1955 *Present :* **Gratiaen J., Swan J., de Silva J., Sansoni J. and Fernando J.**

E. L. PERERA, Appellant, *and* C. W. MUNAWEERA (Food and Price Control Inspector), Respondent

S. C. 1,176—M. C. Colombo, 57,397

Mens rea—*Applicability to statutory offences—Mistake of fact—Validity of such defence—Penal Code, ss. 38 (2), 72— Control of Prices Act, No. 29 of 1950, s. 8 (1) and (6).*

Section 72 of the Penal Code which enacts that " nothing is an offence which is done by any person . . . who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it " applies to all offences alike, including every statutory offence whose definition does not contain a particular state of mind or knowledge as one of its elements. In the latter case the accused will be entitled to an acquittal if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law.

The appellant was charged with having sold a loaf of bread weighing 15½ ounces at a price fixed for a 16 ounce loaf; this sale at a price beyond the controlled price constituted, it was alleged, a contravention of section 8(1) of the Control of Prices Act. The appellant gave evidence to the effect that he himself believed that the weight of the offending loaf was in fact 16 ounces and that in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf.

Held, that it was not open to the trial Court to convict the appellant unless it rejected the appellant's evidence that he believed in good faith, and by reason of a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight.

APPEAL from a judgment of the Magistrate's Court, Colombo. This appeal was reserved for the decision of a Bench of five Judges upon a reference by Rose C.J. in the following terms :—

" The appellant in this case was convicted of selling a loaf of bread which purported to be a pound loaf and which actually weighed only 15½ ounces, for 26 cents which would have been the appropriate price under the relevant order for a one pound loaf of bread.

" The appellant suggests that no moral turpitude attaches to him in this matter in view of the fact that several hundreds of loaves of bread were baked on this particular morning, and that had the remainder of these loaves been weighed it would have been found

that all except a negligible quantity would have weighed either the required 16 ounces or slightly more. Evidence was adduced in support of this position and the present appeal was argued on the basis that that evidence should be accepted for the reason that the learned Magistrate in his order appears to have acted on the basis that the factual position as presented by the appellant was correct but that his liability in law was absolute, irrespective of 'mens rea'.

"It is of course quite possible to advance a valid argument in support of either view, and it appears that there are conflicting authorities of this court. Soertsz J. appears to have come to opposite conclusions on the point of the principle involved in two cases, in both of which he was sitting alone. In *Gunasekere v. Dias Bandaranaike* (39 N. L. R. 17) he held that Section 72 of the Penal Code could be availed of by the appellant, whereas in *Perumal v. Arumugam* (40 N. L. R. 532) he held that in relation to a charge under section 28 of the Poisons, Opium and Dangerous Drugs Ordinance the existence of *mens rea* was not an essential element of the offence.

"The view expressed in the former case would seem to derive support from a Full Bench decision that was decided as long ago as in 1921, the case of *Weerakoon v. Ranhamy* (23 N. L. R. 33 at pages 43 and 44).

"Having regard to the importance of this matter from the point of view of the effect that its decision must have upon the efficacy of prosecutions under these various controlling ordinances, and in view of the conflicting authorities, I consider that this is a matter which should properly be referred to a decision of more than one Judge; and in pursuance of Section 48A of the Courts Ordinance, I hereby direct that the matter shall de decided by a Bench of five Judges."

H. V. Perera, Q.C., with *A. B. Perera*, for the accused appellant.—English Law is defferent from the law in Ceylon. In Ceylon there are the General Exceptions in the Penal Code. The question is—is section 72 available to the accused? Our system is statutory and therefore English law cannot be imported into it. *Perumal v. Arumugam* [1] is correct when it says "Section 38 Penal Code makes Section 72 applicable to offences punishable under any law other than this Code"; but is incorrect when it says "it is not an inflexible rule . . .". *Perumal v. Arumugam* [1] is in conflict with the earlier decision of the same Judge in *Letchman v. Murugappa Chettiar* [2] which referred to *Weerakoon v. Ranhamy* [3] and applied section 72. In *Weerakoon v. Ranhamy* [3] the question was whether ignorance is covered by the exception—ignorance implying a mistake of fact as distinguished from pure ignorance. The case was disposed of on the footing that there was ignorance of law, but the Judges considered the applicability of section 72. In *Rex v.*

[1] *(1939) 40 N. L. R. 532.* [2] *(1936) 39 N. L. R. 19.*

[3] *(1921) 23 N. L. R. 33 (F.B.)*

Ansalavarnar [1] the defence was disbelieved. In *Meludaka v. Muttucarupen* [2]—the headnote is incorrect—de Sampayo A.C.J. applied section 72 as the accused proved his mistake of fact.

In the present case, the evidence of the accused was accepted by the Magistrate. The accused honestly believed that he could sell the loaf at the price he did because of the mistake of fact regarding its weight.

In English Law there is no General Exception ; but there are special provisions in the laws relating to the Sale of Bread that afford various defences—e.g., mistake, accident, driage, and acts of persons not within the defendant's control. Vide :—1954 (Vol. 2) Stone's Justices Manual, p. 2414 and *Trickers (Confectioners), Ltd. v. Barnes* [3].

