1971 *Present :* **G. P. A. Silva, S.P.J.**

ABDUL FAJRULHUQ, Appellant, *and*
C. JAYAWARDENA, Respondent

S. C. 301/70—M. M. C. Colombo, 62605

Price-controlled article—Charge of selling it at excessive price—Conviction based on decoy's evidence—Currency note tendered to seller by the decoy—Circumstances when secondary evidence of it is admissible—Weighing scales—Proof of their accuracy—Price Order—Whether Minister's approval of the Order should be proved by the prosecution– Control of Prices Act (Cap. 173), as amended by Acts No. 44 of 1967 and No. 16 of 1966, ss. 4 (3), 4 (4), 5 (7), 8 (6).

The accused-appellant was charged with having sold a pound of beef without bones at a price which exceeded the maximum controlled retail price. He was convicted upon the evidence of a decoy who had handed to the accused a two-rupee note and was given a balance sum of twenty-five cents instead of fifty cents. The two-rupee note, which was handed over to the trial court at the time when the accused was produced, was found missing at the trial.

The evidence was that the pound of beef was weighed by the accused in his own weighing scales and that it was weighed again by the prosecutor in the same scales. The accused did not, when he gave evidence at the trial, question the accuracy of his scales.

Held, (i) that secondary evidence was admissible in respect of the missing two-rupee note.

(ii) that it was not obligatory on the prosecution to have furnished proof of the accused's weighing scales.

Held further, that in a prosecution for a contravention of a Price Order made by the Controller in terms of section 4 (3) of the Control of Prices Act, it is not necessary for the prosecutor to prove that the Price Order has been approved or rescinded by the Minister in terms of section 4 (5) of the Act ; it is sufficient for the prosecutor to prove the Price Order made by the Controller. However, when a long period has intervened between the Price Order made by the Controller and the commission of the alleged offence, the desirable course would be for the prosecutor to adduce some proof at the trial that the Minister has not rescinded but approved the Order.

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

M. Tiruchelvam, Q.C., with *S. P. M. Rajendram*, for the accused-appellant.

C. M. N. Bogollegama, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 23, 1971. G. P. A. SILVA, S.P.J.—

The accused-appellant was charged with having, on the 12th February, 1969, at Kochchikade within the Municipal limits of Colombo where the Price Order No. 430 made by the Controller of Prices (Food) published in the Ceylon Government Gazette No. 14,758/10 of 26th July, 1967 was in operation, sold 16 ounces of beef without bones for Re. 1/50 when the maximum controlled retail price under the said Order was Re. 1/25, and with having thereby committed an offence punishable under section 8 (6) of the Control of Prices Ordinance as amended by the Control of Prices Amendment Acts No. 44 of 1967 and No. 16 of 1966. After trial the learned Magistrate convicted him on 6th January, 1970, and imposed on him a sentence of 6 months' imprisonment and a fine of Rs. 5,000.

The evidence of Police Constable Piyasena, attached to the Vice Squad, who acted as a decoy was that Sub-Inspector Fernando handed to him a Rs. 2 note after noting down the number and instructed him to go to the accused's stall and purchase a pound of beef without bones, having informed him that the price of beef without bones was Re. 1/25 a pound. He also instructed Piyasena to remain at the stall if the price charged was more than the controlled price and to return if the controlled price was charged. Police Constable Wijewardena too was sent by the Sub-Inspector in plain clothes, like Piyasena, to watch the transaction.

Piyasena proceeded to the stall where the accused was and asked for a pound of beef which the accused served up to him and quoted Re. 1/50 as the price. Piyasena handed the Rs. 2 note given to him by the Sub-Inspector and the accused returned to Piyasena a balance of fifty cents. Police Constable Wijewardena thereupon left the spot to signal to the Sub-Inspector who drove up to the stall and took over from Piyasena the pound of beef and the balance 50 cents. He thereafter questioned the accused, searched his drawer and took charge of the Rs. 2 note which he had earlier handed over to Piyasena. He also weighed the pound of meat in the accused's weighing scale and found it to contain one pound and thereafter explained the charge and took the accused into custody. The Rs. 2 note was sealed in an envelope at the spot and the left thumb impression of the accused was obtained on it and thereafter the envelope was never opened but produced in the Magistrate's Court in the same condition.

