1960 *Present :* **T. S. Fernando, J.**

K. THIYAGARAJAH, Appellant, *and* D. M. R. PERERA (Inspector of Police), Respondent

S. C. 58—M. C. Colombo, 20311/B

Merchandise Marks Ordinance (Cap. 122)—Offence as to trade description—Section 2 (2)—" False trade description "—" Acted innocently ".

The appellant was carrying on the business of manufacturing aerated waters under the name of " Dominion Aerated Water Company ". He was in the habit of purchasing in the open market empty aerated water bottles which had once been the property of the " Ceylon Mineral Waters Company ", with the name of that company embossed on them. He filled such bottles with aerated waters other than those of the Ceylon Mineral Waters Company, and then, having placed his own company's labels upon them, sold them as being his company's drinks.

Held, that a false trade description within the meaning of section 2 (2) of the Merchandise Marks Ordinance had been applied to the drinks sold by Dominion Aerated Water Company none the less because the presence of the labels would prevent any reasonable purchaser from supposing that he was buying anything but the drinks of Dominion Aerated Water Company.

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

G. E. Chitty, Q.C., with *Ananda Karunatilake* and *Hannan Ismail*, for the accused-appellant.

Wakeley Paul, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 5, 1960. T. S. FERNANDO, J.—

The appellant was convicted in the Magistrate's Court on the two charges which are reproduced below :—

(1) That he did on 24th June 1959 at Rodney Street, Borella, have in his possession for sale or for any purpose of trade goods, to wit, 119 bottles of aerated waters to which a false trade description, namely, the words "*MANUFACTURED UNDER THE AUTHORITY OF THE PROPRIETORS SCHWEPPES (OVERSEAS) LONDON, ENGLAND*" and "*SCHWEPPES*" had been applied, and thereby committed an offence in breach of section 2 (2) of the Merchandise Marks Ordinance (Cap. 122), punishable under section 2 (4) of the same Ordinance.

(2) That he did at the time and place aforesaid have in his possession for sale or for any purpose of trade goods, to wit, 56 bottles of aerated waters to which a false trade description, namely, "*CEYLON MINERAL WATERS*" and "*THIS BOTTLE IS THE PROPERTY OF CEYLON MINERAL WATERS LIMITED*" had been applied, and thereby committed an offence in breach of section 2 (2) of the Merchandise Marks Ordinance (Cap. 122), punishable under section 2 (4) of the same Ordinance.

Another person, a servant of the appellant, was charged along with him and convicted in respect of the sale of 3 bottles of aerated waters of the kind described in charge (1) above and of 3 bottles of the kind described in charge (2) above. The servant was fined a sum of Rs. 20 in respect of each charge, while the appellant was fined a sum of Rs. 75 also in respect of each charge.

Section 2 (2) of the Merchandise Marks Ordinance enacts that every person who sells or exposes for, or has in his possession for, sale or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves

(*a*) . . . .

and (*b*) . . . .

or (*c*) that otherwise he had acted innocently, be guilty of an offence against this Ordinance.

The question raised in this court on behalf of the appellant is one of law, but before dealing with that question it is necessary to state the facts as found in the court below.

The appellant carries on at 20/1 Rodney Street, Borella, the business of manufacturing aerated waters, mineral waters, fruit drinks and cordials under the name of Dominion Aerated Water Co., a name duly

registered as required by the Business Names Ordinance (Cap. 120). On the day specified in the charges, the appellant's servant referred to above sold to a police constable six bottles of aerated waters bearing labels on which had been printed the words "*LOTUS BRAND—LANKA ORANGE—Dominion Aerated Water Co., 20/1, Rodney Street, Colombo 8*", and three of which had the words reproduced in charge (1) embossed on them, while the other three had embossed on them the words reproduced in charge (2). Of the embossed words, the word "SCHWEPPES" had been embossed on the bottom of the bottles. The purchase was made by the constable in question by prior arrangement with his superior officer, an inspector of police, who was attempting on this day to secure evidence of the sale of these bottles of aerated waters. On the constable reporting the purchase to the inspector, the latter went along to the premises of the appellant and took into his custody some 175 bottles of aerated waters of the two descriptions referred to above. The appellant was present in his premises at the time the bottles were taken over by the inspector. It may be added that in the case of the bottles referred to in charge (2), apart from the words already reproduced in that charge, the following legend had also been embossed :—"*ANY UNAUTHORISED PERSON FILLING THIS BOTTLE WILL BE PROSECUTED*".

The 175 bottles all bore labels similar to the labels on the bottles sold by the appellant's servant to the constable. Certain other bottles were also taken charge of by the inspector, and these too bore labels containing the name and address of the appellant's business while the waters themselves were described variously as *ORANGE BARLEY*, *SPARKLING ORANGE BARLEY* and *FRUIT FLAVOUR COCKTAIL*. Each of the bottles was corked with the familiar crown corks, but these corks were all plain with no markings or printing on them, and different from the corks used by the Mineral Water Company on its bottles which had markings on them. Specimens of the contents of some of the 175 bottles found in the possession of the appellant were sent for analysis by the Government Analyst who reported that the contents were different from any of the varieties of the Schweppes orange drinks or the other kinds of orange drinks manufactured by the Ceylon Mineral Water Company.

