that case.

Since in this case there has been a conviction which in my view has been correctly entered and a sentence of imprisonment is mandatory in terms of the provision to which I have referred, there is no room for any interference with the sentence of imprisonment imposed by the learned Magistrate, which is the minimum prescribed by law.

Learned Crown Counsel draws my attention to the fact that in terms of section 8 (6) (*a*) (*i*) of the Price Control Act as amended by Acts 44 of 1957 and 16 of 1966 it is mandatory not only to pass a sentence of imprisonment but also to impose a fine not exceeding seven thousand five hundred rupees. The Magistrate has not imposed a fine and it becomes necessary in the circumstances to comply with the law and impose the penalty of a fine as well, as required by Statute.

I therefore impose on the appellant in addition to the sentence of imprisonment a fine of Rs. 250/, in default 2 weeks' rigorous imprisonment.

The appeal is accordingly dismissed.

Appeal dismissed.

[1] *(1968) 71 N. L. R. 93.*