Sub-Inspector Fernando corroborated this witness on the material points and also gave the number of the Rs. 2 note which he took down before handing it over to Piyasena to buy the pound of beef. As regards the envelope containing the Rs. 2 note which was sealed by the Sub-Inspector in the presence of the accused and handed over to the trial court at the time the accused was produced, it was found missing at the trial. In the evidence of the Record Keeper, however, he admitted the receipt of this envelope which was further supported by an entry in the Production Register as well as by the receipt given by him to the Police at the time it was handed over by Police Constable Wijewardena.

Mr. Tiruchelvam's first argument on behalf of the appellant was that the absence of this Rs. 2 note was fatal to his conviction. He submitted that in the absence of the note, there was no proof that a Rs. 2 note bearing the number noted by the Sub-Inspector was one in circulation and that it was incumbent on the prosecution to have summoned an officer of the Central Bank in the circumstances to prove that such a note was in circulation. I regret I am unable to see any substance in this argument. The note is only a circumstance of evidentiary value even if it was present and if the Magistrate was able to accept as he did without hesitation the oral testimony of the Police officers with regard to the handing over of a Rs. 2 note and the return of the change of 50 cents for the pound of beef, the mere absence of the note did not affect the correctness of the finding. I can appreciate an argument of this nature if the offence was one connected with the note itself such as its being a counterfeit note ; but where the note only consists of circumstantial support of oral evidence the truth or falsity of which had to be assessed by the Magistrate, the absence of the note at the trial was inconsequential in view of the secondary evidence thereof which the Magistrate accepted.

The second submission made by counsel for the appellant was that there was no evidence as to the accuracy of the accused's scale in which the beef was weighed by the Sub-Inspector. He relied for this submission

on an observation made by Howard, C.J. in the case of *Ekanayake v. Wassira*[1], to the effect that in the absence of evidence as to the accuracy of the scales it could not be said that the standard of proof required in a criminal case had been reached. The facts of that case bore a similarity to the facts of the instant case in regard to the weighing of the article in that the decoy in that case too weighed it in the accused's scale. In that case however there was another substantial contention raised on behalf of the appellant and accepted by the appellate court that the Price Order which referred to one pound and half pound loaves of bread had no application to quarter pound loaves. While it is correct that Howard, C.J. also took into consideration the absence of evidence as to the accuracy of the scale in dismissing the appeal by the complainant, this is a view with which I find compelled most respectfully to disagree. I can well understand if there is, in a particular case, a dispute as to the correct weight of the article sold and it had been weighed in a scale supplied by the complainant the accuracy of which has not been established by evidence. But in a case such as the one referred to or in the instant case, where the evidence is that the accused weighed in his own scale one pound of the article bought by a customer and it is again weighed by the prosecutor in the same scale and found to contain one pound, and where not even a suggestion is made on behalf of the accused at the trial that the scale was inaccurate, I am unable to see any justification for a court, in order to reach the satisfaction necessary in a criminal case, to insist on a requirement by the prosecution to furnish proof of the accuracy of the accused's own scale which the law ordinarily requires to be accurate. In the instant case there is the additional fact that the accused gave evidence and, although he had an opportunity to say that his scale was inaccurate, did not say so either directly or by implication. The other case cited by counsel was *Sheriffdeen v. Girihagama* [2] in which the accused was convicted of having sold 15 ounces of beef at a price which exceeded the controlled price of one pound. In that case, the question whether the quantity sold was 15 ounces or 16 ounces became a vital issue and the connected facts made it obligatory on the prosecution to prove the accuracy of the scale used for the purpose, which was not the accused's scale but one used in a co-operative store. The facts of that case have no application to those of the instant case for another reason, namely, that there was an opportunity in that case of a portion of the beef sold by the accused to have been abstracted before it was weighed by the constable.

The final submission of counsel for the appellant revolved round a question of law. He first argued that the Gazette, in which the order of the Controller as approved by the Minister was published, was not referred to in the charge. The view has often been taken in these courts that the particular Gazette in which a Price Order is published need not even be referred to in the charge. I note however that the relevant