The Magistrate was satisfied that these bottles had once been the property of the Ceylon Mineral Water Company which, by arrangement with the manufacturers of the aerated and mineral waters known as *Schweppes*, manufactures Schweppes waters in Ceylon in addition to other kinds of aerated or mineral waters. It is not disputed that none of the waters manufactured by the Ceylon Mineral Waters Company is described by the names *Lanka Orange*, *Orange Barley*, *Sparkling Orange Barley* or *Fruit Flavour Cocktail* which were the names printed on the labels attached to the bottles taken away from the premises of the appellant. He was further satisfied that in buying the bottles of the kind found in the appellant's possession no reasonable person was likely to be misled into the belief that he was buying Schweppes waters or any of the other kinds of waters manufactured by the Ceylon Mineral Water Company.

The appellant proved to the Magistrate's satisfaction that he was in the habit of purchasing empty bottles in the open market through itinerant empty bottle vendors and that bottles bearing the Schweppes marks and the marks of the Ceylon Mineral Water Company are always available for purchase in that way.

In spite of these findings which appear to show that the appellant was not deceiving the public, the learned Magistrate found the charges established, and in reaching this finding he was undoubtedly influenced, as indeed I am in deciding the question raised on appeal, by a decision of the King's Bench Division in England on a case stated by justices after a conviction entered by them in a prosecution for an offence under the Merchandise Marks Act of 1887 (50 & 51 Vict. Ch. 28). The case I refer to is *Stone v. Burn* [1], where three judges of the King's Bench (Lord Alverstone C. J., Pickford J. and Lord Coleridge J.) concurred in the opinion that a conviction was correctly entered in a case which has such a striking resemblance to the case before me in regard to both facts and law that the two are almost indistinguishable from each other. In that case, Stone, a bottler of beer, having in the course of his business come into possession of certain bottles belonging to the Felinfoel Brewery Company and embossed with that company's name, filled them with beer brewed by Bass & Co., placed Bass & Co.'s labels upon them, and then sold the contents as being Bass & Co.'s beer. The Court upheld the finding that a false trade description, viz. the Felinfoel Brewery Company's name, had been applied to the beer brewed by Bass & Co. none the less because the presence of the Bass labels on the bottles would prevent any reasonable purchaser from supposing that he was buying anything but Bass's beer. In forming the opinion they did, the judges of the King's Bench felt that effect had to be given to section 5 of the Merchandise Marks Act, the relevant part of which reads that "a person shall be deemed to apply a trade mark or mark or trade description to goods who encloses the goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture, in, with or to any *covering* . . . . to which a trade mark or trade description has been applied". By sub-section (2) of section 5 the expression "*covering*" is defined as including a bottle. As Pickford J. put it (vide page 932), "if in so doing he applied the Felinfoel company's name to the beer it clearly was a false name . . . . and therefore when he sold the beer he sold goods to which a false trade description was applied and consequently by virtue of section 5 he committed an offence unless he proved that he acted *innocently*".

The question of law raised by Mr. Chitty on behalf of the appellant was two-fold :—

(1) that having regard to the findings of the Magistrate, even if it is held that a trade description was applied it was not a false trade description, and

(2) that in any event the Magistrate was in error when he concluded that the appellant had failed to prove that he acted innocently.

[1] *L. R. (1911) 1 K. B. 927.*

Mr. Chitty contended that the case of *Stone v. Burn* (*supra*) had been wrongly decided and urged me to take the view that the word "innocently" in section 2 at least bears not only the meaning put upon it by the King's Bench but also the meaning "not guiltily". He went on to argue that the findings of fact reached by the learned Magistrate negatived that the appellant acted guiltily in the matter of the bottling of the waters manufactured by him in the way he did. While I have not been unimpressed by the argument of learned counsel, I do not consider it cogent enough to disregard the opinion of a Bench of three judges that the innocence contemplated by the statute exists only where the infraction was committed by inadvertence or mistake of fact. Lord Alverstone C.J. observed that "mere ignorance of the provisions of the statute does not amount to innocence for this purpose. The words "*acted innocently*" point to the same misapprehension of fact, for he did what he did with full knowledge and claiming that he had a right to do it". Lord Coleridge J. put the same matter thus :—"But, as was said by Channell J. in *Christie's case*[1], the innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament. Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact. And here the appellant knew all the facts—his only mistake was as to the effect of the statute".

Our own statute, the Merchandise Marks Ordinance (Cap. 122) passed in 1889 is almost word for word and section for section a repetition of the Merchandise Marks Act of 1887 which has been the subject of interpretation in *Stone's case* (*supra*). Having regard to the close identity in facts between that case and this, the authority is absolutely in point and I would respectfully adopt it for application to the question raised in appeal before me. The learned Magistrate has found that the appellant, just as much as Stone in the English case, was not labouring under any mistake of fact, that he was aware of what he was doing and claimed to have a right to do it as the bottles were readily available in the market. In these circumstances the appeal must be dismissed. I do so and think it is not irrelevant to observe at this stage that the appellant has previously been convicted of an offence punishable under this same Ordinance.

Appeal dismissed.

[1] *L. R.* (*1900*) *2 Q. B. 522.*