In the present case, the accused by a practical system tested the weight—though he did not weigh each loaf. He believed that the loaf in question weighed 16 ozs. He *bona fide* thought so. As counter clerk he had no control over the other employees. He issued the ingredients for making a particular quantity of loaves, checked their number when baked and tested the weight of some loaves. When occasionally a short weight loaf was discovered it was converted to toast.

The difference in weight in this case is only $\frac{3}{4}$ oz. There can be no doubt as to the *bona fides* of the accused.

H. A. Wijemanne, Crown Counsel, with *Vincent T. Thamotheram* and *V. S. A. Pullenayagam*, Crown Counsel, for the Attorney General.—The question is whether section 72 permits an accused person to plead a mistake of fact in regard to absolute prohibitions. The observations of Bertram, C. J., in *Weerakoon v. Ranhamy* [4] on the scope of section 72 are *obiter* and not binding on this Court. That case was disposed of on the footing that there was a mistake of law. In any event, those observations are erroneous. The correctness of the principle referred to at p. 43—that the absence of the word "knowingly" shifts the burden of proof—has been doubted by Devlin J. in *Taylor's Central Garages (Exeter) v. Roper* [5].

Section 72 applies only to offences which involve *mens rea*. In the case of an absolute prohibition the prosecution need not prove a mental element. For instances of absolute prohibition vide *Renolds v. G. H. Austin and Sons, Ltd.* [6]. Soertsz J. in *Perumal v. Arumugam* [7] followed the English Law. See also *Buckingham v. Duck* [8]; *Pearks Dairies, Lim. v. Tottenham Food Control Committee* [9]; *James & Son, Ltd. v. Smee* [10]. The definition of "offence" in section 38 cannot enlarge the scope of section 72.

Even if section 72 applies, the accused has not established his defence of mistake. The evidence led by him shows that 5 per cent. of his bread would normally be short in weight, that the bread is subject to driage and that it has less driage if it is double baked. The accused should

[1] *(1922) 1 Times 46.*
[2] *(1923) 1 Times 239.*
[3] *(1955) 1 All England Reports 803.*
[4] *(1921) 23 N. L. R. 33 (F. B.).*
[5] *(1951) 2 T. L. R. 284.*
[6] *(1951) 1 All England Reports 606.*
[7] *(1939) 40 N. L. R. 532.*
[8] *(1919) L. J. K. B. D. Vol 88. p. 375.*
[9] *(1919) L. J., K. B. D. Vol. 78 p. 623.*
[10] *(1954) 3 All England Reports 273.*

therefore have either weighed his bread before selling or double-baked it. As he did neither he cannot plead a *bona fide* mistake of fact. Moreover, the Price Order C 229 in *Gazette* 10,248 of May 18, 1951 and the Bread Ordinance, Cap. 171, as amended by Ordinance 33 of 1944 casts a legal duty on the accused to weigh the bread before it is sold.

Counsel also cited *Silva v. Attorney General* [1].

Cur. adv. vult.

June 6, 1955. *The judgment of the Court.*—

This appeal was reserved for the decision of a Bench of five Judges under the provisions of Section 48A of the Courts Ordinance.

The appellant was charged with having sold a loaf of bread purporting to weigh 16 ounces, but in fact weighing only 15¼ ounces, at a price which was 1 7/32 cents in excess of the maximum control price fixed under a Food Price Order in force at the time ; this sale, it was alleged, constituted a contravention of Section 8 (1) of the Control of Prices Act, No. 29 of 1950 and was punishable under Section 8 (6) of the Act.

The appellant admitted the bare facts relied on by the prosecution—namely, that the loaf of bread weighed slightly less than 16 ounces and that the price charged was accordingly in excess of the controlled price. He gave evidence, however, to the effect that, as a responsible person employed by a reputable bakery, he had taken all reasonable precautions to avoid selling bread at prices beyond the controlled price ; that he honestly believed that the weight of the offending loaf was in fact 16 ounces, and that, in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf. In other words, he set up a defence under Section 72 of the Penal Code the relevant provisions of which are as follows :—

> " 72. Nothing is an offence which is done by any person who . . . . by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it ".

The learned Magistrate did not reject the appellant's version of the circumstances relating to the sale. He took the view, however, that the Food Price Order in question contained words of absolute and unqualified prohibition, and that in regard to such offences, as in England, the defence of " *bona fide* mistake of fact " was not available to an accused person against whom the commission of the *actus reus* had been established. In reaching this conclusion, the learned Magistrate adopted the *ratio decidendi* of Soertsz J's judgment in *Perumal v. Arumugam* [2]. In that case a person charged under Section 28 of the Poisons, Opium, and Dangerous Drugs Ordinance (Cap. 172) explained by way of defence that his possession of an article containing ganja

[1] *(1940) 42 N. L. R. 304 at 309.* [2] *(1939) 40 N.L.R. 532.*

was due to a *bona fide* mistake of fact. Soertsz J. decided that Section 72 of the Penal Code was not applicable to offences punishable under Section 28 of the Ordinance because :

