

1972

Present : Rajaratnam, J.

**S. M. THASTHAKEER, Appellant, and P. J. N. JAYASEKERA,
Respondent**

S. C. 253/71—M. C. Colombo South, 16330/B

*Food and Drugs Act (Cap. 216)—Section 4 (1)—Charge thereunder against a salesman
in respect of a sale of Orange Jam—Quantum of evidence—Mens rea—Appli-
cability of s. 72 of Penal Code to a statutory offence.*

The accused-appellant, who was a salesman in a shop, was charged with having contravened the provisions of section 4 (1) of the Food and Drugs Act by selling an article of food (a bottle of Orange Jam) which was not of the substance of food demanded by the purchaser. The Government Analyst gave evidence that there was only 8.01% of orange and 34% of Ash pumpkin in the article sold and that the entire fruit content was separated from the rest of the jam which contained sugar, glucose and water.

Held, that, on a consideration of the Analyst's evidence, it was impossible to arrive at a finding that the article sold was Orange Jam in nature, substance or quality. Nevertheless, the appellant was not liable to be convicted. As a mere salesman in a shop far away from the factory, he could not have known what the exact composition was in the bottle of jam. He could not therefore have had the guilty knowledge or intention to commit the alleged offence. A defence under section 72 of the Penal Code is available in statutory offences also.

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

G. E. Chitty, with *M. Wannappa*, for the accused-appellant.

V. Karalasingham, with *U. C. B. Ratnayake*, for the complainant-respondent.

Cur. adv. vult.

June 6, 1972. RAJARATNAM, J.—

The accused-appellant was charged with having sold an article of food to wit a bottle of Orange Jam which was not of the substance of food demanded by the purchaser, in breach of Section 4 (1) of the Food and Drugs Act, and thereby with having committed an offence punishable under Section 56 (1) of the said Act, Chapter 216 of the Legislative Enactments.

After the trial the appellant was found guilty and fined Rs. 100/-. The accused was a salesman in a shop and is alleged to have sold the article in question to the Food Inspector who was also an authorised officer under the Food and Drugs Act. Two points were urged by the learned Counsel for the appellant in appeal: (1) that the evidence led by the prosecution does not disclose an offence under the Food and Drugs Act, (2) the accused being a salesman in a shop which was only selling what was put into the market by a manufacturer would not have the knowledge about the exact composition of the jam in the closed bottle. Therefore guilty knowledge or intention cannot be imputed to him. Under Section 72 of the Penal Code he cannot be held guilty of the offence as he was under the mistaken belief that what was put in the market as Orange Jam was Orange Jam in nature, quality and substance. Learned Counsel for the appellant, however, stressed that the jam put into the market was not in a breach of Section 4 (1) of the Food and Drugs Act. On the evidence led for the prosecution the Government Analyst stated that there was only 8.01% of orange and 34% of Ash pumpkin. The entire fruit content was separated from the

rest of the jam which contained sugar, glucose and water. On a consideration of the Analyst's evidence it would have been impossible for any Court to arrive at a finding that the article sold to the purchaser was, in nature, substance or quality—orange jam. I am unable to agree with the appellant's Counsel that the particular bottle was orange jam put into the market and it was not in breach of Section 4(1) of the Food and Drugs Act. Learned Counsel for the appellant vigorously argued that the liquid was analysed and a good part of it might have been orange juice. It is difficult for me to hold that the jam in which the solid contents had only 8% orange and 34% Ash pumpkins was in nature, substance and quality orange jam on the speculation that the water found therein could be orange juice! On the second point, however, it is undisputed that the accused would not have and could not have known what the exact composition was in the bottle of jam, being only a salesman in a shop far from the factory and all the circumstances prove that the accused believed it was orange jam that was sold and it necessitated the microscopic examination by the Analyst to realise that his belief was mistaken. It has been held by a Divisional Bench in *Perera v. Munaweera*¹ 56 N. L. R. p. 433 that a defence under Section 72 of the Penal Code is available in statutory offences also. I am of the view that guilty knowledge or intention is essential to prove the offence in question. No doubt the defence was not specifically taken at the trial and such a defence must be proved in law by a preponderance of probability by the accused. But where the circumstances in the prosecution case itself by more than a balance of probability prove that the salesman could not have had the guilty knowledge or intention to commit this offence, he cannot be found guilty of the offence. It is not completely without significance that in the whole proceedings in Court the manufacturer's name was not revealed. No doubt all the State's horses and all the State's men have concentrated on bringing an innocent salesman to book in this case but I cannot resist making the comment that it might have been more in the interest of the public if the attention of the authorities had been paid for what it was worth to those responsible for this little false legend on the bottle that was sold.

I set aside the conviction and acquit the accused.

Appeal allowed.

¹ (1955) 56 N. L. R. 433.