

1969. Present : de Kretser, J.

M. T. M. MUSTAPHA, Appellant, and SUB-INSPECTOR OF POLICE,  
BATTICALOA, Respondent

*S.C. 1070/68—M. C. Batticaloa, 24128*

*Control of Prices Act—Price Order relating to sale of Nespray milk food—Charge of  
contravening it—Quantum of evidence—Statements on label—Relevancy.*

Selling a marketed tin of milk food labelled "Nespray 1 pound" at a price in excess of the price permitted by the relevant Price Order is a contravention of that Price Order. In such a case it is not necessary for the prosecution to prove that the tin contained a pound of the milk food, for the price is fixed per tin and not per pound, and the question whether what is stated on the label is factually correct does not arise.

**A**PPEAL from a judgment of the Magistrate's Court, Batticaloa.

*G. E. Chitty, Q.C.*, with *T. W. Rajaratnam* and *G. E. Chitty (Jnr.)*, for the accused-appellant.

*Tyrone Fernando*, Crown Counsel, for the Attorney-General.

*Cur. adv. vult.*

May 28, 1969. DE KRETSEK, J.—

The Magistrate of Batticaloa (Mr. O. S. M. Seneviratne) convicted the accused of the two charges laid against him; viz. selling a pound tin of Nespray which is Price Controlled at Rs. 2.90 for Rs. 3/- and failing to exhibit conspicuously on the Price Board the controlled price of Nespray. He sentenced the accused to 6 weeks R. I. and a fine of Rs. 1,000/- in default 6 weeks R.I. on count 1, and a fine of Rs. 50/- in default 2 weeks R.I. on count 2. The accused has appealed.

The Magistrate who had the advantage of seeing the school-boy witness Marso giving evidence has accepted that evidence after carefully weighing all that was urged by Counsel against that course. I see no reason to disagree with him. Marso's evidence established that the accused asked him for Rs. 3/- for a one pound tin of Nespray, and when Marso gave him the Rs. 10/- note of which the number has been noted, in payment, the accused gave him the tin of Nespray produced as P3 and a balance of Rs. 7/-. The accused's defence was that he had no ten cent bit at the cashier's table he was at, and that he had intended giving it, taking it from another table in the boutique but that he was arrested before he could do so. It appears to have been a foolish thing to do—so foolish that I find myself unable to believe it happened that he, a trader dealing in Price Controlled goods should have handed over only a balance that established guilt when he could have given the true balance in a minute or two. The fact that I have observed in appeals from convictions in other Price Control cases similar claims of having intended to hand over

the balance, which makes all the difference between guilt and innocence, but not having had the time to do so, makes me all the more sceptical. The Magistrate did not accept his testimony and I am of the view that the Magistrate was correct in doing so. On the facts, then, it is established that the accused sold to Marso as a one pound tin of Nespray, the production P3 which the Magistrate notes was untampered with and which bore the label "Nespray nett weight 1 pound" (454 grams).

Mr. Chitty for the appellant submits that the prosecution to succeed must prove that the tin P3 contained a pound of the milk food known as Nespray and that the prosecution does not prove that by proving that the accused sold a tin of milk food bearing a label, Nespray nett. weight one pound (454 grams).

Counsel for the Crown relying on the case of *Jalaldeen v. Jayawardene*<sup>1</sup> submits that the accused when he sold to a customer the tin so labelled "adopted the specification on the label and admitted by conduct the weight and contents stated in the label".

If by this is meant that the accused must be held to have admitted that what was stated on the label was the truth, I must with all respect disagree, for the evidence is that the tin was untampered with. Therefore the accused relied as much as anyone else on what was stated on the label. The fact that he pinned his faith on what was stated on the label does not mean that his faith could not be misplaced.

From the evidentiary point of view the legend Nespray 1 lb. nett on the label is hearsay and the case of *Myers v. Director of Public Prosecutions*<sup>2</sup> cited with approval in *Patel v. Comptroller of Customs*<sup>3</sup>, "makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or marking".

Counsel for the Crown further submits that it is common knowledge that the milk food known as Nespray is marketed by its manufacturer in tins of which the contents weigh 1 pound, 2½ pounds and 5 pounds respectively. His submission is that the Price Order fixes prices for milk food in tins so labelled, and in the instant case, the prosecution having proved that the accused sold the tin P3 bearing such a label for Rs. 3.00 when the controlled price was Rs. 2.90, the accused is guilty of the charge laid against him.

It then becomes necessary to decide what it is that is Price Controlled. Is it a pound of the milk food of the brand known as Nespray ordinarily marketed in tins or is it a tin of milk food labelled Nespray 1 pound nett weight (454 grams.)? The relevant price order is No. 407 of 1.3.66 published in G.G. (Extraordinary) 14,664 of 1.3.66, and what is relevant in it to this case is: (ii) fixes with immediate effect the prices specified in columns 2 and 3 of the Schedule hereto to be the maximum wholesale price per dozen tins and the maximum retail price per tin respectively

<sup>1</sup> (1968) 70 N. L. R. 476.

<sup>2</sup> (1964) 2 A. E. R. 581.

<sup>3</sup> (1965) 3 A. E. R. 593.

above which the brand of milk food specified in the corresponding entry in column 1 of the Schedule shall not be sold within the island of Ceylon

..... What is relevant in the Schedule reads:—

<i>Column 1</i>		<i>Column 3</i>
<i>Brand of Milk Food</i>		<i>Maximum Retail Price per tin</i>
		<i>Rs. c.</i>
Nespray 1 lb.	..	.. 2 90
Nespray 2½ lb.	..	.. 7 0
Nespray 5 lb.	..	.. 13 25

In my view an examination of the Price Order confirms the correctness of the submission of Counsel for the Crown. Milk food is marketed in tins and what the Price Order controls is the price at which such tins can be sold. It is to be noted that the price is fixed per tin and not per pound. So a tin of milk food described under column 1 of the schedule as "Nespray 1 pound" for the reason that that is how it is labelled by its manufacturers, is controlled at Rs. 2.90. A tin of milk food described under column 1 as Nespray 2½ lbs. is controlled at Rs. 7/- and so on. In these circumstances, it appears to me the question of whether what is stated on the label is factually correct does not arise, and there is no need to comfort oneself with the thought that "it would be absurd to suppose that manufacturers of Nespray adopt any uncommon course of conduct or business practice, and that they understate in their labels the weight of the milk food they sell". The evidence having established that the accused did sell P3 a tin of milk food labelled Nespray 1 pound for Rs. 3/-, when such a tin is Price Controlled at Rs. 2.90, is, in my opinion rightly convicted of the charge.

There remains the conviction on the charge which should be that the accused failed to exhibit conspicuously on a notice board the maximum retail price of Nespray. Apart from the fact that the charge is wrongly drafted in that what it is alleged that he failed to exhibit conspicuously is the notice board, I find that the notice board in question has, for some careless reason, not been produced to enable the Magistrate to decide whether what was stated on it was conspicuous or not. I therefore set aside the conviction on this count.

The next question is what the sentence on count 1 should be. As the accused is a first offender, I do not think a prison sentence is called for. Counsel for the Crown concedes that this is a case in which the right of the Court to apply the provisions of Section 325 of the Criminal Procedure Code has not been taken away by law. I set aside the sentence imposed and direct the accused to enter into a bond in Rs. 1,000 (personal) to be of good conduct and to come up for conviction and sentence if called on within a period of three years, and to pay Rs. 1,000 as Crown costs within one month of entering into the bond. Subject to these variations accused's appeal is dismissed.

*Appeal dismissed, subject to certain variations.*