> " As regards Common law offences, which so far as we are concerned have been made statutory to the extent that they have been codified in our Penal Code, *mens rea* is necessary as Section 72 of the Penal Code indicates. Section 38 makes Section 72 applicable to offences punishable under ' any law other than this Code ' as well, but in my opinion, this does not mean that it necessarily applies to all offences outside the Penal Code. It is not an inflexible rule. Whether it applies or not must as I have pointed out on the authority of the cases I have referred to depend on the particular Legislative Enactment. If I may repeat myself and use the words of de Sampayo J. ' there are many branches of social and municipal legislation in which an act is made criminal without any *mens rea* '. The Poisons, Opium, and Dangerous Drugs Ordinance is such an Ordinance. "

It was argued before us that this decision was wrong, and that it is in conflict with the earlier judgment of the same distinguished Judge in *Letchman v. Murugappa Chettiar*[1]. In that case the accused was charged with plying an omnibus along a route not approved by the licensing authority. His defence was he honestly believed that he had a valid licence authorising him to proceed along the particular route. Soertsz J., in quashing the conviction, said:

> " The accused has given evidence and his defence is that he had not been informed, and he was not aware, that the licensing authority had withdrawn his approval of a section of the route. There is no reason whatever for rejecting the accused's evidence on this point. The only question is whether his defence is good in law. I am of opinion it is. In *Weerakoon v. Ranhamy*[2], a Bench of four Judges considered the question of *mens rea* in relation to our law. They held that Section 72 of the Penal Code which enacts that ' nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it ' applies to all enactments alike, including those enactments which impose absolute obligations. The English Law drew a distinction and made the plea of absence of *mens rea* inoperative in the case of charges framed under ' certain exceptional enactments containing prohibitions which are interpreted as unqualified '. Our law knows no such distinction. "

In our opinion this passage correctly sets out the general principle as to the applicability of Section 72 of the Penal Code not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon. Section 38 (2) of the Code unambiguously declares that the word " offence " in Chapter 4 of the Code (dealing with " General Exceptions ") includes " a thing punishable in Ceylon under any law other than this Code". Accordingly, Section

[1] *(1936) 39 N. L. R. 19.* [2] *(1921) 23 N. L. R. 33.*

72 equally applies to every statutory offence even if its definition does not contain a particular state of mind or knowledge as one of its elements. *Weerakoon v. Ranhamy* [1]. It is therfore wrong to say that the rule laid down in Section 38 of the Code in its present form is " not inflexible ". Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act, and it is not required in addition to establish that the accused acted with any specific intention or knowledge. But this does not mean that in such a case the accused is to be denied the right to plead any of the general exceptions set out in Chapter 4 of the Code. The accused would therefore be entitled to an acquittal if he proved on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law. The accused must, of course, prove affirmatively the existence of each of these circumstances, and he will not be entitled to the benefit of Section 72 if he fails to do so, or merely leaves that issue in doubt. *The King v. Chandrasekera* [2].

Learned Crown Counsel conceded that these principles are in accord with the rule unanimously laid down by a Full Bench of this Court nearly 34 years ago in *Weerakoon v. Ranhamy* [1]. He invited us, however, to hold that that case had been wrongly decided on this point, and that the general observations as to the applicability of Section 72 of the Code to all statutory offences were *obiter dicta*. We are quite unable to take this view. The observations referred to were considered by all the Judges to be strictly necessary for their ultimate decision, and therefore constituted an essential part of its *ratio decidendi*. The Court unanimously agreed, as a preliminary to its conclusions, that Section 72 of the Code did apply to prosecutions under the Forest Ordinance, but the majority of the Judges then proceeded to hold that on the evidence the mistake relied on was one of law and not of fact. Even if the decision of a Collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot subsequently be over-ruled by even a subsequent Collective Bench, far less by a Bench to which an appeal has been referred under Section 48A. Vide *Jane Nona v. Leo* [3].

We were invited to consider the undesirability of Section 38 of the Penal Code making Section 72 inflexibly applicable to offences to which, under modern conditions, Parliament may, in the interests of justice, consider the defence of *bona fide* mistake to be inappropriate. This argument does not impress us. In such a contingency, it is always open to Parliament to enact that, in regard to any particular criminal statute, Chapter 4 of the Penal Code or any part of it shall not apply : Section 38 (2) would then stand repealed or amended to that extent. No such repeal or amendment having been enacted in the case of offences punishable under the Control of Prices Act, No. 29 of 1950, it was not open to the learned Magistrate to convict the appellant without rejecting the appellant's evidence that he believed in good faith, and by reason of

[1] *(1921) 23 N. L. R. 33.* [2] *(1942) 44 N. L. R. 97.*

[3] *(1923) 25 N. L. R. 241.*

a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight. We allow the appeal and quash the conviction.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice.

(Sgd.) V. L. ST. CLAIR SWAN,
Puisne Justice.

(Sgd.) K. D. DE SILVA,
Puisne Justice.

(Sgd.) M. C. SANSONI,
Puisne Justice.

(Sgd.) H. N. G. FERNANDO,
Puisne Justice.

Appeal allowed.