[1] *(1945) 29 C. L. W. 76.*

[2] *(1969) 72 N. L. R. 454.*

Gazette in which the order made by the Controller was published, namely Government Gazette Extraordinary No. 14,758/10 of 26.7.67, has been referred to in the charge and produced as P5 by the prosecution witness, Sub-Inspector Fernando. Crown Counsel's answer to the submission that the Gazette in which the Minister's approval was published should have been referred to in the charge is that, in view of the clear wording of section 4 (3) of the Control of Prices Act (Chapter 173) that an Order made by the Controller comes into operation when such order is made and signed by the Controller and published in accordance with the provisions of sub-section 4, there is no requirement to refer in the charge to the Gazette in which the Minister's approval has been published. His contention finds support in two cases cited by him, namely, *Food and Price Control Inspector v. Piyasena*[1], and *Martin Cooray v. Sub-Inspector of Police, Borella.*[2] I was myself anxious to know during the course of the argument whether this Price Order had been subsequently approved or rescinded by the Minister who is vested with the power to take either of these courses in terms of section 4 (5) of the Control of Prices Act. The Crown Counsel was unable to enlighten me on this but relied strongly on the recent decision of Samerawickrame, J. in the 73 New Law Report case to show that it was sufficient for the prosecution to prove the Price Order made by the Controller.

While I do not disagree with the views expressed in the two judgments cited above, there is another aspect of this matter which would have presented certain difficulties in my way in affirming the conviction in this case had the Crown Counsel not subsequently brought to my notice the Gazette in which the approval of the Minister had in fact been published, namely, Government Gazette Extraordinary No. 14,762/4 of 24th August, 1967. For, I cannot help thinking that when the Magistrate convicted this accused he did so without being aware whether the Price Order made by the Controller in July, 1967, was in operation in February 1969 or whether it had been subsequently rescinded by the Minister. This situation seems to me to be unsatisfactory and I refrain from interfering with this conviction only because I am satisfied that it has not occasioned a failure of justice as the Minister has in fact not rescinded but approved the order made by the Controller or Prices.

The appeal is accordingly dismissed.

I should now wish to state my views on the aspect of this question which has not been dealt with in the two previous judgments referred to, presumably because the Court was not invited to consider that aspect. In both these cases the aspect that has been considered by Weerasooriya J. and Samerawickrame J. is whether, in a case where an accused is charged with contravening a Price Order made by the Controller in terms of section 4 (3) of the Control of Prices Ordinance, it is necessary for the prosecution to prove that the said Order has been approved by the Minister and

[1] *(1955) 57 N. L. R. 310.*

[2] *(1970) 73 N. L. R. 397.*

whether the notification of such approval has been published in the Gazette. I have no difficulty in agreeing that the provisions of sub-section 3 make such an order operative when it is signed by the Controller and public notice thereof has been given as contemplated by sub-section 4. These provisions are intended in my view to deal with offenders against such a Price Order with immediate effect despite any time lag that may occur between the signing of the Order by the Controller and further action by the Minister as contemplated in sub-section 5. If the wording of this sub-section was to the effect that an Order made by the Controller shall be placed before the Minister for approval but that the Order shall nevertheless be effective from the time it is signed by the Controller, there would of course be no difficulty as to whether there should be a reference to the Minister's approval in a charge, the obvious answer being in the negative as the Minister's approval would appear in that event to be a mere formality. It seems to me however that, as sub-section 5 empowers the Minister to approve or to rescind the Order of the Controller, such Order is not placed before the Minister for his formal approval but that he may well rescind the Order. He may, for instance, think that the price fixed by the Controller in the Order is too low having regard to the supply of the article available and may wish to fix a higher price ; or consider the price too high, having regard to the capacity of the consumer to pay or the general high cost of living or for any other reason, and may wish to fix a lower price. When, particularly, there is a long period intervening between the order made by the Controller and the commission of the alleged offence, as in the instant case—a period of nearly two years—it is fair and desirable that an accused person should know at the time he is charged whether the original Order of the Controller has been approved or rescinded by the Minister. It is also important for the trial Judge to be certain, before he decides to convict an accused, whether such Order has for any reason been rescinded by the Minister rather than that he should be in the dark as to whether the Minister has approved or rescinded the Order. Whichever way one looks at the question, whether from the point of view of the Court or of the accused, therefore, it seems to me that the desirable course would be for the prosecution to adduce some proof at the trial that such an Order has not been rescinded by the Minister. This may in practice of course result in the prosecution proving that the Minister has in fact not rescinded but approved the Order. I feel justified in expressing this view by reason of the further provision in section 4 (7) that when an Order has been approved by the Minister and notification of such approval is published, "the Order shall be deemed to be as valid and effectual as if it were herein enacted." If at the stage when the notification is published the Order is elevated to the position of an enactment, I do not see any reason why an accused should be continued to be charged under an Order of the Controller of Prices when he can be charged in terms of a provision that has assumed the form of an enactment.

Appeal dismissed.